SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 131

HOWARD LAWN, PETITIONER,

vs.

UNITED STATES OF AMERICA

No. 133

WILLIAM GIGLIO AND FRANK LIVORSI, PETITIONERS,

vs.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Upon the argument of this appeal, appellants will move this Court to consider, as part of appellants' appendix, pages 1a to 176a of an appendix heretofore filed by the Government with this Court on an appeal from Judge Goddard's dismissal of six prior indictments, under the name of *United States of America*, Appellant, against *Louis J. Roth, et al.*, Appellees (No. 22752) 208 F. 2d 467.

SOUTHERN DISTRICT OF NEW YORK

Crim. No. C142-72

UNITED STATES OF AMERICA,

v.

WILLIAM GIGLIO, FRANK LIVORSI, HOWARD LAWN, LOUIS J. ROTH and AMERICAN BRANDS CORPORATION,

Defendants.

Docket Entries

DATE	PROCEEDINGS
7/23/53	Filed Indictment—Ordered Sealed. Wright, J.
1/26/54	Sealed Indictment ordered opened on Motion of Asst U. S. Atty Kilsheimer.
	William Giglio — Pleads Not Guilty — Bail $1000—
	Frank Livorsi — Pleads not guilty — Bail $1000—
	Howard Lawn—Pleads not guilty—released on own recognizance
	Louis J. Roth — Pleads Not Guilty — Bail $1000—

Docket Entries

DATE	PROCEEDINGS
	American Brands Corpn. Pleads Not Guilty by Lloyd P. Stryker, Atty. Paroled until 4 P. M. to give bail—
	Defts allowed until 3/15/54 for motions— I. R. Kaufman, J.
4/ 6/54	Filed the following motions as to Defts Giglio, Livorsi, Lawn & American Brands Corp. Motion for Bill of particulars
	Motion to dismiss indictment, suppress evidence, for a hearing to ascertain the scope and extent of the suppression order etc., directing that the Grand Jury minutes be made available to defendants; vacating the stay of Judge Goddards order which directed the return to defts of their books etc and directing the return of books and papers to the defendants
	Motion for an order directing the Atty for the Govt to permit defendants to inspect and copy all books papers etc
	Motion for the Government to produce before the Court at a time and place to be fixed, all books papers etc
4/ 6/54	Filed the following motions as to defendant Louis J. Roth:
	Motion for Bill of particulars
	Motion for an order directing the Atty for the Government to produce before the Court at a time and place to be fixed all books, papers, etc.

Docket Entries

DATE	PROCEEDINGS
	Motion for an order directing the Atty for the Government to permit the deft to inspect and copy all books papers etc Motion for an order to dismiss indictment etc.
5/12/54	Filed recognizances for William Giglio and Frank Livorsi dated 1/26/54 for $1000. Continental Cas. Co.
5/12/54	Filed recognizance for Louis J. Roth dated 1-26-54 for $1000. Natl Surety Corp.
7/22/54	Louis J. Roth Pleads Guilty to counts 1-2-3-4-5-6-7-9-10 Atty Present. Sentence ajd with out date. Bail continued. Wright J.
8/26/54	Filed notice of motion for an order quashing or modifying subpoenas served by defendants on 4/6/54 Ret 9/7/54
10/20/54	Filed affdts in opposition to defts. motions to dismiss indictment etc.
10/20/54	Filed Opinion #21432 by PALMIERI, J.—Motion to grant a hearing or inspection of grand jury minutes denied. Defts. motion to dismiss indictment denied. Motion to suppress denied. Motion to vacate stay of an order to return to the defts. illegally obtained material and to return said material granted. Motion for bill of particulars denied except to the extent to amount of tax due the US and source and portions of income tax returns which govt claims are false.
10/25/54	Filed bill of particulars.

Docket Entries

DATE	PROCEEDINGS
10/26/54	Filed Transcript of record of proceedings, dated 9/7/54
10/28/54	Filed Notice of motion and affidavits, to renew and/or reargue defts motions to permit defts to inspect & copy or photograph all books etc., to produce before the court books, etc., and for bill of particulars. Motion Ret. 11/8/54
11/ 1/54	Filed notice of motion to reargue defendants motion for an order dismissing indictment; suppress evidence; directing a hearing to ascertain the scope and extend of the suppression order etc: that grand jury minutes be made available to defendants: vacating stay of Judge Goddards order which directed return to defts of their books etc., and directing return of books & papers to defendants under the supervision of the court.
11/ 1/54	Filed memorandum in support of defendants motion for renewal and/or reargument.
11/ 4/54	Motion filed 10/28/54 advanced to this day and it is respectfully referred to Judge Palmieri. WEINFELD, J.
11/ 8/54	Motion filed 11/1/54 respectfully referred to Judge Palmieri. WEINFELD, J.
11/10/54	Filed Affidavit of Lloyd Paul Stryker Atty. and affidavit of Milton R. Wessel Asst U. S. Atty. Re motion to reargue motions under Rules 16, 17(c) and 7(f) of the Fed. Rules of Crim. Procedure.

Docket Entries

DATE	PROCEEDINGS
11/10/54	Filed Supplementary Memorandum #21482—Palmieri, D. J. "Defendants' motions are denied in all respects except as hereinafter indicated."
11/17/54	Filed notice of settlement and direct order that except as specifically granted in order motions to reargue are denied in all respects. PALMIERI, J. (Mailed notice)
11/17/54	Filed counter order (Unsigned)
11/23/54	Filed Transcript of record of proceedings, dated 10/28/54 7/19 & 22, 1954.
12/27/54	Filed Transcript of record of proceedings, dated 12/13/54.
1/ 7/55	Filed affdt. and notice of motion for an order quashing or modifying subpoenas served by defts. on 1/4 and 1/6/55.
1/ 7/55	Filed affdt. and notice of motion for an order quashing or modifying subpoenas served on Sec. of Treasury by defts. on 1/6/55.
1/ 7/55	Filed affdt. and notice of motion for an order quashing or modifying subpoena served on Reconstruction Finance Corp. by defts. on 1/6/55.
1/11/55	Filed affdt. and notice of motion for an order quashing or modifying subpoena served on Dept. of Agriculture by defts.
1/12/55	Motion to suppress subpoena served on U. S. Atty. respectfully referred to Judge Walsh. I. R. KAUFMAN, J.

Docket Entries

DATE	PROCEEDINGS
1/13/55	Motions to suppress subpoenas served on RFC and Sec. of Treasury respectfully referred to Judge Walsh. I. R. KAUFMAN, J.
1/10/55	Filed Transcript of record of proceedings, dated 1/26/54.
1/17/55	Motion to suppress subpoenas served on Dept. of Agriculture respectfully referred to Judge Walsh. I. R. KAUFMAN, J.
1/17/55	Filed order directing the examination of David G. Lubben by qualified medical practitioner. WALSH, J.
1/27/55	Envelope containing papers in re: David Lubben ordered sealed by Judge Walsh and deposited with Cashier in Room 602 to be kept in vault.
2/ 4/55	Envelope containing papers in re: Louis J. Roth, ordered sealed by Judge Walsh and deposited with Cashier in Room 602 to be kept in vault.
2/ 4/55	Memo endorsed on motion papers filed 1/7/55 and 1/11/55 (Motions to quash subpoena (4)). Disposed of as indicated in stenographer's minutes. WALSH, J.
2/16/55	Filed order amending order heretofore entered on 1/14/55 and filed on 1/17/55. WALSH, J.
1/11/55	Trial begun before WALSH, J. as to defts. Giglio, Livorsi, Lawn & American Brands Corp.
1/12/55	Trial cont'd. and cont'd. on January 13, 14, 17, 18, 1955.

Docket Entries

DATE	PROCEEDINGS
1/19/55	Trial cont'd. Alternate Juror #1 replaced Juror #8.
1/20/55	Trial cont'd. and cont'd. on Jan. 21, 25, 26, 27, 28, 31, Feb. 1, 2, 3, 4, 7, 8, 9, 1955.
2/10/55	Trial cont'd. All motions made by defendants denied. WALSH, J.
2/11/55	Trial cont'd. and cont'd. on Feb. 14, and 15, 1955.
2/16/55	Trial cont'd. Both side rest. Defts. renew previous motions. Denied. All motions made by defendants. denied.
2/17/55	Trial cont'd. Summations.
2/18/55	Trial cont'd. and concluded. Verdict—William Giglio, Frank Livorsi and Howard Lawn guilty as charged in indictment. Jury polled. Defts. reserve motions until time of sentence. Sentences adjd. to 3/8/55. Pre-sentence investigation ordered. Bails cont'd. WALSH, J.
3/11/55	All motions to dismiss denied. All motions for new trial and set aside verdict Denied.
3/11/55	Filed Judgment—William Giglio sentenced to FIVE YEARS on count ten. FIVE YEARS on count one to run consecutively to and begin after sentence on count 10. FIVE YEARS on each of counts 2-5-7 to run concurrently with each other and concurrently with sentence on count one. FIVE YEARS on count three to run consecutively to and begin after sentence on count one. FIVE YEARS on counts 4 & 9 to run con-

DATE	PROCEEDINGS
	currently with each other and concurrently with sentence on count three, at a place of confinement to be designated by the Attorney General Remanded. WALSH, J..
	Filed Judgment—Frank Livorsi sentence to Five Years on count ten. FIVE YEARS on count six to run consecutively to and begin after sentence on count ten. FIVE YEARS on count eight to run concurrently with sentence on count six. FIVE YEARS on count nine to run consecutively to and begin after sentence on count six, at a place of confinement to be designated by the Attorney General Remanded. Walsh, J.
	Filed Judgment—Louis J. Roth sentenced: Imposition of sentence on counts 1-2-3-4-5-6-7-9-10 is suspended. Probation for Five Years, subject to the standing probation order of this court. Special condition of probation that defendant continue cooperation with the Government and make settlement with Government on taxes. Walsh, J.
3/11/55	The Court declares a mistrial as to. Deft. American Brands Corp. and dismisses indictment as to American Brands Corporation. Walsh, J.
3/11/55	Filed motion for new trial—Memo endorsed—Motion denied. WALSH, J.
3/11/55	Filed motion for judgment of acquittal—Memo endorsed. Motion denied. WALSH, J.

Docket Entries

DATE	PROCEEDINGS	
3/11/55	Filed affdts. with reference to use of certain documents.	
3/11/55	Filed notice of appeal by Frank Livorsi. Copy mailed to warden, Fed. Det. Hd. 3/11/55. (LPS)	5.00
3/11/55	Filed notice of appeal by William Giglio. Copy mailed to warden, Fed. Det. Hd. 3/11/55. (LPS)	5.00
3/11/55	Filed motion for arrest of judgment. Memo endorsed. Motion denied as to Giglio and Livorsi. WALSH, J.	
3/16/55	Filed true copy of order of US CA—Present bail of defendants continued until decision of motion by full court. 3/11/55. LEARNED HAND US CJ.	

Indictment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No. C142-72

UNITED STATES OF AMERICA,

v.

WILLIAM GIGLIO, FRANK LIVORSI, HOWARD LAWN, LOUIS J. ROTH and AMERICAN BRANDS CORPORATION,

Defendants.

The Grand Jury charges:

That on or about the 12th day of September, 1947, at the Southern District of New York, WILLIAM GIGLIO and LOUIS J. ROTH, the defendants, in connection with a matter arising under the Internal Revenue Laws, did unlawfully, wilfully and knowingly, aid, assist in, procure, counsel, and advise the preparation and presentation of a false and fraudulent return, to wit, a partnership return of income of the Eatsum Food Products Company, Limited for the fiscal year beginning June 1, 1945 and ending May 31, 1946.

(Title 26, Section 3793(b) (1), United States Code)

COUNT TWO

The Grand Jury further charges:

That on or about the 12th day of September, 1947, at the Southern District of New York, WILLIAM GIGLIO and

LOUIS J. ROTH, the defendants, in connection with a matter arising under the Internal Revenue Laws, did unlawfully, wilfully and knowingly, aid, assist in, procure, counsel and advise the preparation and presentation of a false and fraudulent return, to wit, a partnership return of income of the Tavern Fruit Juice Company for the period beginning April 16, 1945 and ending March 31, 1946.

(Title 26, Section 3793(b) (1), United States Code)

(3517)

COUNT THREE

The Grand Jury further charges:

That on or about the 15th day of September, 1947, at the Southern District of New York, WILLIAM GIGLIO and LOUIS J. ROTH, the defendants, did wilfully and knowingly attempt to defeat and evade a large part of the income taxes due and owing to the United States of America by American Brands Corporation, American Brands Wholesale Corporation and American Trucking and Forwarding Corporation for the calendar year 1946, by filing and causing to be filed with the Collector of Internal Revenue for the Third Collection District of New York, a false and fraudulent Consolidated Corporation Income Tax Return within the provisions of Sec. 141, Title 26, United States Code, in the name of American Brands Corporation, in which American Brands Corporation, American Brands Wholesale Corporation, American Trucking and Forwarding Corporation, American Sweets Corporation and American Agar Corporation were listed as an affiliated group of corporations, and in which return the defendants stated that

the net income of American Brands Corporation and its affiliated group of corporations was $261,753.36, and that the tax due and owing thereon was the sum of $104,701.35; whereas, as the defendants then and there well knew, American Brands Corporation, American Brands Wholesale Corporation, American Trucking and Forwarding Corporation, American Sweets Corporation and American Agar Corporation were not an affiliated group of corporations within the provisions of Sec. 141, Title 26, United States Code, and the net income of American Brands Corporation for the said calendar year was the sum of $279,371.45, upon which said net income American Brands Corporation owed to the United States of America an income tax of $106,161.15,

(3518)

and the net income of American Brands Wholesale Corporation for the said calendar year was the sum of $169,131.09, upon which said net income American Brands Wholesale Corporation owed to the United States of America an income tax of $64,269.81, and the net income of American Trucking and Forwarding Corporation for the said calendar year was the sum of $3,180.16, upon which said net income American Trucking and Forwarding Corporation owed to the United States of America an income tax of $667.83.

(Section 145 (b), Title 26, United States Code)

COUNT FOUR

The Grand Jury further charges:

That on or about the 15th day of September, 1947, at the Southern District of New York, William Giglio and Louis J. Roth, the defendants, in connection with a matter

arising under the Internal Revenue laws, did unlawfully, wilfully and knowingly aid, assist in, procure, counsel, and advise the preparation and presentation of a false and fraudulent return, to wit, a Consolidated Corporation Income Tax Return, in the name of American Brands Corporation for the calendar year 1946. (Section 3793(b) (1), Title 26, United States Code)

COUNT FIVE

The Grand Jury further charges:

On or about the 15th day of September, 1947, at the Southern District of New York, William Giglio and Louis J. Roth, the defendants, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by William Giglio to the United States of America, (3519)
for the calendar year 1946, by filing and causing to be filed with the Collector of Internal Revenue for the Third Collection District of New York, a false and fraudulent income tax return, wherein they stated that the net income of William Giglio for said calendar year was the sum of $286,690.01, and that the amount of tax due and owing thereon was the sum of $232,978.73, whereas as they then and there well knew, the net income of William Giglio for the said calendar year was the sum of approximately $429,190.77, upon which said net income William Giglio owed to the United States of America an income tax of approximately $344,520.92. (Section 145(b), Title 26, United States Code)

COUNT SIX

The Grand Jury further charges:

On or about the 15th day of September, 1947, at the Southern District of New York, Frank Livorsi and Louis J. Roth, the defendants, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by Frank Livorsi to the United States of America, for the calendar year 1946, by filing and causing to be filed with the Collector of Internal Revenue for the Third Collection District of New York, a false and fraudulent income tax return, wherein they stated that the net income of Frank Livorsi for said calendar year was the sum of $289,515.00, and that the amount of tax due and owing thereon was the sum of $236,003.65, whereas as they then and there well knew, the net income of Frank Livorsi for the said calendar year was the sum of approximately $432,015.75; upon which said net income Frank Livorsi owed to the United States of America an income tax of approximately $347,395.36. (Section 145(b), Title 26, United States Code)

(3520)

COUNT SEVEN

The Grand Jury further charges:

From on or about the 1st day of September, 1947, and up to and including the date of the filing of this indictment, at the Southern District of New York, and elsewhere, William Giglio, Howard Lawn and Louis J. Roth, the defendants, an income tax return for the calendar year 1946 for said William Giglio having been filed stating the net income of said William Giglio for said calendar year to be

the sum of $286,690.01 and the amount of tax due and owing thereon to be the sum of $232,978.73, did wilfully and knowingly attempt to defeat and evade the payment of a large part of the taxes due and owing by William Giglio to the United States of America for the calendar year 1946, in that they did conceal the assets of William Giglio. (Title 26, Section 145(b) and Title 18, Section 2, United States Code)

COUNT EIGHT

The Grand Jury further charges:

From on or about the 1st day of September, 1947, and up to and including the date of the filing of this indictment, at the Southern District of New York, and elsewhere, Frank Livorsi, the defendant, having filed an income tax return for the calendar year 1946, stating the net income of Frank Livorsi for said calendar year to be the sum of $289,515.00 and the amount of tax due and owing thereon to be the sum of $236,003.65, did wilfully and knowingly attempt to defeat and evade the payment of a large part of the tax due and owing by him to the United States of America for the calendar year 1946, in that he did conceal his assets. (Title 26, Section 145(b), United States Code)

COUNT NINE

The Grand Jury further charges:

From on or about the 1st day of January, 1946, and up to and including the date of the filing of this indictment, at the Southern District of New York, William Giglio, Frank Livorsi, Howard Lawn, and Louis J. Roth, the defendants, did wilfully and knowingly attempt to defeat and

evade the payment of a large part of the taxes due and (3521)
owing by American Brands Corporation for the calendar year 1946, in that they did misappropriate, convert, and divert assets of the aforementioned corporations to their own use and benefit. (Title 26, Section 145(b), and Title 18, Section 2, United States Code)

COUNT TEN

The Grand Jury further charges:

1. From on or about the 1st day of July, 1945, and continuously thereafter up to and including the date of the filing of this indictment, at the Southern District of New York, William Giglio, Frank Livorsi, Howard Lawn, Louis J. Roth and American Brands Corp., the defendants, did wilfully and knowingly combine, conspire, confederate, and agree together and with each other and with divers other persons to the Grand Jurors unknown to commit an offense against the United States of America, to wit, to violate the provisions of Section 145 (b), Title 26, United States Code.

2. It was a part of the said conspiracy that the defendants would defeat and evade a large part of the taxes due and owing by the said defendants individually and by American Brands Corporation, American Brands Wholesale Corporation, and American Trucking and Forwarding Corporation.

3. It was further a part of the said conspiracy that the defendants would defeat and evade the payment of a large part of the taxes due and owing by said defendants individually and by American Brands Corporation, Ameri-

can Brands Wholesale Corporation, American Trucking and Forwarding Corporation.

4. It was further part of the said conspiracy that the defendants would organize and cause to be organized

(3522)

American Brands Corporation, American Brands Wholesale Corporation, American Trucking and Forwarding Corporation, American Agar Corporation and American Sweets Corporation.

5. It was further a part of the said conspiracy that the defendants would file and cause the filing of delinquent income tax returns long after the due date for the filing of said returns for said defendants individually and for American Brands Corporation, American Brands Wholesale Corporation, American Trucking and Forwarding Corporation, American Agar Corporation, and American Sweets Corporation.

6. It was further a part of said conspiracy that the defendants would cause American Brands Corporation to fail to withhold taxes on salaries or wages paid to the defendants.

7. It was further a part of the said conspiracy that the defendants would misappropriate, convert and divert assets of the aforesaid corporation.

8. It was further a part of the said conspiracy that the defendants would falsify, destroy and fail to keep and preserve books and records of the operations of the aforesaid corporations and of Batsum Food Products Co., Limited, and Tavern Fruit Juice Company.

9. It was further a part of the said conspiracy that the defendants would cause a consolidated corporation income tax return in the name of American Brands Corporation to be filed with the Collector of Internal Revenue for the Third Collection District of New York.

10. It was further a part of the said conspiracy that the defendants would file and cause to be filed false and fraudulent income tax returns for the said defendants individually and for American Brands Corporation, American Brands Wholesale Corporation, American Trucking and Forwarding Corporation, American Agar Corporation and American Sweets Corporation.

(3523)

11. It was further a part of the said conspiracy that the defendants would file and cause to be filed false returns of partnership income for the Eatsum Food Products Co., Limited, and Tavern Fruit Juice Company.

12. It was further a part of the said conspiracy that the defendants would conceal assets of William Giglio and Frank Livorsi for the purpose of evading the payment of taxes.

OVERT ACTS

1. In pursuance of the said conspiracy and to effect the objects thereof, at the Southern District of New York, on or about the 15th day of September, 1947, William Giglio and Louis J. Roth, the defendants, filed and caused to be filed with the Collector of Internal Revenue for the Third Collection District of New York, a partnership return of income for the fiscal year beginning June 1, 1945

and ending May 31, 1946 of Eatsum Food Products Co., Limited.

2. Further in pursuance of the said conspiracy and to effect the objects thereof, at the Southern District of New York, on or about the 15th day of September, 1947, William Giglio and Louis J. Roth, the defendants, filed and caused to be filed with the Collector of Internal Revenue for the Third Collection District of New York, a partnership return of income for the period beginning April 16, 1945 and ending March 31, 1946 of Tavern Fruit Juice Co.

3. Further in pursuance of the said conspiracy and to effect the objects thereof, at the Southern District of New York, during the month of March or April 1946, William Giglio and Louis J. Roth, the defendants visited the office of Bernard Bercu.

(3524)

4. And further in pursuance of the said conspiracy and to effect the objects thereof, at the Southern District of New York, on or about the 11th day of September, 1947, Howard Lawn, Louis J. Roth and William Giglio, the defendants, had a conversation with one Solomon Tepper.

5. And further in pursuance of the said conspiracy and to effect the objects thereof, at the Southern District of New York, on or about the 28th day of October, 1946, Louis J. Roth, the defendant, did file and cause to be filed with the Collector of Internal Revenue for the Third Collection District of New York, an individual income tax return for one Mario Betancourt.

6. And further in pursuance of the said conspiracy and to effect the objects thereof, at the Southern District of

New York, on or about the 1st day of March, 1946, Louis J. Roth, the defendant and one Samuel Starr had a conversation.

7. And further in pursuance of the said conspiracy and to effect the objects thereof, at the Southern District of New York, on or about the 1st day of September, 1946, Louis J. Roth, the defendant, and one Mario Betancourt had a conversation.

8. And further in pursuance of the said conspiracy and to effect the objects thereof, at the Southern District of New York, on or about the 15th day of September, 1947, William Giglio and Louis J. Roth, the defendants, did file and cause to be filed with the Collector of Internal Revenue for the Third Collection District of New York, a consolidated corporation income tax return of American Brands Corporation, for the calendar year 1946.

9. And further in pursuance of the said conspiracy and to effect the objects thereof, at the Southern District of New York, on or about the 15th day of September, 1947, William Giglio, the defendant, did file and cause to be filed

(3525)

with the Collector of Internal Revenue for the Third Collection District of New York, his individual return of income for the calendar year 1946.

10. And further in pursuance of the said conspiracy and to effect the objects thereof, at the Southern District of New York, on or about the 15th day of September, 1947, the defendant Frank Livorsi, did file and cause to be filed with the Collector of Internal Revenue for the Third Collection

District of New York, his individual return of income for the calendar year 1946.

11. And further in pursuance of the said conspiracy and to effect the objects thereof, at the Southern District of New York, on or about the 28th day of June, 1948, the defendant Louis J. Roth did deposit a sum of money in his account in the Pennsylvania Exchange Bank. (Title 18, Section 371, United States Code)

.....

J. Edward Lumbard
United States Attorney

.....

Foreman

(3526)

Bill of Particulars

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C 142-72

UNITED STATES OF AMERICA,

v.

WILLIAM J. GIGLIO, FRANK LIVORSI, HOWARD LAWN and AMERICAN BRANDS CORPORATION,

Defendants.

UNITED STATES OF AMERICA, for its Bill of Particulars, in compliance with the opinion of the Honorable Edmund L. Palmieri filed October 20, 1954, respectfully alleges and shows as follows:

NOTE: The following particulars relate only to the charged criminal violations and do not include other specific charges of fraud and/or non-payment of tax, which are or may be the subject of civil proceedings.

Particulars are set forth for each taxpayer as follows:

a) Amount of income on which it is alleged in the indictment that a tax was due to the United States.

b) Source of income on which it is alleged in the indictment that a tax was due to the United States.

c) Amount of tax it is alleged was due.

d) Income tax returns upon which the indictment is based that the government claims are false.

(3727)

1. Eatsum Food Products Company, Limited:

a) $91,600, consisting of $140,000 additional income unreported less $48,400 additional salaries allowed as expense but unclaimed.

b) Cash corn syrup sales.

c) Information return only.

d) Attached hereto.

2. Tavern Fruit Juice Company:

a) $80,872.45, consisting of $72,321.17 closing inventory not disclosed, and $32,780.93 claimed research expense deduction disallowed, less $9,229.65, additional purchase expense allowed but not claimed and $15,000 legal fee expense allowed but not claimed.

b) (See (a) above).

c) Information return only.

d) Attached hereto.

3. American Brands Corporation, et al:

a) Consolidation disallowed. $63,091.52 additional deduction allowed, consisting of $72,321.17 opening inventory allowed but not claimed, less $9,229.65 purchase expense disallowed.

b) (See (a) above).

c) $171,098.79.

d) Attached hereto.

4. William Giglio:

a) $142,500.76.

b) $127,164.70 additional income (Eatsum), plus $40,436.23 additional income (Tavern), plus $24,899.83 income from undisclosed corn syrup sales, less $50,000 other income reported.

c) $344,520.92.

(3728)

d) Attached hereto.

5. Frank Livorsi:

a) $142,500.75.

b) $127,164.70 additional income (Eatsum), plus $40,436.22 additional income (Tavern), plus $24,899.83 income from undisclosed corn syrup sales less $50,000 other income reported.

c) $347,395.36.

d) Attached hereto.

Dated: New York, N. Y.
October 22, 1954.

Respectfully submitted,

J. EDWARD LUMBARD,
United States Attorney for the Southern District of New York
Attorney for the United States of America.
Office and P. O. Address:
United States Court House
Foley Square
Borough of Manhattan
City of New York

Bill of Particulars

To:

LLOYD PAUL STRYKER, ESQ.,
Attorney for Defendants
40 Wall Street
New York 5, N. Y.

Annexed to the Bill of Particulars are the following documents which will be included in the exhibits to be submitted to the Court:

a) Partnership Return of Income of Eatsum Food Products Co., Ltd. for fiscal year beginning June 1, 1945 and ending May 31, 1946 (3730-3734). This document was introduced in evidence at the trial and marked Government's Exhibit 6.

b) Partnership Return of Income of Tavern Fruit Juice Co. for fiscal year beginning April 16, 1945 and ending March 31, 1946 (3735-3739). This document was introduced in evidence at the trial and marked Government's Exhibit 7.

c) Corporation Income Tax Return of American Brands Corp. for the calendar year 1946 (3740-3745). This document was introduced in evidence at the trial and marked Government's Exhibit 8.

d) Individual income tax return of William Giglio for the calendar year 1946 (3746-3748). This document was introduced in evidence at the trial and marked Government's Exhibit 2.

e) Individual income tax return of Frank Livorsi for the calendar year 1946 (3749-3751). This document was introduced in evidence at the trial and marked Government's Exhibit 4.

Defendants' Motion to Dismiss Indictment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

—against—

WILLIAM GIGLIO, FRANK LIVORSI, HOWARD LAWN, LOUIS J. ROTH and AMERICAN BRANDS CORPORATION,

Defendants.

SIR:

PLEASE TAKE NOTICE that upon the indictment herein and the affidavits of William Giglio, Herman Holzer, Howard Lawn and Frank Livorsi, and the exhibits annexed thereto, all sworn to the 6th day of April, 1954, the undersigned will move this court on the 12th day of April, 1954, at 10:30 o'clock in the forenoon, at Room 318 of the United States Courthouse, Foley Square, New York, N. Y., for an order

(a) dismissing the indictment;

(b) suppressing the use of all memoranda, work sheets, photostats, copies, notes and all leads and clues obtained by the Government from the defendants' books and records produced before the grand jury in violation of their constitutional rights under the Fifth Amendment, and from the defendants' oral testimony before the grand jury;

(c) directing a hearing to ascertain the scope and extent of the suppression order and to ascertain the extent of the use of the said books, records and oral testimony and leads

and clues obtained therefrom in connection with the present indictment;

(d) directing that the minutes of the proceedings before the grand jury which found the present indictment be made available to the defendants;

(3537)

(e) vacating the stay of Judge Goddard's order which directed the return to the defendants of their books and papers produced in violation of their constitutional rights under the Fifth Amendment; and

(f) directing the return of such books and papers to the defendants under the supervision of the court.

Dated: New York, N. Y., April 6, 1954.

Yours, &c.,

LLOYD PAUL STRYKER,
Attorney for Defendants
William Giglio, Howard Lawn,
Frank Livorsi & American
Brands Corp.
Office & P. O. Address:
40 Wall Street,
New York 5, N. Y.

To:

J. EDWARD LUMBARD, JR., ESQ.,
United States Attorney,
Southern District of New York.

(3538)

Affidavit of William Giglio, Read in Support of Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

against

WILLIAM GIGLIO, FRANK LIVORSI, HOWARD LAWN, LOUIS J. ROTH and AMERICAN BRANDS CORPORATION,

Defendants.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

WILLIAM GIGLIO, being duly sworn, deposes and says:

1. I am one of the defendants in the above entitled matter and make this affidavit in support of a motion by the defendants to dismiss the said indictment.

2. My plea of not guilty puts in issue all of the material allegations of the indictment.

3. In order that the court may understand the defendants' present position, the following history of the proceedings is pertinent. The facts set forth herein are contained in the papers on appeal in *United States* v. *Roth* and five other actions in the United States Court of Appeals for the Second Circuit (208 F. 2d 467).

4. On September 14, 1950, three informations were filed in this court. One information (C 133-194) charged your deponent with a violation of § 145(a) of the United

States Code, consisting of an alleged failure to pay any part of my income tax for the year 1946, except the sum of $4,000. The second information (C 133-195) charged your deponent, along with the defendants Lawn, Roth and

(3539)

Livorsi, of violating the same section by unlawfully causing a corporate defendant, American Brands Corp., to fail to pay any part of its income tax for 1946, except the sum of $100. The third information (C 133-196) charged the defendant Livorsi with a violation of the same section consisting of an alleged failure to pay any part of his income tax for the year 1946, except the sum of $4,000. All of the defendants appeared, pleaded not guilty and were released on bail. The Government's investigation into the dealings of the individual defendants and their business ventures continued over the course of the ensuing two years while the informations were marked off the calendar. Finally, that investigation arrived at the point where the defendants, against whom the original charges were still pending, were directed to appear before a grand jury sitting in the Southern District of New York by virtue of subpoenas duces tecum which directed that each of the defendants give evidence in regard to an alleged violation of the conspiracy statute (Title 18, § 371, United States Code). The grand jury proceeding was entitled "Re: John Doe."

5. The subpoenas also directed production before the grand jury of the books and records of twelve business organizations, eight of which were corporations and four of which were partnerships. The grand jury subsequently found six indictments against these defendants on September 15, 1952. All of the defendants moved to dismiss these

indictments, as well as the informations filed in 1950, on the ground that constitutional rights guaranteed to a defendant in a criminal case by the Fifth Amendment to the Constitution of the United States had been violated in the grand jury proceedings which preceded the indictments. (3540)

The defendants also moved for an order suppressing all of the evidence obtained by the Government in the course of the grand jury proceedings in which the defendants' rights were violated, and directing the Government to return such evidence.

6. These motions were argued before Hon. Henry W. Goddard, one of the judges of this court, on January 21, 1953, along with certain other preliminary motions made by the defendants.

7. On February 20, 1953, Judge Goddard filed a memorandum opinion in which, after referring to the fact that the defendants' affidavits "appeared to raise a serious constitutional issue," he directed that the defendants be allowed to inspect "that part of the minutes which pertain to their interrogation before the grand juries sitting in July and September, 1952 on the matter covered by these indictments."

8. A hearing was held before Judge Goddard on March 3, 1953, for that purpose. The matter was then adjourned to March 6, 1953, to afford the defendants an opportunity to inspect and to make copies of their grand jury testimony.

9. On March 6, 1953, Judge Goddard heard argument on the basis of the grand jury minutes which the defendants

had been permitted to examine. Finally, on March 27, 1953, more than two months after the original submission, Judge Goddard dismissed all of the indictments against the defendants and directed the Government to return to the respective defendants the partnership and personal records produced by them in response to the grand jury subpoenas served upon them in July of 1952. He refused, however, to dismiss the informations filed in 1950.

(3541)

10. Judge Goddard's opinion and order which was dated March 27, 1953, concluded as follows:

> "The motions to dismiss the indictments numbered 139-206, 139-304, 139-305, 139-306, 139-307, 139-308 filed against Giglio, Livorsi, Lawn, and Roth, are granted and the Government is directed to return, to the respective defendants, the partnership and personal records produced by them in response to the subpoenas."

11. The Government appealed from this order to the Court of Appeals for the Second Circuit. The District Court, in September of 1953, pursuant to the stipulation of the parties, stayed that portion of Judge Goddard's order which directed the return of the defendants' records, pending the hearing and determination of the Government's appeal, and further directed that the said records be impounded by this court and subject to its further orders pending the hearing and determination of said appeal.

12. The Government's appeal was subsequently dismissed by the Court of Appeals on the ground that it was untimely.

13. In the meanwhile, and on July 23, 1953, a grand jury in this district found the indictment now pending in this court against these defendants. This indictment remained sealed until January 26, 1954, when it was opened in the presence of the defendants who appeared and pleaded not guilty.

14. The present indictment contains ten counts. Except for relatively immaterial variations which are summarized below, the separate counts of the present indictment are identical, word for word, with the indictments dismissed by Judge Goddard on the ground that the defendants' constitutional rights had been violated before the grand jury. (3542)

Indictments Dismissed by Judge Goddard	*Indictment Presently Before This Court*
C 139-304, Count One, charged William Giglio and Louis Roth with aiding, etc., in the preparation and presentation of a false partnership return of income of Eatsum Food Products Company, Ltd. for the fiscal year beginning January 1, 1945, and ending May 31, 1946.	Count One is identical.
C 139-304, Count Two, charged William Giglio and Louis J. Roth with aiding, etc., in the preparation and presentation of a false partnership return of income of Tavern Fruit Juice Company	Count Two is identical.

Indictments Dismissed by Judge Goddard	*Indictment Presently Before This Court*
for the period beginning April 16, 1945, and ending March 31, 1946.	
C 139-308, Count One, charged William Giglio and Louis J. Roth with attempting to defeat and evade income taxes due and owing by three corporations for the calendar year 1946, by filing a false and fraudulent consolidated corporation income tax return.	Count Three is identical, with the exception that it is now alleged that the true net income of one of the corporations for the period in question was approximately $10,000 less than previously charged, and the tax owed approximately $3,000 less than previously charged.
C 139-308, Count Two, charged William Giglio and Louis J. Roth with aiding, etc., in the preparation and presentation of a false consolidated corporation income tax return in the name of the corporate defendant.	Count Four is identical.
C 139-306 charged William Giglio and Louis J. Roth with attempting to defeat and evade the income tax of William Giglio for the calendar year 1946, by filing a false and fraudulent income tax return.	Count Five is identical, with the exception that the true net income of the said William Giglio for the period in question is stated to be approximately $1,000 less than previously charged, and the tax owed approximately $1,000 less.

Indictments Dismissed by Judge Goddard	*Indictment Presently Before This Court*
C 139-305 charged Frank Livorsi and Louis J. Roth with attempting to defeat and evade the income tax due and owing by Frank Livorsi for the calendar year 1946, by filing a false and fraudulent income tax return.	Count Six is identical, with the exception that the true net income of Frank Livorsi for the period in question is stated to be approximately $1,000 less than previously charged, and the tax owed approximately $1,000 less.
C 139-307, Count One, charged William Giglio, Howard Lawn and Louis J. Roth with attempting to defeat and evade the payment of taxes owed by William Giglio for the calendar year 1946, in that they concealed the assets of the said William Giglio.	Count Seven is identical except that the following clause has been added to the present indictment: " * * * an income tax return for the calendar year 1946 for said William Giglio having been filed stating the net income of said William Giglio for said calendar year to be the sum of $286,690.01 and the amount of tax due and owing thereon to be the sum of $232,978.73 * * *."
C 139-307, Count Two, charged Frank Livorsi with attempting to defeat and evade the payment of a large part of his tax for the calendar year 1946, in that he concealed his assets.	Count Eight is identical, with the exception that the following clause has been added: "* * * having filed an income tax return for the calendar year 1946, stating the net income of Frank Livorsi for said calendar year to be the sum of $289,-

Indictments Dismissed by Judge Goddard	*Indictment Presently Before This Court*
	515.00 and the amount of tax due and owing thereon to be the sum of $236,003.65 * * *."
C 139-307, Count Three, charged that William Giglio, Frank Livorsi, Howard Lawn and Louis J. Roth attempted to defeat and evade the payment of taxes due and owing by the corporate defendant for the calendar year 1946, by misappropriating, converting and diverting assets of certain corporations to their own use and benefit.	Count Nine is identical.
C 139-307, Count Four, charged a conspiracy to commit the alleged substantive crimes set forth in the other indictments, along with other alleged unlawful acts of the defendants.	Count Ten is identical, with the exception that the following alleged overt act has been added: "And further in pursuance of the said conspiracy and to effect the objects thereof, at the Southern District of New York, on or about the 28th day of June, 1948, the defendant LOUIS J. ROTH did deposit a sum of money in his account in the Pennsylvania Exchange Bank."

15. The defendant Louis Roth was not reindicted for allegedly attempting to defeat and evade income tax due and owing by him for the calendar year 1945. The present indictment, therefore, is merely a reiteration, with minor changes, of five of the indictments which Judge Goddard dismissed on the ground that the defendants' rights had been violated before the grand jury. Thus, Judge Goddard held, and I am informed that his holding is the law of this case, that the Government obtained six indictments against these defendants through the use of tainted and illegal evidence. There is now before this court an indictment covering the identical subject matter of five of those dismissed indictments. There is good reason to believe that the evidence presented by the Government to the grand jury which found the present indictment was likewise tainted and illegal and that such indictment could not have been found without the use of tainted and illegal evidence.

16. When the Government appealed from Judge Goddard's order to the Court of Appeals for the Second Circuit, it moved for an order adding the appeal to the June, 1953, calendar for argument. The Government sought to impress the Court of Appeals with the importance of a prompt determination of the appeal. It sought to convince the Court of Appeals that *new* indictments, found before the expiration of the period of limitations, would not fully serve its purposes. Gerome J. Leone, Esq., the Assistant United States Attorney then in charge of the prosecution, who had presented the matter to the grand jury which found the original indictments, stated in an affidavit presented to the Court of Appeals that any

superseding indictments that might be found would be attacked by the defendants on the ground that they also were the result of the unlawful production of books and records by these defendants. He pointed out, in arguing for a prompt disposition on appeal, that no amount of care which the Government took could protect against this "risk" unless the Government omitted all charges from the superseding indictments with respect to the partnership entities. Mr. Leone's full statement on this subject was as follows:

> "At first blush, it might appear that the effect of the dismissal of the indictments might be obviated by obtaining superseding indictments before September 14, 1953. However, under Judge Goddard's order, which also directed the return of documents originally produced, such indictments will have to be obtained without the benefit of the books and records originally produced by the defendants before the Grand Jury. The government will not only be limited in its presentation to the Grand Jury, but will be required to meet attacks on any subsequent indictments on the ground that they too are the result of the original production of books and records by these defendants. No amount of care can protect against this risk, lest it be omitting all charges whatsoever with respect to the partnership entities involved in this complex scheme. This would be far short of full prosecution of the violations involved."

17. The superseding indictment, far from "omitting all charges whatsoever with respect to the partnership en-

tities," repeats all of the charges which had been included in the earlier indictments. Thus, the Government has assumed knowingly the "risk" over which it expressed such great concern and which it conceded "[n]o amount of care can protect against," namely, that subsequent indictments could be attacked on the ground that they too were obtained as a result of the evidence which had tainted the original indictments.

(3546)

18. Mr. Leone, in this statement to the Court of Appeals, overlooked the fact that Judge Goddard dismissed not only the indictments which related to partnership transactions, but those which related to corporate transactions as well. He also overlooked the fact that some of the tainted evidence consisted of oral testimony by the defendants. Thus, Judge Goddard held that the evidence illegally obtained, consisting of oral and documentary evidence, tainted the corporate, partnership and individual indictments. It is now incumbent upon the Government, therefore, to establish that the present indictment, whether it relates to partnership, personal or corporate matters, was obtained without the use of tainted and illegal evidence.

19. As further proof that tainted and illegal evidence was used to obtain the present indictment, I refer to the fact that this matter was under investigation by the Government since some time prior to the 1950 informations; that the matter was continued to be investigated after informations were obtained in 1950; that no *indictments* were found against the defendants in 1950, none was found in 1951, none was found prior to the time I was subpoenaed before the grand jury in July of 1952; that the first grand jury before which I appeared was permitted to terminate without finding

indictments, and that it was not until after I had produced all of the records and papers and had testified in violation of my constitutional privilege against self-incrimination that the September, 1952, grand jury finally found the indictments which Judge Goddard subsequently dismissed. This is persuasive proof, I respectfully submit, that the dismissed indictments were based upon tainted evidence and that the present indictment which is substantially the same, suffers from the same defects.

(3547)

20. By order of this court, the papers and records which Judge Goddard directed to be returned to the defendants were impounded by the court pending the Government's appeal. The papers were impounded *after*, not before, the present indictments were found. Now that the said appeal has been dismissed, the stay of Judge Goddard's order should be vacated and the papers and records should be returned to the defendants. I respectfully suggest that this should be done under the supervision of the District Judge who hears this motion so that he will be in a position to pass upon the question of suppressing leads and clues which the Government may have obtained from these papers and records and from the defendants' oral testimony.

21. The defendants seek the following relief:

(a) An order vacating the stay of Judge Goddard's order directing the return to the defendants of certain books and papers.

(b) An order directing the return of such books and papers to the defendants under the supervision of this court.

(c) An order suppressing the use of all memoranda, work sheets, photostats, copies, notes and all leads and clues

obtained by the Government from the defendants' said books and records and from the defendants' oral testimony before the grand jury.

(d) A hearing for the purpose of ascertaining the scope and extent of the suppression order and to ascertain the extent of the use of these books, records and oral testimony and leads and clues obtained therefrom in connection with the present indictment.

(3548)

(e) An order disclosing to the defendants the proceedings before the grand jury which found the present indictment.

(f) An order dismissing the indictment.

(Sworn to by William Giglio on April 6, 1954.)

(3549)

Affidavit of Frank Livorsi, Read in Support of Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

— against —

WILLIAM GIGLIO, FRANK LIVORSI, HOWARD LAWN, LOUIS J. ROTH and AMERICAN BRANDS CORPORATION,

Defendants.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

FRANK LIVORSI, being duly sworn, deposes and says:

1. I am one of the defendants named in the above indictment.

2. I have read the annexed affidavit of William Giglio and join in this application.

(Sworn to by Frank Livorsi on April 6, 1954.)

Affidavit of Howard Lawn, Read in Support of Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

—against —

WILLIAM GIGLIO, FRANK LIVORSI, HOWARD LAWN, LOUIS J. ROTH and AMERICAN BRANDS CORPORATION,

Defendants.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

HOWARD LAWN, being duly sworn, deposes and says:

1. I am one of the defendants named in the above indictment.

2. I have read the annexed affidavit of William Giglio and join in this application.

(Sworn to by Howard M. Lawn on April 6, 1954.)

(3550)

Affidavit of Herman Holzer, Read in Support of Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

—against—

WILLIAM GIGLIO, FRANK LIVORSI, HOWARD LAWN, LOUIS J. ROTH and AMERICAN BRANDS CORPORATION,

Defendants.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

HERMAN HOLZER, being duly sworn, deposes and says:

1. I am a Certified Public Accountant with offices at 25 Commerce Street, Newark, N. J.

2. In the latter part of 1952, I was retained to assist Lloyd Paul Stryker, Esq. in the preparation of the defense of five indictments pending in this court against William Giglio, Howard Lawn, Frank Livorsi and American Brands Corporation.

3. I visited the office of Gerome J. Leone, Esq., the Assistant United States Attorney then in charge of the prosecution, in the middle of December, 1952. At that time, Mr. Leone stated to me, in the presence of counsel, that he placed the books and papers which the Government had in its possession in four different categories, as follows:

(a) Books and records brought in by the defendants.

(b) Books and records "abandoned" by the defendants.

(c) Books and records obtained by process from others.

(d) Books, records and information obtained from others, not by process.

(3552)

4. Mr. Leone then stated that he would make available to the defendants the books and records that they had brought in, pursuant to the grand jury subpoena, during the summer of 1952. He also said that he would make available to the defendants corporate books and records which the Government had obtained by process from a receiver appointed by the courts of the State of New Jersey. He stated that he would refuse to permit the defendants to inspect any of the books and records in the other two categories, namely, certain books and records which he claimed they had "abandoned" and records obtained from others without process.

5. In the early part of January, 1953, I went to Room 438 in the Federal Courthouse at Foley Square. There I met Mr. Theodore Present who, I was advised, is an Internal Revenue Agent of the United States Treasury Department. In that room were approximately 100 transfile cartons of documents which I was advised the defendant Giglio had produced pursuant to grand jury subpoena during the year 1952. Mr. Present stated that he had removed certain papers and documents from the files (which the defendant Giglio had produced pursuant to grand jury subpoena), and that he had placed this material in his confidential file. He stated that he wanted an opportunity to put all of this material back in its proper place, so that we would not be able to ascertain what he had taken out of these files. Mr.

Present refused to let us look at the material which the defendant Giglio had brought in under grand jury subpoena until Mr. Present had returned all of the removed material to the files. The next day, Mr. Present told me that he had put the material back and that we were at liberty to begin our examination.

(3553)

6. I am informed that thereafter Mr. Stryker made a motion for a bill of particulars in behalf of the defendants. I understand that this motion was never decided because the indictments were subsequently dismissed by Judge Goddard. Nevertheless, before the indictments were dismissed, and on February 2, 1953, Mr. Present handed me a summary containing some information which was tendered in lieu of a bill of particulars. A copy is annexed hereto, marked Exhibit "A" and made a part hereof. After I examined this paper, I pointed out to Mr. Present that it was entirely inadequate. I pointed out to him that according to this summary, the Government was charging both the defendant Giglio and the defendant Livorsi with additional income from Eatsum Food Products Co., a partnership, in the amount of $127,164.70, making a total of additional income from that source to these defendants in the amount of $254,329.40. As against this additional income, the Government's figures, handed to me, indicated that there was a net adjustment of only $91,600.00 on Eatsum's information return, leaving the difference between $254,329.40 and $91,600.00 unreconciled. I asked Mr. Present for a reconciliation of these figures and he told me that he could not give it to me without Mr. Leone's permission.

7. Between February 6th and 13th, I was in Room 438 with Mr. Present on several occasions. The defendant

Roth was also there, acting as his own accountant in checking through the books and records. On one of these occasions, I told Mr. Present that we had been forced to conjecture whether the Government was using the constructive dividend theory, with reference to the corporations, in

(3554)

allocating additional income to the defendants Giglio and Livorsi. He told me to forget about that theory. I then asked him, in effect, whether he had changed the distributive shares of profit shown on the partnership return or whether he had disregarded the partnership agreement by disregarding certain partners or rearranging the percentages of profit or income. Mr. Present then stated that I could figure all of this out the same way he had figured it out. He said to me that I had all of the information available to me in that room and that this was the same source he had used in arriving at these figures.

8. In connection with the corporations, I asked Mr. Present whether he had increased income or disallowed expenses. In answer to this question, he also replied that all of the reconstructed figures were available to me from the material in this room.

9. From the foregoing, I was led to believe that the books, papers and documents produced by the defendant Giglio pursuant to the grand jury subpoena were the basis for the indictments found against the defendants.

10. Annexed hereto, marked Exhibit "B" and made a part hereof, is a list of the books and records produced by the defendant Giglio pursuant to said subpoena. This list was given to me by Mr. Present.

(Sworn to by Herman Holzer on April 6, 1954.)

(3555)

EXHIBIT "A"

Giglio

Additional Income from Eatsum	127 164 70	
" " " Tavern	41 578 73	
" " " Individuals (1 or more)	24 899 83	
Total	193 643 26	
Less: Other Income Per Return	50 000 —	
Net Adjustment		143 643 26

Livorsi

Additional Income from Eatsum	127 164 70	
" " " Tavern	41 578 72	
" " " Individuals (1 or more)	24 899 83	
Total	193 643 25	
Less: Other Income Per Return	50 000 —	
Net Adjustment		143 643 25

Tavern Partnership

Purchases & Cost of Sales Adjusted (Net)	65 376 52	
Expenses Adjusted (Net)	17 780 93	
	83 157 45	

Eatsum Partnership

Additional Income (Net)	140 000 —	
Additional Expenses Allowed (Net)	(48 400 —)	
Net Adjustment	91 600	

(3556)

EXHIBIT "B"

INDEX OF RECORDS IN ROOM 438

as at August 15, 1952

(80 Cartons)

Carton No.	General Contents
1	Accounts receivable folders of Eatsum Food Products containing sales slips and shipping information (Letter "B").
2	Accounts receivable folders of Eatsum Food Products containing sales slips and shipping information (S. H. Kress).
3	Accounts receivable folders of Eatsum Food Products containing sales slips and shipping information (Letter "H").
4	Accounts receivable folders of Eatsum Food Products containing sales slips and shipping information (Letter "C"—includes cash sales).
5	Eatsum sales invoices—December 1945, January 1946, and February 1946—factors assignment sheets.
6	Eatsum sales s os—early period before partnerships; American Brands Corp., American Sweets, and American Trucking and Forwarding accounts payable bills; American Brands, American Sweets correspondence; American Brands Corp. sales slips to National Biscuit Co. and others.
7	Eatsum sales slips; factors assignment sheets February and March 1945.
8	Eatsum sales slips—S.S. Kresge Co., and S. H. Kress & Co.

Exhibit "B"

Carton No.	General Contents
9	Accounts receivable folders of Eatsum Food Products containing sales slips and shipping information (Letters "C" and "D").
10	Old Eatsum ledger cards; Sales Tax information; shipping records; Eatsum cancellations and warehouse records. (3557-3558)
11	Accounts receivable folders of Eatsum Food Products containing sales slips and shipping information (Letter "B").
12	Purchase invoices—Eatsum (Letters "G" to "N").
13	Accounts receivable folders of Eatsum Food Products containing sales slips and shipping information (Letters "D" and "E").
14	Accounts receivable folders of Eatsum Food Products containing sales slips and shipping information (Letter "M").
15	Accounts receivable folders of Eatsum Food Products containing sales slips and shipping information (Letter "G").
16	Accounts receivable folders of Eatsum Food Products containing sales slips and shipping information (Letter "L").
17	Purchase invoices—Eatsum (Letters "A" to "F"); commission reports; sugar purchases; brokerage reports.
18	Accounts receivable ledger cards—Eatsum (single proprietorship); credit memos; Eatsum sales slips 1943 and 1944.
19	Customers remittance notices; accounts receivable Eatsum partnership.

Exhibit "B"

Carton No.	General Contents
20	Accounts receivable folders of Eatsum Food Products containing sales slips and shipping information (Letter "M").
21	Eatsum sales slips.
22	Accounts receivable folders of Eatsum Food Products containing sales slips and shipping information (J. J. Newberry).
23	Commission earning from Shotwell.
	(3559)
24	Customer remittance notices, accounts receivable, Eatsum April 1944 to July 1945.
25	Eatsum sales invoices, November, December 1944, January 1945; factors assignment sheets.
26	Sales invoices, Eatsum (single proprietorship).
27	Shipping orders, Eatsum (single proprietorship) 1944; Eatsum partnership sales slips, March and April 1946; Eatsum partnership correspondence "L" to "Z".
28	Eatsum partnership correspondence, "A" to "L".
29	Accounts receivable folders of Eatsum Food Products containing sales slips and shipping information (Letters "G" and "H").
30	Purchase invoices, Eatsum partnership (Letters "O" to "T"—includes Tavern).
31	Accounts receivable folders of Eatsum Food Products containing sales slips and shipping information (Letters "P" to "R").
32	Eatsum sales slips and factors assignment sheets November and December 1945.

Exhibit "B"

Carton No.	General Contents
33	Accounts receivable folders, Eatsum (Letter "A"); old Eatsum invoices; voided invoices; sugar invoices; bills of lading.
34	Eatsum single proprietorship correspondence (Letters "P" to "Z").
35	Accounts receivable folders of Eatsum Food Products containing sales slips and shipping information (Letters "T" to "V").
36	Accounts receivable folders of Eatsum Food Products containing sales slips and shipping information (F. W. Woolworth).
37	Eatsum accounts receivable ledger sheets (Letters "A" to "F.V.").
	(3560)
38	Eatsum accounts receivable ledger sheets (Letters "G" to "N").
39	Eatsum accounts receivable ledger sheets (Letters "O" to "Z").
40	Accounts receivable folders of Eatsum Food Products with sales slips and shipping information (Letter "W" and part of F.W.Woolworth).
41	Cancellations Eatsum Food Products (Letters "Q" to "Z").
42	Accounts receivable folders of Eatsum Food Products with sales slips and shipping information (Letters "R" and "S").
43	Accounts receivable folders of Eatsum (single proprietorship) 1943 and 1944 (Letters "A" to "Z").
44	Accounts receivable folders Eatsum Food Products containing sales slips and shipping information (Newberry).

Exhibit "B"

Carton No.	General Contents
45	Accounts receivable folders Eatsum Food Products containing sales slips and shipping information (J. J. Newberry).
46	Shipping tickets, Eatsum; cancellations, Eatsum "A" and "B".
47	Eatsum accounts receivable folders, sales slips, shipping information "B" and "C".
48	Eatsum cancellations (Partnership) (Letters "B" to "K").
49	Eatsum accounts receivable folders, sales slips, shipping information (Letter "R").
50	Eatsum accounts receivable folders, sales slips, shipping information (Letter "W").

(3561)

51	Eatsum accounts receivable folders, sales slips, shipping information (Letters "O" and "P").
52	Eatsum correspondence (single proprietorship) 1944 (Letters "D" to "L").
53	Eatsum correspondence (single proprietorship) 1944 (Letters "A" to "C").
54	Eatsum (single proprietorship) sales slips, credit memos 1943 and 1944.
55	Eatsum cancellations (Butler Bros.).
56	Eatsum accounts receivable folders, sales slips and shipping information (Letter "N").
57	American corporations—Minute Books, Stock Transfer Records, Stock Certificate Books; American Brands Corp. purchase bills, correspondence, sales slips.

Exhibit "B"

Carton No.	General Contents
58	Accounts receivable folders, Eatsum (Letters "I" to "L"; American Corporation sales slips.
59	Accounts receivable folders, Eatsum. (Letter "S").
60	Accounts receivable folders, Eatsum (Letter "K"), purchase and sales invoices of American Corporations; insurance records of American Agar and American Sweets.
61	Cancellations, Eatsum (Letters "L" to "P".)
62	Accounts receivable folders, Eatsum (Letters "M" and "N"); Van Dyke Industrial records; sales and purchase invoices of American corporations.
63	Carton of cancelled checks, assorted.
64	Correspondence, Eatsum and American Brands Corp; shipping orders, Eatsum; accounts receivable folders Eatsum, ration checks, etc. (3562)
65	Paid bills, American Brands Corp.; Eatsum sales invoices 1943, 1945, 1946.
66	Accounts receivable folders, Eatsum (Letter "F"); Eatsum Packing and Production records; Eatsum payroll book; American Brands Corp. purchase invoices and correspondence.
67	Eatsum sales slips October 1944, January 1945, September 1944, May 1945; correspondence and invoices, American Corporations.
68	Correspondence and purchase invoices American Brands Corp. and other American corporations.
69	Eatsum sales slips July, August, September 1945; American Brands Corp. and Eatsum correspondence; Eatsum receiving and packing records; Eatsum payroll books.

Exhibit "B"

Carton No.	General Contents
70	Cancelled checks, assorted; correspondence of American Brands Corp. and purchase invoices, employee cards.
71	Eatsum shipping invoices, December 1945.
72	Eatsum sales and shipping invoices (Partnership).
73	Eatsum sales, shipping and receiving invoices.
74	Eatsum sales invoices.
75	Eatsum sales invoices.
76	Eatsum sales invoices.
77	American Brands Corp. purchase invoices and correspondence.
78	Eatsum (Partnership) factors assignments and remittances November 1945 to March 1946.
79	Correspondence, sales invoices, purchase invoices of American Brands Corp., American Sweets, American Agar; insurance records; Eatsum partnership sales invoices. (3563)
80	Eatsum factors assignment sheets and remittance advices; Eatsum inventory control and sales analysis work sheets; Eatsum accounts receivable schedules (work sheets). (3564)

Exhibit "B"

Received at United States Court House, New York, N. Y., Room 438, on September 4 and 5, 1952:

American Trucking & Forwarding Corp.— 1 Check # 1241

American Sweets Corp. — 2 checks # 1105, 1161; 1 statement.

American Brands Wholesale Corp. — 22 checks; 3 statements

American Brands Corp. —167 checks; 22 statements

Burlan Corp. — 74 checks; 10 statements

Loraine Food Corp. — 1 post binder; Gen. Ledger, A/R, A/P.

Loraine Food Corp.	Check Stub Book	Coml. Tr. Co. of N. J.	# 5001 # 5487	3-15-46 to 5- 8-47
Loraine Food Corp.	Check Stub Book	Coml. Tr. Co. of N. J.	# 5494 # 5526	5- 9-47 to 8-26-47
Van Dyke Industrial Co.	Check Stub Book	Mfg. Tr. Co.	# 1001 # 1144	4-25-46 to 12- 9-46
Van Dyke Industrial Co.	Check Stub Book	Mfg. Tr. Co.	# 1145 # 1176	12- 9-46 to 3-17-46
American Trucking & Forwarding Co.	Ck. Stub Bk.	Mfg. Tr. Co.	# 1000 # 1144	4- 2-46 to 11-25-46
American Trucking & Forwarding Co.	Ck. Stub Bk.	Mfg. Tr. Co.	# 1145 # 1241	11-26-46 to 7-25-47
American Brands Wholesale Corp.	Ck. Stub Bk.	Mfg. Tr. Co.	# 1001 # 1150	4- 5-46 to 8-28-46
American Brands Wholesale Corp.	Ck. Stub Bk.	Mfg. Tr. Co.	# 1151 # 1276	8-29-46 to 10-31-46
American Brands Wholesale Corp.	Ck. Stub Bk.	Mfg. Tr. Co.	# 1277 # 1414	10-31-46 to 2- 3-47
American Brands Wholesale Corp.	Ck. Stub Bk.	Mfg. Tr. Co.	# 1415 # 1507	2- 4-47 to 9- 5-47
American Sweets Corp.	Ck. Stub Bk.	Mfg. Tr. Co.	# 1001 # 1131	11-18-46 to 4-29-47
American Sweets Corp.	Ck. Stub Bk.	Penn Exch Bk.	# 1001 # 1173	1-21-47 to 11-26-47

Exhibit "B"

American Sweets Corp.	Ck. Stub Bk.	Mfg. Tr. Co.	# 1083 # 1150	2-27-47 to 5-29-47 (or 49?)
American Agar Corp.	Ck. Stub Bk.	Cml. Tr. Co. of N. J.	# 501 # 542	1-30-46 to 5- 1-46
American Agar Corp.	Ck. Stub Bk.	Cml. Tr. Co. of N. J.	# 1001 # 1023	3-12-46 to 3-25-46
American Agar Corp.	Ck. Stub Bk.	Cml. Tr. Co. of N. J.	# 1024 # 1501	3-26-46 to 8-16-46
American Agar Corp.	Ck. Stub Bk.	Cml. Tr. Co. of N. J.	# 1502 # 2002	8-16-46 to 12-30-46
American Agar Corp.	Ck. Stub Bk.	Cml. Tr. Co. of N. J.	# 2003 # 2020	12-30-46 to 1-11-47
American Agar Corp.	Ck. Stub Bk.	Cml. Tr. Co. of N. J.	# 2003 # 2348	12-30-46 to 8-19-47

(3566)

Items Rec'd at U. S. Court House Sept. 4 and 5, 1952 (Cont'd)

American Brands Corp.	Check Stub Book	Mfg. Tr. Co.	# 1000 # 1144	3-27-46 to 5- 3-46
American Brands Corp.	Check Stub Book	Mfg. Tr. Co.	# 1145 # 1278	5- 3-46 to 6-21-46
American Brands Corp.	Check Stub Book	Mfg. Tr. Co.	# 1279 # 1422	6-24-46 to 8- 2-46
American Brands Corp.	Check Stub Book	Mfg. Tr. Co.	# 1423 # 1560	8- 2-46 to 9-23-46
American Brands Corp.	Check Stub Book	Mfg. Tr. Co.	# 1561 # 1703	9-23-46 to 10-24-46
American Brands Corp.	Check Stub Book	Mfg. Tr. Co.	# 1704 # 1849	10-25-46 to 11-26-46
American Brands Corp.	Check Stub Book	Mfg. Tr. Co.	# 1850 # 1996-A	11-26-46 to 12-20-46
American Brands Corp.	Check Stub Book	Mfg. Tr. Co.	# 1997 # 2136	12-20-46 to 1-23-47

Exhibit "B"

American Brands Corp.	Check Stub Book	Mfg. Tr. Co.	# 2138	1-23-47 to
			# 2375	2-17-47
American Brands Corp.	Check Stub Book	Mfg. Tr. Co.	# 2276	2-17-47 to
			# 2416	3- 7-47
American Brands Corp.	Check Stub Book	Mfg. Tr. Co.	# 2417	3- 7-47 to
			# 2554	4-10-47
American Brands Corp.	Check Stub Book	Mfg. Tr. Co.	# 2555	4-10-47 to
			# 2691	5- 2-47
American Brands Corp.	Check Stub Book	Mfg. Tr. Co.	# 2692	5- 2-47 to
			# 2817	9- 5-47 &
			1 ck. not numbered	11- 5-47
American Brands Corp.	Check Stub Book	Penn Exch. Bk.	# 101	5- 1-47 to
			# 400	6-19-47
American Brands Corp.	Check Stub Book	Penn Exch. Bk.	# 401	6-19-47 to
			# 724	12-15-47
American Brands Corp.	Check Stub Book	Penn Exch. Bk.	# 1001	4- 4-47 to
			# 1022	4-30-47
American Brands Corp.	Check Stub Book	Isabella County State Bank		
			# 1001	1- 9-47 to
			# 1317	9- 4-47

Minutes Book--American Brands Corp.

Minutes Book—American Agar Corp.

Stock Certificates Book—American Brands Corp.

Stock & Transfer Ledger—American Brands Corp.

(3567)

Defendants' Motion for Bill of Particulars

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

against

WILLIAM GIGLIO, FRANK LIVORSI, HOWARD LAWN, LOUIS J. ROTH and AMERICAN BRANDS CORPORATION,

Defendants.

SIR:

PLEASE TAKE NOTICE that upon the indictment herein and the affidavit of Lloyd Paul Stryker, sworn to the 6th day of April, 1954, the undersigned will move this court on the 12th day of April, 1954, at 10:30 o'clock in the forenoon, at Room 318 of the United States Courthouse at Foley Square, New York, N. Y., pursuant to Rule 7 (f) of the Federal Rules of Criminal Procedure, for an order directing the United States Attorney to serve upon the undersigned within thirty days after the service of a copy of such order a bill of particulars of the indictment herein.

COUNT ONE. With respect to *Count One* relating to the partnership return of income of Eatsum Food Products Company, Ltd., state:

1. The manner and respect in which it is claimed that the defendant William Giglio procured, advised and aided in the preparation and presentation of the said return.

2. The nature or kind and amount of each item claimed by the Goverment as making up the total gross income.

(3528)

3. The source, amount and date, or approximate date, of receipt of any unreported income claimed by the Government.

4. The description and amount of each deduction against the total gross income which the Government has allowed or disallowed.

5. The nature or kind and the amount of all items of business expenditures claimed by the Government to be for the personal use of the individual defendants, specifying the defendant.

6. The amount of cash withdrawals claimed to have been made by each of the defendants and transferred to his personal account and claimed to have been falsely charged to expenses, specifying the defendant.

7. The items of expenses entered in the books claimed by the Government to be fictitious and the manner in which they are false.

8. The total of any income claimed to have been received by, or in behalf of, each of the defendants which, it is claimed, should have been but was not included in the said return, specifying the defendant.

9. The nature or kind and amount of each overstatement of the cost of production or the cost of sales. If it is claimed that said return was false in that it did not report income which is claimed to have been diverted by any or all of the defendants, set forth the nature of such diversion, the defendant responsible for it and the amount thereof.

Defendants' Motion for Bill of Particulars

COUNT TWO. With respect to *Count Two* relating to the partnership return of income of Tavern Fruit Juice Company, state:

(3529)

1. Same as Count One, Item 1.
2. Same as Count One, Item 2.
3. Same as Count One, Item 3.
4. Same as Count One, Item 4.
5. Same as Count One, Item 5.
6. Same as Count One, Item 6.
7. Same as Count One, Item 7.
8. Same as Count One, Item 8.
9. Same as Count One, Item 9.

COUNT THREE. With respect to *Count Three* relating to the consolidated corporation income tax return of American Brands Corporation, American Brands Wholesale Corporation, American Trucking and Forwarding Corporation, American Sweets Corporation and American Agar Corporation, state.

1. The respect in which the Government claims the said corporations were not an affiliated group of corporations within the provisions of § 141, Title 26, United States Code, as charged in the said count.
2. Same as Count One, Item 2.
3. Same as Count One, Item 3.
4. Same as Count One, Item 4.

5. Same as Count One, Item 5.

6. Same as Count One, Item 6.

7. Same as Count One, Item 7.

8. Same as Count One, Item 8.

9. Same as Count One, Item 9.

COUNT FOUR. With respect to *Count Four* relating to the consolidated corporation income tax return in the name of American Brands Corporation, state:

(3530)

1. Same as Count One, Item 1.

2. The respects in which the Government claims that the said return was false and fraudulent over and beyond its presentation as a consolidated corporation income tax return.

COUNTS FIVE, SIX. With respect to *Count Five* relating to the income tax return of the defendant William Giglio, and *Count Six* relating to the income tax return of the defendant Frank Livorsi, state in connection with each of said counts:

1. Each item of money and/or property which the Government claims the defendant received in 1946 from each corporation, partnership or business venture with which the Government claims the said defendant was associated.

2. Same as Count One, Item 2.

3. Same as Count One, Item 3.

4. Same as Count One, Item 4.

5. Same as Count One, Item 5.

6. Same as Count One, Item 6.

COUNTS SEVEN, EIGHT, NINE. With respect to *Count Seven* relating to the alleged concealment of assets of William Giglio, *Count Eight* relating to the alleged concealment of assets of the defendant Frank Livorsi and *Count Nine* relating to the alleged concealment of assets of American Brands Corporation, state in connection with each of said counts:

1. Itemize the assets of each defendant claimed to have been concealed and state which of the defendants is alleged to have concealed such asset or assets and when.

(3531)

2. The nature of each such claimed concealment.

3. The value of each such asset claimed to have been concealed.

4. If the Government claims that the defendant transferred assets with intent to conceal, state the name or names of the transferee or transferees and the name or names of the transferor or transferors; if the Government is unable to state such name or names, then identify the transfer or transfers in such a manner as the Government is capable of doing.

COUNT TEN. With respect to *Count Ten* alleging a conspiracy to violate § 145 (b), Title 26, United States Code, state:

1. Whether the Government claims with respect to the alleged conspiracy that

(a) the defendants sought to defeat and evade a large part of the taxes due and owing by them indi-

vidually and by American Brands Corporation, American Brands Wholesale Corporation and American Trucking and Forwarding Corporation as set forth in Counts Three, Five and Six of this indictment;

(b) the defendants sought to defeat and evade the payment of a large part of the taxes owed by the defendants individually and by American Brands Corporation, American Brands Wholesale Corporation, American Trucking and Forwarding Corporation, American Agar Corporation and American Sweets Corporation as set forth in Counts Seven, Eight and Nine of this indictment;

(c) the consolidated corporation income tax return in the name of American Brands Corporation is that set forth in Counts Three and Four of this indictment;

(3532)

(d) the defendants filed and caused to be filed false and fraudulent income tax returns for the defendants individually and for American Brands Corporation, American Brands Wholesale Corporation, American Trucking and Forwarding Corporation, American Agar Corporation and American Sweets Corporation as set forth in Counts Three, Four, Five and Six of this indictment;

(e) the defendants filed and caused to be filed false returns of partnership income for Eatsum Food Products Company, Ltd. and Tavern Fruit Juice Company as charged in Counts One and Two of this indictment;

(f) the defendants sought to conceal assets of William Giglio and Frank Livorsi as set forth in Counts Seven and Eight of this indictment.

2. If the Government makes such contention with respect to any or all of the foregoing, state that such particulars as may be granted by the court with respect to any of such counts are to be considered the particulars of the present count. If the Government does not so contend with respect to any of the foregoing, state in what particulars the Government's claim is different from that set forth in Counts One through Nine of the said indictment.

3. The method or methods which it is claimed that the defendants employed to defeat and evade the payment of a large part of the taxes due and owing by American Brands Corporation, American Brands Wholesale Corporation and American Trucking and Forwarding Corporation.

4. The method or methods which it is claimed each of

the defendants employed to misappropriate, convert and divert assets of American Brands Corporation, American Brands Wholesale Corporation, American Trucking and Forwarding Corporation, American Agar Corporation and American Sweets Corporation.

5. Describe the assets of each of said corporations claimed to have been misappropriated, converted or diverted by each of the defendants.

6. The nature of each misappropriation, diversion and conversion.

7. The entries which the Government claims were falsely made in the books and records of American Brands Corporation, American Brands Wholesale Corporation, American Trucking and Forwarding Corporation, American Agar Corporation, American Sweets Corporation and

of Eatsum Food Products Company, Ltd. and of Tavern Fruit Juice Company, as well as the respects in which it is claimed such entries were false.

8. Describe and enumerate the books and records which it is claimed that the defendants undertook to falsify, destroy and fail to keep and preserve of the operations of the aforesaid corporations and of Eatsum Food Products Company, Ltd., and Tavern Fruit Juice Company. If the Government claims such books, papers and records were destroyed, specify by whom.

Dated: New York, N. Y., April 6, 1954.

Yours, &c.,

LLOYD PAUL STRYKER,
Attorney for Defendants William Giglio, Howard Lawn, Frank Livorsi & American Brands Corp.,
Office & P. O. Address:
40 Wall Street,
New York, 5, N. Y.

To:

J. EDWARD LUMBARD, JR., ESQ.,
United States Attorney,
Southern District of New York.

(3534)

Affidivit of Lloyd Paul Stryker. Read in Support of Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

LLOYD PAUL STRYKER, being duly sworn, deposes and says:

1. I am the attorney for the defendants William Giglio, Howard Lawn, Frank Livorsi and American Brands Corporation.

2. This is a motion for a bill of particulars in behalf of the said defendants.

3. The annexed notice of motion contains a short statement of the substance of each count of the indictment, followed by the items of particularization sought from the Government.

4. The charges with respect to which particulars are sought are general in nature and permit the Government several alternatives of proof, making it difficult, if not impossible, for the defendants to prepare for trial and to prevent surprise. A memorandum of the pertinent authorities will be submitted to the court.

(Sworn to by Lloyd Paul Stryker on April 6, 1954.)

Affidavit of Milton R. Wessel, Read in Opposition to Defendants' Motion to Dismiss Indictment, etc.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C 142-72

UNITED STATES OF AMERICA

v.

WILLIAM GIGLIO, FRANK LIVORSI, HOWARD LAWN, LOUIS J. ROTH, and AMERICAN BRANDS CORPORATION,

Defendants

STATE OF NEW YORK
COUNTY OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK } ss.:

MILTON R. WESSEL, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney and have been in charge of the prosecution of the above-entitled matter since August 2, 1954. This affidavit is based upon my review of the files assigned to me in this case and not upon personal knowledge.

2. This affidavit is submitted in opposition to defendants' motions seeking the following relief:

(a) dismissal of the indictment, suppression of evidence, return of documents, a hearing and inspection of Grand Jury minutes, all based upon an

alleged violation of defendants' constitutional privileges against self-incrimination;

(b) production of documents under Rule 16;

(c) inspection of documents under Rule 17(c); and

(d) bills of particulars under Rule 7(f).

In addition, it is submitted in support of the Government's cross-motion to quash subpoenas served by defendants in connection with their Rule 17(c) motion.

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THE INDICTMENT

3. The present indictment, in ten counts, was filed and ordered sealed on July 23, 1953. It was opened January 26, 1954, when defendants pleaded not guilty.

4. The first nine counts charge substantive violations by defendants of the internal revenue laws in violation of Title 26, United States Code, Section 145(b) or Section 3793(b)(1).

5. The tenth count charges that defendants conspired to violate the internal revenue laws in various ways, including by evading taxes, misappropriating, converting and diverting assets, falsifying, destroying and failing to keep and preserve books and records, filing false and fraudulent returns, and concealing assets, all in violation of Title 18, United States Code, Section 371.

PRIOR PROCEEDINGS

6. On September 14, 1950, three informations were filed in the United States District Court for the Southern

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District of New York; two of them separately charged defendants Giglio and Livorsi with failure to pay income taxes for the year 1946; the third information charged that Giglio and Livorsi along with defendants Lawn and Roth had caused American Brands Corporation to fail to pay its corporate income tax for the same year. All three informations charged misdemeanors, and were filed just before the three year statute of limitations barred the prosecutions.

7. The investigation into the dealings of these individuals and their business ventures continued over the course of the ensuing two years. Meanwhile Giglio, Livorsi, Lawn

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and Roth appeared and pleaded not guilty to the informations. On April 9, 1951, as the investigation continued, all three informations were marked off the calendar.

8. On July 7, 1952, a Grand Jury subpoena duces tecum addressed to Roth was left with his attorney, Frederick J. Waters, at the attorney's office. The following day three Grand Jury subpoenas duces tecum addressed to Giglio, Lawn and Livorsi were similarly left with their attorney, J. Gerard Cregan. The subpoenas were the standard official forms and were identical except as to addressee and time of appearance. They called for the production of books and records relating to twelve business concerns, eight of which were corporations, and most of which were inactive.

9. Seven days after the delivery of these subpoenas to their attorneys, the respective defendants appeared at the Court House. No motions addressed to the subpoenas had been made in the interval.

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10. On July 14, 1952, Roth went before the Grand Jury and was sworn as a witness in a proceeding entitled *Re: John Doe*. He was asked questions about his name and business. He admitted receiving a subpoena duces tecum through his attorney and then asked about the meaning of the word "records" as used in the subpoena. He said that he did not have any of the papers asked for, and although he readily acknowledged that he had worked on the books as an accountant several years before, he testified that he had not seen them since. He also stated that he did not know where the books were, and that the last time he had seen them was in a storeroom which was under the charge of Giglio. This was Roth's one and only appearance before that Grand Jury.

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11. Livorsi appeared on July 15, 1952, and was sworn as a witness. He gave his name and address and acknowledged that he had received a subpoena duces tecum through his attorney. He said that he had none of the records sought, that he had never had them and had never even seen them. This was made clear by responses to questions determining whether he had been in a position to handle or have control of the books. He testified that he never signed any papers or checks and that he had been a partner of only one of the concerns as far as he could recall, although he could find out from Giglio if he ever was an officer or partner of any of the other business entities. He said he did not know where the books were. This was Livorsi's only Grand Jury appearance.

12. Lawn also appeared on July 15 before the Grand Jury. He gave his name and address. He acknowledged

that he was himself an attorney. He said that he had received a subpoena duces tecum from his counsel. He had brought along three checks (plus a check stub relating to the first) drawn by Tavern Fruit Juice Company (a partnership) payable to him. He said he had obtained them from Giglio. He offered (". . . in the event those four items interest you") to furnish photostatic copies ("Yes, I will be glad to do it.") and asked to be permitted to retain the originals.

13. Lawn said that he did not have any other books and records requested in the subpoena, that he had never had them in his possession and did not know who had them. He understood that the books of five of the corporations had been produced in a state bankruptcy proceeding in New Jersey and had later been turned over to a government agent.

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14. Lawn acknowledged having been an officer of American Brands Corporation, but explained that he had been an "accommodation officer" and had no authority with respect to the books. He had seen the books of incorporation but had never seen the other corporate books. He was asked whether he had ever represented himself to be president of American Brands Corporation or had ever signed any papers as president. He replied readily (". . . I am perfectly willing to comply with any questions that you ask me.") but denied ever having represented himself in that capacity. He had never authorized the removal of any books. He had never been a partner of Tavern Fruit Juice Company. After being excused, Lawn was recalled to be asked a question raised by a juror as to whether he had received a salary as an accommodation officer. He answered the question although warned

by the Assistant United States Attorney: "... I don't know if you need answer it". This is the sum and substance of Lawn's testimony in his only appearance before the Grand Jury.

15. Giglio followed Lawn before the Grand Jury. He gave his name and address and acknowledged receipt of a subpoena duces tecum given him by his attorney. Earlier in the day his attorney had spoken to the Assistant United States Attorney concerning the whereabouts of certain of the records sought by the subpoena. Giglio explained that he had not brought the books and records specified in the subpoena that day "... only because I have not had sufficient time to look for them and gather them together. I will be very happy to bring them in if I may be granted a little bit of time in which to gather this material". He said, "... that goes for most of those," except for books and records of Bronx Home Products Company, which he did not own, and the books turned over to the Internal Revenue

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Department in 1949. He said that the books and records of American Brands Corporation had been turned over to the New Jersey receiver in 1947.

16. Giglio asked 30 days to look for the remaining records. He admitted having produced some of the records. He admitted having produced some of the records only recently in a different proceeding but still protested that he did not know where they all might then be. He started writing down a list of the papers as he was talking. He offered to call the co-owner of Van Dyke Industrial Corporation to obtain whatever books he might have. He

did not think that he himself had any of the books or records of Lorraine Food Corporation or Lorraine Food Company (partnership), but he did have some of the books and records of Tavern Fruit Juice Company (partnership), and in response to the question whether he intended to produce them he replied, "I certainly do". Again, however, he insisted that he needed time: ". . . on every one of these companies and corporations—if you will grant me 30 days, I will produce everything that I can humanly possibly get my hands on". As for Eatsum Food Products Company (partnership) he thought that most of the books and records were in the hands of the Intelligence Unit, though he might still have some scraps and odds and ends. "If I can find any of it, I will be glad to bring it in".

17. Giglio discussed the delivery of the books and records of the various concerns to the receiver. He said that invoices, correspondence and cancelled checks had been retained. For a while these had been stored at 19 Rector Street, but later they had been moved, on his authorization, to various other places. Giglio was asked where. In many

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places, he said; he could not remember all of them. When asked for his best recollection he balked, and protested that some of the papers were needed to defend himself against the pending informations. He went on to explain that ". . . I intend to bring you every scrap of paper I can find because I have nothing to fear . . ." and said that what he had meant about needing the papers for his defense was that he would like to have photostats of some of the things that his accountants and attorneys thought they might need.

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18. Giglio was again asked where the records were stored. He replied:

> "Well, they have been stored in many places, Mr. Leone. I've said that I'll bring them in, I've sworn to you that I'll bring them in here to you. I would like the privilege of photostating some of them— not all of them because they are rather voluminous— the rest I will bring in".

The question was repeated: where were the records stored after removal from 19 Rector Street? Then, for the first time, Giglio claimed his constitutional privilege.

19. The Assistant United States Attorney restated the questions on location of records, specifically limiting his inquiry to the records of American Brands Corporation. Giglio again claimed his privilege and then asked if he could leave the Grand Jury room to consult his attorney. He was excused for this purpose.

20. After he had consulted with his attorney, Giglio returned to the Grand Jury room. Again he was asked as to the location of the records of American Brands Corporation.

> "Upon advice of counsel, I would like to claim constitutional privileges, Mr. Leone".

Then he repeated his willingness to bring in the records of American Brands Corporation as well as the records of all the corporations and partnerships:

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> "A little earlier I said that I would be perfectly willing to bring in anything I can gather and find on

> any of these companies or corporations. I am not sparring with you or seeking any advantage. I am truthfully sitting here and saying that if you will give me a reasonable period of time I will bring in everything, to the best of my ability, that I can find".

Again he was asked where the American Brands Corporation books and records were; again he claimed his privilege; and again he was excused to consult with his attorney.

21. After conferring with his attorney for the second time Giglio returned and again refused to say where the records of American Brands Corporation were located. He claimed his privilege on the same question regarding the whereabouts of books and records of six of the corporations named in the subpoena. He was not asked about partnership records at this time. The Grand Jury thereupon instructed him to appear with them before the Judge sitting in Criminal Part.

22. Giglio appeared with the Grand Jury before Honorable T. Hoyt Davis. The courtroom was cleared and the transcript of questions concerning the whereabouts of corporate books and records, and Giglio's claims of privilege, were read. The Court directed that the questions be answered. Giglio himself spoke up and pointed out the pendency of an information against him. The Court observed that that was beside the point. Giglio then urged upon the Court his willingness to produce the records.

> ". . . I have offered to bring them in; I have offered to bring the grand jury these records. If I were

given a short bit of time in which to accumulate this material, I will be very happy to bring them in".

The Court said that the question of giving him time was up to the Grand Jury.

23. Giglio returned immediately from the courtroom to the Grand Jury room. He said he would answer the questions in his own way but he wanted to make a statement (3674) first. He went on:

"The reason I asked for some time to locate this material is because it could be in many places; and, in addition, some of this material will be required by me for my defense against a charge levied against me in 1950 and against charges that the United States Attorney's Office is considering against me for the future. I am under investigation. It is not a 'John Doe' investigation. I know full well that I have been under investigation for six years, because I have been hounded for six years by a couple of Internal Revenue Agents".

24. Giglio proceeded to describe the location of the records, again stating his complete willingness to produce them for the Grand Jury ". . . because I have nothing to fear . . .". Some books and records, he said, were in Chicago; some in Jersey City, New York, Newark and his home; some might even be in a barn in Locust, New Jersey.

25. Although the questions specifically related to corporate books and records, sometimes Giglio talked about corporate records, sometimes about books and records gen-

erally. He was told that the Grand Jury desired the records in the vicinity delivered the following day. Assistance was offered to help him collect the papers, but Giglio declined:

> "I will be glad to deliver the stuff to you if I could have a copy of everything I bring in here."

The Assistant United States Attorney readily agreed to this.

26. The next morning, July 16, 1953, Giglio appeared before the Grand Jury and reported that he had brought a truck with 30 cartons of books and records. He said that he would deliver the balance the following day with the exception of material located in Chicago, which he would produce in a week.

27. A week later, on July 23, 1952, Giglio again appeared before the Grand Jury and reported that there were no records in Chicago after all. He said, however, that

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he had another truckload of records still to deliver. The Grand Jury asked that these be brought in the following day.

28. On September 2, 1952, Giglio appeared before a subsequently-impanelled Grand Jury. He was asked if he had produced all the records of American Brands Corporation. He answered by reading portions of a statement prepared by his attorney. The statement referred to the pending information and said that some material had not been turned over because it impinged on Giglio's constitutional rights and that some included partnership records which were personal papers.

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29. Giglio was pressed on the production of the books and records of American Brands Corporation. He asked the Assistant United States Attorney to explain to him his constitutional rights. This was done. Again he was asked if he had produced all of the records of American Brands Corporation. He claimed privilege. He left the Grand Jury room and consulted with his attorney and then returned. Once more the privilege was claimed on the American Brands Corporation records.

30. Giglio was excused until the following day and instructed to consult his attorney further about the production of the remaining records of this corporation and also as to the missing records of four of the other corporations listed in the subpoena duces tecum. The Assistant United States Attorney said nothing about producing the missing records of any of the partnerships. Giglio asked specifically if these were included. The Assistant referred to the books and records specified in the subpoena:

> "Those books and records have not been produced by you and it is up to you as to whether you wish to produce them and comply with the terms of the
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> subpoena and whether you don't, and if you don't, this grand jury will consider whether your refusal in bringing in those books and records is proper or improper, and whatever their feelings may be they will take steps accordingly".

31. Meanwhile, that same day, Giglio's attorney served a notice of motion to quash the subpoena. Upon the con-

sent of the United States Attorney an order was submitted to Honorable Sylvester J. Ryan for signature, quashing the subpoena as to the books, records and papers of three partnerships listed in the subpoena, ". . . except as to those books and records of the foregoing three companies as he [Giglio] may have already produced." This order was signed and entered on September 15, 1952.

32. On September 3, 1952, Giglio again appeared before the Grand Jury. He was asked about the production of the corporate records but instead of answering, he insisted on reading a statement prepared by his attorney. He was directed to appear before the Judge in Criminal Part.

33. Honorable Edward Weinfeld, before whom Giglio appeared with the Grand Jury, directed him to produce the missing records of American Brands Corporation after hearing him read the statement prepared by his attorney.

34. On the following two days, September 4 and 5, 1952, Giglio produced the missing records of American Brands Corporation, and then the missing records of other corporations listed in the subpoena, as well as some books and records of additional corporations. He was not asked to, and did not, produce any of the missing partnership records. At the close of proceedings on September 5, 1952, the Assistant United States Attorney observed that Giglio had at last complied with the terms of the subpoena. Giglio corrected him; he pointed out that he still had some records

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covered by the subpoena which had not been produced because they were personal and as to which the Assistant had agreed that they could be retained. The subpoenas had

wholly been complied with, Giglio noted, only as to corporate books and records.

35. The September Grand Jury handed up one indictment on September 15 and five more on October 20.

36. At the end of December 1952, defendants moved to dismiss all six indictments and the three informations on the ground that their constitutional rights under the Fifth Amendment had been violated because they had not been advised before the Grand Juries of their privileges against self-incrimination. This motion came on before Hon. Henry Goddard who, on March 27, 1953, filed an opinion in which he stated he was exercising his discretion to dismiss the indictments but refused to dismiss the informations.

37. On April 7, 1953, counsel for defendants other than Roth submitted by mail a form of Order to be submitted to Judge Goddard. A copy of that proposed Order is attached hereto as Exhibit "3".

38. On April 29, Judge Goddard signed and filed an Order which was based largely upon an Order proposed by the Government. This Order directed dismissal of the indictments, denied defendants' motions to dismiss the informations and directed the return to defendants of their partnership and personal records. It did not direct the suppression of any evidence or the return of any copies.

39. On May 5, 1953, the Government filed a notice of appeal from Judge Goddard's Order. Because the statute of limitations was to run in September, the United States Attorney served a written motion on May 28 to

advance the hearing of the appeal to the June Calendar. (3678)

Consent to make an oral application had theretofore been denied by defendants, and the written motion was equally opposed. On June 1, 1953, the Goverment's motion was denied by the Court of Appeals.

40. Although defendants printed briefs in which they argued that the Government's appeal was not timely filed, no motion to dismiss the appeal was made until after the period of limitations had run in late September. At that time defendants moved to dismiss the appeal on the ground that it was filed more than thirty days after the filing of Judge Goddard's opinion, and that the opinion under the rules was the Order appealed from. This motion was granted. The Court of Appeals has never ruled on the merits of Judge Goddard's decision.

Reasons for Delay

41. Defendants' affidavits refer to the delay from the filing of informations in 1950 to the obtaining of indictments in September, 1952, and the delay from commencement of Grand Jury hearings in March until indictment in September, as establishing that the Government needed their testimony and production of partnership documents to indict. While I do not know the reasons for the delay referred to, I found two administrative obstacles which prevented the Assistant in charge from presenting evidence to the Grand Jury during this period.

42. The Assistant was prevented from subpoenaing a witness located a great distance away until the following

fiscal year, (beginning July 1, 1952) because the Department lacked funds.

43. The Assistant was also instructed not to offer evidence to the Special Grand Jury then considering the matter without express authority of his superior. I could (3679)

find no reason for this.

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44. I have instructed the investigating Agents that they are not to use in this prosecution any evidence which was obtained in any way from defendants' testimony or production of partnership documents under subpoena of the 1952 Grand Juries.

45. Under no circumstances will I allow the use of such testimony or records in this prosecution without order of court.

(Sworn to by Milton R. Wessel on September 7, 1954.)

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Affidavit of Theodore Present, Read in Opposition to Defendants' Motion to Dismiss Indictment, etc.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C 142-72

UNITED STATES OF AMERICA,

v.

WILLIAM GIGLIO, FRANK LIVORSI, HOWARD LAWN, LOUIS J. ROTH, and AMERICAN BRANDS CORPORATION,

Defendants.

STATE OF NEW YORK
COUNTY OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK } ss.:

THEODORE PRESENT, being duly sworn, deposes and says:

1. I have been an Internal Revenue Agent, United States Treasury Department, since 1946. Since 1948 I have cooperated with Special Agents James J. Twohig and Paul G. Mahon in a joint investigation relating to the above named defendants.

2. As Revenue Agent in this matter, my primary responsibility is to handle the work of auditing and of computing tax liability. However, I have also assisted the

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Special Agents in their work of obtaining evidence to document the case.

3. Prior to March, 1952, when, I am advised, the first Grand Juries heard evidence in this case, we had in our possession the following categories of documents obtained from third persons (among others):

(a) copies of bank statements, microfilm enlargements of checks which cleared through defendants' bank accounts, and other information obtained from various institutions;

(b) books and records relating to defendants' businesses obtained from third persons;

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(c) books and records relating to defendants' businesses which documents had been abandoned by defendants; and

(d) books and records relating to defendants' businesses which had been obtained from a New Jersey Receiver of certain of defendants' businesses.

DOCUMENTS PRODUCED BY DEFENDANTS

4. In July 1952 I was advised by Assistant United States Attorney Gerome J. Leone that defendants were producing certain books and records in this case, and that I was to have charge of these documents. I met defendants Giglio and Lawn in Room 438, United States Court House, for the purpose of inventorying the books and records produced by them. The records were contained in seventy-seven cartons and were opened by me in their presence.

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5. I was advised that arrangements had been made between Mr. Leone and these defendants for them to be present at such time as the cartons were to be opened, and at any times they desired. In addition, they were to be permitted to make copies of any and all records which they had produced.

6. On August 14, 1952, Lawn appeared at Room 438 and handed me three cartons which he said had just been located, making eighty cartons in all. Attached hereto and marked Exhibit "1" is a copy of a receipt for these eighty cartons. This inventory was prepared by me with the aid of three other Agents assigned to assist me.

7. All of the records produced in this first group of eighty cartons were either partnership or corporate records. No personal records of defendants were included.

8. On September 4th and 5th, 1952, I appeared outside of courtroom 706 and assisted Mr. Leone to carry certain books and records to the fourth floor. I was advised these papers were produced by Giglio. During the week of September 8th, I made an inventory of these latter rec-

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ords, all of which were corporate records. A photostatic copy of this inventory is attached hereto as Exhibit "2". I know of no records produced by defendants other than those described in Exhibits "1" and "2".

9. After the first day of inspection, July 29, 1952, Lawn and Giglio made infrequent appearances at Room 438. They stated they would make arrangements to send

someone in but no one appeared in their interests until December, 1952.

INSPECTION OF DOCUMENTS

10. My first task was to inventory defendants' papers. This took about one week, and revealed that most of the important books and records were missing. As I have already stated, no personal records were ever produced; in addition no partnership books of original entry (cash disbursements, purchase books, and the like) were produced. Even the corporate records were in large part missing, as was established when some of the missing corporate records were made available by defendants in September.

11. The next, and much more difficult, job was an analysis and audit of the papers produced. I found very quickly that defendants had produced a large volume of completely irrelevant material. Moreover they had taken their cancelled checks and shuffled and mixed them so thoroughly that the job of putting them in numerical order proved an additional burden.

12. Once the task of eliminating the entirely irrelevant material and of sorting documents had been completed, I was able to conclude that substantially all the important papers had been removed from the group produced. For example, I already had in my possession microfilm enlargements of some of defendants' checks and copies of bank statements, which had been obtained from banks. I also had

duplicate or triplicate copies of certain of defendants' sales slips which had been obtained from third persons. By comparing these papers in my possession with those produced it was clear that defendants' copies of the incriminating documents were missing. Moreover, analysis of other kinds of papers also revealed missing papers. As an example, there were cash authorization slips in existence for some cancelled checks made out to "Cash", but not for many others, although previous information in my possession indicated that such cash authorization slips should have been in existence and available.

USE OF PARTNERSHIP DOCUMENTS

13. I am advised that defendants' motions refer to both "partnership and personal" records produced. As I have already stated, and as Exhibits "1" and "2" show, there were no "personal" documents produced.

14. My examination of partnership records, after they were properly sorted and the completely irrelevant eliminated, revealed almost nothing of significance to this indictment. Since almost all the important or incriminating papers had already been removed, I was able to discover absolutely no new evidence or leads thereto in these papers. I discovered only two instances where the partnership papers corroborated evidence previously in the Government's possession, and nothing else of any significance to this indictment whatsoever, either new, corroborative, in refutation or otherwise. Those two instances were as follows:

(a) Long before 1952 we had competent and persuasive testimonial and documentary evidence that

defendants' had not reported certain cash receipts as income. This had been the subject of public testimony as early as 1950 before the Kefauver Committee. My analysis of defendants' sales invoices corroborated that these cash receipts had not been reported.

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(b) Also long before 1952 we had powerful, competent evidence of another of defendants' illegal transactions. One of the partnership checks produced by defendants was shown to a witness who thereupon corroborated this evidence.

PREPARATION OF NEW INDICTMENT

15. After Judge Goddard dismissed the 1952 indictment, Mr. Leone called a conference at which the Special Agents and I, among others, were present. At that time he said it was necessary that a new indictment be obtained and that it not be based in any way, however remote, upon evidence obtained through defendants' testimony or production of partnership documents to the 1952 Grand Juries. At that time and at other times he and Mr. Kilsheimer insisted that the new indictment be based exclusively upon other evidence; their instructions were that wherever there was a doubt about the use of some evidence, the doubt should be resolved in favor of exclusion. I knew that the statute of limitations would run shortly on defendants' 1946 tax years and that this might therefore be our last chance to successfully prosecute them.

16. We went over the old indictments item by item. Mr. Leone asked questions about each charge made and the

evidence in support. I brought up the two instances of corroboration mentioned above which resulted from my examination of the partnership records. These were resolved as follows:

(a) As to the corroboration of failure to report cash receipts, it was decided that we would rely solely on the evidence already in our possession. I was instructed that I was not to disclose that defendants' sales invoices corroborated this charge either before the Grand Jury, at trial, or otherwise in this prosecution. Except for the disclosure in this affidavit, I have followed these instructions.

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(b) As to the corroboration of the other illegal transaction, it was decided that this matter would be eliminated in the new indictment. I was instructed to recompute the figures accordingly. While we all felt that we could rely on the persuasive evidence already in our possession before the use of this one check, we also felt some question might be raised because the check had been shown to a witness. It was decided to err, if at all, in favor of caution.

17. As a result of these instructions, I recomputed the amounts set forth in the indictment based upon the elimination of this one charge. In so doing I also discovered an oversight. The new figures in the present indictment differ from the old because of recomputations based on the elimination of this one charge and the correction of this oversight.

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HOLZER-ROTH CONVERSATION

18. I have read the affidavit of Herman Holzer and paragraph 20 of the affidavit of defendant Roth, both sworn to April 6, 1954 and both submitted in support of the present motions. They conclude that certain computations made by me in connection with the 1952 indictments were based on my inspection of the partnership records produced under subpoena by defendants to the 1952 Grand Juries. In this they are wholly and completely mistaken.

19. Holzer and Roth state that the records produced by them were in Room 438 in this building; they then refer to two questions asked by Holzer, to which my answer was that they could discover those facts for themselves by examining the documents in that room. They conclude that, therefore, I based my answers to those questions (which were material to the indictments) on the partnership documents produced by them. Of course this overlooks the fact that they produced partnership and corporate records, and my computations *might* have been based on the latter group. But, in fact, Holzer and Roth failed to disclose a most important fact to this Court: there were other records, not produced by defendants, in Room 438. It was these latter records to which I was referring and I am sure both knew so at the time.

20. In fact, substantially all the documents available to me in this prosecution were in Room 438, including even my own workpapers. Mr. Leone, before the Holzer-Roth conversation, had directed me to allow defendants to in-

spect, in addition to the documents produced by them under subpoena, the abandoned records and the Receiver's records referred to in subparagraphs (b) and (c) of paragraph 3

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of this affidavit. I believe Holzer was working on these records at the time of our conversation; I am sure Roth examined these records before he looked at anything else. I know that defendants spent most of their time examining the abandoned and the Receiver's records, and precious little time on their own production.

21. In my response to Holzer's questions I referred only to these abandoned and Receiver's documents and in no way to the partnership papers produced by defendants under subpoena. Although Holzer says he asked me only about one tax return (Eatsum), Roth says the question was with reference to changes in the percentage distributive shares of the profits of the partners in two companies, Eatsum and Tavern. I know this is incorrect because there was no change in the Tavern percentage distributive shares and both Holzer and Roth being accountants, must have known this fact.

22. Although it is not important in connection with these motions, I would like to correct another implication in Mr. Holzer's affidavit. In paragraph 5 he states that I said I had removed certain papers and put them in my "confidential file". While I did remove certain papers, my removal was only for the purpose of photostating, and not to retain them in a "confidential file". I never intended to keep these papers and returned them as promptly as possible.

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—CONCLUSION

23. I was in complete charge of the documents produced by defendants and know the nature of those documents and the evidence obtained as the result of my examination of them.

24. The only evidence which resulted from my exami-

(3688)

nation of defendant's partnership documents was the above described two instances of corroboration. No evidence which resulted in any way, either directly or indirectly, from my examination of those records has been used in any way in this prosecution. My instructions from the United States Attorney are that no such evidence is to be used in this prosecution in the future.

(Sworn to by Theodore Present on August 27, 1954.)

(3689)

Affidavit of James J. Twohig, Read in Opposition to Defendants' Motion to Dismiss Indictment, etc.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C 142-72

UNITED STATES OF AMERICA

—v—

WILLIAM GIGLIO, FRANK LIVORSI, HOWARD LAWN, LOUIS J. ROTH, and AMERICAN BRANDS CORPORATION,

Defendants.

STATE OF NEW YORK
COUNTY OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK } ss.:

JAMES J. TWOHIG, being duly sworn, deposes and says:

1. I am a Special Agent, United States Treasury Department. I joined the Department in May 1937 and was transferred to the Intelligence Unit in May 1945. I received my present assignment to the Racket Squad in the Intelligence Unit when the Squad was organized in 1948.

2. Shortly after I was transferred to the Intelligence Unit in 1945, the investigation which resulted in the present indictment, among other prosecutions, was assigned to me. I am accordingly familiar with all the facts and circumstances in this matter.

3. I have been advised defendants' charge that evidence used in obtaining the present indictment was either based

upon or resulted from leads disclosed by their testimony or production of partnership records under subpoena of the 1952 Grand Juries. I wish to emphatically deny that I, or anyone else representing the Government, to my knowledge, so used defendants' partnership documents or Grand Jury testimony.

(3690)

SOURCES OF EARLY INVESTIGATION

4. Although assigned to this investigation in December 1945, I did not commence intensive work on this case for about two years. In the interim, because of the press of other work, I confined my inquiries largely to the collecting of data derived from institutional sources. This included credit information, banking information, and similar material.

5. About the end of 1947 or beginning of 1948, I became alerted to the magnitude of the crimes involved in this matter. At that time one of my two Squad leaders was S. Whitman Cordes. He took an active part in the direction of my work and assisted me greatly. A major joint investigation was thereafter commenced, in which I was assisted by Special Agent Paul G. Mahon; Revenue Agent Theodore Present was responsible for the auditing and tax liability computation work, and also assisted us in our primary responsibility of obtaining evidence to document the case. From 1949 until hearings were held by the Kefauver Senate Crime Investigation Committee, in this matter in August 1950, Mahon and I devoted almost full time and Present substantial time to this case.

6. Our investigation proved extremely productive. At the end of this period we had collected a mass of documents which wove a damaging and incriminating web about these defendants. Some of the important sources of these documents were:

(a) institutions, which provided various documents, including copies of bank statements and microfilm enlargements of bank checks;

(b) third persons, from whom a highly relevant group of papers were obtained, including books and records relating to defendants;

(3691)

(c) abandoned books and records relating to defendants' businesses;

(d) the New Jersey Equity Receiver of certain of defendants' businesses who turned over other books and records relating to defendants; and, of course

(e) government agencies.

KEFAUVER COMMITTEE HEARINGS

7. The Court will recall that a Senate Crime Committee, chairmaned by Senator Estes Kefauver, was created in 1950, charged with conducting a full scale inquiry into crime in interstate commerce. In the summer of 1950 I was approached by representatives of that Committee who said they had learned of our investigation and thought it might be an appropriate subject for their consideration.

8. Mahon and I reviewed our evidence with the Committee staff for a full week. At the end, we were told that

the Committee was highly impressed and considered the matter as the perfect subject for their inquiry. Accordingly, the Committee held closed hearings in executive session in New York City on August 14 and 15, and devoted its entire first public hearing in Washington on August 22, 1950 to this case. The individual defendants, of course, all testified at that time, and, I believe, knew substantially the full nature of the Government's evidence and charges.

9. So impressed was Senator Kefauver with the record of defendants' crimes that he devoted a whole chapter of his book on the Committee's work to it. Chapter 9 of the book, "Crime in America", published in 1951, is entitled "How to Turn Brass Into Gold: The Black Market and Business Infiltration Story".

(3692)

10. I have read paragraph 4 of the affidavit of defendant Roth, sworn to April 6, 1954. He states there that he was interrogated by the Kefauver Committee,

> "... as to transactions which are included within the present indictment and which matters constitute evidence which furnished a link in the chain of evidence necessary to establish the Government's prosecution herein."

However, he recites no facts in support of this conclusion. I believe I am fully informed as to the nature and sources of all evidence which now is or at any time has been in the Government's possession in connection with this prosecution. I categorically deny that the questioning of Roth or any of the other defendants furnished any link in the chain

of evidence in this prosecution. All of the evidence upon which the Kefauver Committee based its examinations of these defendants had been furnished from our investigation; not only did defendants reveal nothing new which was of any consequence but they denied facts which were and are so well substantiated as to be beyond any reasonable question.

USE OF DEFENDANTS' DOCUMENTS

11. I have read the affidavit of Revenue Agent Present, sworn to August 27, 1954. He was in charge of analyzing and auditing the documents produced by defendants in 1952 under Grand Jury subpoena. At various times he described to me the nature of defendants' production: that it was largely irrelevant, that papers had been deliberately mixed up, and that no new evidence of any kind had been disclosed as far as this indictment is concerned.

(3693)

12. I know of the two instances of discovery of corroborative evidence which had previously been in our possession, described in paragraph 14 of Present's affidavit. I know these to be the only cases where anything material to this indictment was learned from Present's examination because I am sure he would have told me if he had discovered anything else.

13. I have also read the affidavit of Herman Holzer, and paragraph 20 of the affidavit of defendant Roth, both sworn to April 6, 1954, which are discussed by Present in paragraphs 18 through 22 of his affidavit. While I was

not present during the conversation described in those affidavits, I know that there were papers other than those produced by defendants in Room 438. At the instruction of Mr. Leone, the Assistant United States Attorney then in charge of the case, Present made available to defendants the abandoned and Receiver's documents I have described above in subparagraphs (c) and (d) of paragraph 6. Those papers were in Room 438.

14. I was present when Mr. Leone issued the instructions described in paragraphs 15 and 16 of Present's affidavit and know that the instant indictment was revised so as to exclude reference to the illegal transaction which was corroborated when one of the defendants' cancelled checks was shown to a witness. I was instructed, as were Mahon and Present, by both Mr. Leone and Mr. Kilsheimer that no evidence should be used in obtaining the new indictment which came in any way from defendants' testimony or production of partnership documents to the 1952 Grand Juries.

15. I was also instructed by Assistant United States Attorneys Leone, Kilsheimer and later, Heffron and Wessel, that under no circumstances was I (or the other Agents)

(3694)

to use any evidence in this prosecution which was obtained in any way, however remote, from defendants' testimony or production of partnership documents under subpoena of the 1952 Grand Juries. Both Present and Mahon were given the same instructions in my presence. I have followed these instructions carefully, as, I am sure, have the other Agents.

SUPPRESSION OF DOCUMENTS

16. This case is only one of several criminal prosecutions and civil matters arising out of this investigation, although it is by far the largest and most important. Copies were made of some of the partnership documents produced by defendants under 1952 Grand Jury subpoena, and these were placed in files unrelated to this indictment.

17. These other criminal and civil matters are largely pending in other jurisdictions. I do not therefore, know what effect an order requiring the suppression of such copies or leads and clues would have, but it might result in a lack of evidence as to some persons.

IMPORTANCE OF DENYING DISCOVERY

18. I understand the Court may exercise certain discretion in connection with defendants' motions to learn the Government's evidence and witnesses. To assist the Court in exercising that discretion, I feel I must advise of the nature of these crimes and these defendants.

19. This is one of the largest and most serious income tax fraud cases now pending. Defendants, particularly Livorsi and Giglio, are associated with powerful organized elements of the most vicious kind, with tentacles in many

major American cities and with connections in the underworld. Lawn, (once Chief of the Criminal Division in the New Jersey United States Attorney's Office and an honor graduate from Harvard Law School), their lawyer,

and Roth, their accountant, are little better. Roth himself is also connected with members of the underworld. I have grave fear that if these defendants are permitted to learn the identity of the Government's witnesses, or if they can get facts from which they can conclude who such witnesses are, these witnesses may be threatened and perhaps harmed.

20. The criminal violations here charged are based upon black-market operations, associated with bribery, kickbacks, coercion and destruction of documents. Defendants maintained on their payrolls convicted gangsters who in this way were able to satisfy parole requirements, although they did little or no work. Livorsi himself is a former convict, and a major narcotics trafficker.

21. I am sure defendants will try to treat this prosecution as a simple, innocent business fraud—it is not and it is vital that the Court recognize that the prosecution is in fact of organized gangsters who will stop at nothing to defeat justice.

CONCLUSION

22. Neither I nor anyone else, to my knowledge, has made any use of any kind in this prosecution of either defendants' testimony or production of partnership documents under subpoena of the 1952 Grand Juries. I have been instructed that I am not to make any such use in the future in this prosection and will not do so.

(Sworn to by James J. Twohig on September 2, 1954.)

Affidavit of Paul G. Mahon, Read in Opposition to Defendants' Motion to Dismiss Indictment, etc.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C 142-72

UNITED STATES OF AMERICA

—v—

WILLIAM GIGLIO, FRANK LIVORSI, HOWARD LAWN, LOUIS J. ROTH, and AMERICAN BRANDS CORPORATION,

Defendants.

STATE OF NEW YORK
COUNTY OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK } ss.:

PAUL G. MAHON, being duly sworn, deposes and says:

1. I am a Special Agent, United States Treasury Department. I became a Special Agent in May, 1946 and received my present assignment to the Intelligence Unit, Racket Squad, in 1948. In June, 1949, I was assigned to the investigation out of which came this prosecution.

2. I have read the affidavit of Special Agent James J. Twohig. In particular, I have personal knowledge of the facts in paragraphs 3 and 5 through 22 and know them to be true.

3. Neither I nor anyone else to my knowledge has made any use of any kind in this prosecution of either defendant's testimony or production of partnership documents under subpoena of the 1952 Grand Juries. I have been instructed that I am not to make any such use in the future in this prosecution and will not do so.

(Sworn to by Paul G. Mahon on September 2, 1954.)

Affidavit of Gerome J. Leone, Read in Opposition to Defendants' Motion to Dismiss Indictment, etc.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C 142-72

UNITED STATES OF AMERICA

Plaintiff,

against

WILLIAM GIGLIO, FRANK LIVORSI, HOWARD LAWN, LOUIS J. ROTH, and AMERICAN BRANDS CORPORATION,

Defendants.

STATE OF NEW YORK
COUNTY OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK } ss.:

GEROME J. LEONE, being duly sworn, deposes and says:

1. I am an attorney duly licensed to practice in the State of New York. I submit this affidavit to explain to the Court certain relative facts in connection with several motions made by the defendants to dismiss the above indictment.

2. Until late 1953 I was an Assistant United States Attorney and was in charge of the prosecution of the 1950 information still pending against defendants, and the 1952 indictments which were dismissed by order of Judge God-

dard. In 1953, with James B. Kilsheimer III, I appeared and presented evidence to the Grand Jury which returned the present indictment.

3. I am advised that defendants now suggest that all or at least some of the evidence presented to the 1953 Grand Jury was based upon partnership and personal documents and testimony obtained from defendants by the 1952 Grand Juries, or leads and clues resulting therefrom.

(3698)

4. I believe that the only evidence presented to the 1953 Grand Jury which could possibly have been based in any way upon information so obtained would be the testimony of the investigating agents. While I cannot of personal knowledge state the sources of all the evidence testified to by the agents to the 1953 Grand Jury, I know that the specific direction given by me to the agents was that they were not to use any evidence obtained in any way, however remote, from either testimony or partnership documents disclosed by defendants to the 1952 Grand Juries. I do not believe any personal records were produced.

5. At the time the 1953 Grand Jury considered the evidence and returned the indictment herein, the appeal was pending from Judge Goddard's order dismissing the 1952 indictments. The purpose of obtaining the 1953 indictment and sealing it until final action was taken on the appeal was in order to have available an indictment free from any possible taint in the event the Court of Appeals sustained the dismissal of the 1952 indictments. It was believed at that time that the Court of Appeals would not

finally act until after the statute of limitations would have barred prosecution for 1946 tax violations; in fact, defendants did not even move to dismiss the Government's appeal until after the statute had run.

6. Under these circumstances, the 1953 indictment was to be based solely and entirely upon evidence obtained without reference in any way to the disclosures made by defendants either in partnership documents or in testimony to the 1952 Grand Juries. I instructed and directed the Special Agents and the Revenue Agent to use no evidence (3699)
or leads and clues so obtained in any way, either before the Grand Jury, at trial, or otherwise in this prosecution. In discussing the 1953 indictment, we went over every charge and all proof and I was assured by the agents that nothing remained which could in any way be even remotely related to defendants' testimony or partnership documents.

7. I believe that the agents followed my directions. I know of no evidence presented to the 1953 Grand Jury which was obtained in any way, however remote, from defendants' testimony or production of partnership documents to the 1952 Grand Juries.

(Sworn to by Gerome J. Leone on August 31, 1954). (3700)

Affidavit of James B. Kilsheimer III, Read in Opposition to Defendants' Motion to Dismiss Indictment, etc.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C 142-72.

UNITED STATES OF AMERICA,

Plaintiff,

v.

WILLIAM GIGLIO, FRANK LIVORSI, HOWARD LAWN, LOUIS J. ROTH, and AMERICAN BRANDS CORPORATION,

Defendants.

STATE OF NEW YORK
COUNTY OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK } ss.:

JAMES B. KILSHEIMER III, being duly sworn, deposes and says:

1. I am an attorney duly licensed to practice in the State of New York and submit this affidavit in connection with motions made by defendants to dismiss the above indictment.

2. From August 1950 until April 1954, I was an Assistant United States Attorney for the Southern District of New York. I was assigned to handle the appeal from the Order of Judge Goddard dismissing the 1952 indictments against these defendants, and was also in charge of the prosecution on the present indictment until my resignation.

3. With Gerome J. Leone, another Assistant United States Attorney, I presented evidence to the 1953 Grand Jury which returned the present indictment. I understand that defendants in their motions addressed to that indictment have suggested that all or part of the evidence submitted to the 1953 Grand Jury was based on or derived

(3701)

from personal or partnership documents obtained from, or testimony of, defendants before the 1952 Grand Juries.

4. The only testimony before the 1953 Grand Jury which could in any way have been based upon disclosures by the defendants or personal or partnership books and records produced by them before the prior grand juries would have been the testimony of the Treasury Agents. While I do not have personal knowledge as to the source of the agents' testimony, I do know that they were instructed that nothing, even remotely obtained as a result of disclosures made by the defendants before the 1952 Grand Juries, or from their personal or partnership records produced there, was to be used either before the 1953 Grand Jury, at the trial of this cause, or otherwise in this prosecution.

5. The present indictment was returned by the 1953 Grand Jury, and sealed by the Court, while the appeal was pending from Judge Goddard's Order dismissing the 1952 indictments. The purpose of obtaining this indictment was to avoid the barring of prosecution of defendants for 1946 tax violations in the event the Court of Appeals sustained Judge Goddard's Order. It was expected that the Court of Appeals would not decide the appeal until after the Statute of Limitations had run; in fact, the defendants did

not even move to dismiss the appeal until after the Statute of Limitations had run.

6. It was the instructions of the United States Attorney to me and to Mr. Leone that no evidence presented to the 1953 Grand Jury was to be based in any way upon the personal or partnership documents or testimony obtained by the 1952 Grand Juries from defendants, or leads and clues resulting therefrom. These instructions in turn were

(3702)

relayed to the investigating agents who were directed to use nothing of that kind before the Grand Jury at any time in the prosecution of these defendants.

7. I have no reason to doubt that the agents obeyed the instructions to them and believe that they did so obey.

8. In the preparation of the 1953 indictment, a careful analysis was made of each charge and all evidence to be used in support thereof. I was convinced that each charge was fully supported by evidence in the Government's possession without any reference, direct or indirect, to either the testimony of defendants before the 1952 Grand Juries or personal or partnership books and records produced by them before said Grand Juries.

(Sworn to by James B. Kilsheimer III on August 26, 1954.)

(3703)

Affidavit of Howard A. Heffron, Read in Opposition to Defendants' Motion to Dismiss Indictment, etc.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C 142-72

UNITED STATES OF AMERICA

—v—

WILLIAM GIGLIO, FRANK LIVORSI, HOWARD LAWN, LOUIS J. ROTH and AMERICAN BRANDS CORPORATION,

Defendants.

STATE OF NEW YORK
COUNTY OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK } ss.:

HOWARD A. HEFFRON, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney for the Southern District of New York. I was in charge of the prosecution of the above-entitled matter from the time that James B. Kilsheimer III resigned as an Assistant in 1954 until August 2, 1954, when this prosecution was reassigned to Assistant United States Attorney Milton R. Wessel.

2. I did not participate in the presentation of evidence to the July, 1953 Grand Jury which returned the present indictment. I therefore cannot state, of personal knowledge, the sources of the evidence upon which this indictment is based. However, when the matter was reassigned to me

Affidavit of Howard A. Heffron, Read in Opposition to Defendants' Motion to Dismiss Indictment, etc.

I acquainted myself with all the prior proceedings and was aware of the Order of Judge Goddard and of the dismissal of the appeal from that Order.

3. I was also aware that partnership documents produced by defendants had been ordered returned, and pursuant to stipulation, had been impounded by this Court. I knew and was advised that it was essential that no evidence obtained in any way as the result of defendants' testimony

(3704)

or production of partnership documents before the 1952 Grand Juries was to be used in this prosecution.

I instructed Treasury Agents Twohig, Mahon and Present to this effect. I am sure they followed my instructions.

4. While I was in charge of this prosecution, neither defendants' testimony before the Grand Jury nor any of the partnership documents produced by them under Grand Jury subpoena were used in any way by me, or to my knowledge, by anyone else.

(Sworn to by Howard A. Heffron on August 31, 1954.)

(3705)

DOCUMENTS ATTACHED (3706-3714):

Exhibit "1." Copy of "Index of Records in Room 438 as at August 15, 1952 (80 cartons)." This document is reproduced *supra* pp. 48-54.

Exhibit "2." Copy of Inventory of Corporate Records. This document is reproduced *supra* pp. 55-57.

EXHIBIT "3", ANNEXED TO AFFIDAVITS IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS INDICTMENT, ETC.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C 133-195, C 139-203, C 139-304, C 139-305, C 139-306, C 139-307, C 139-308

UNITED STATES OF AMERICA,

Plaintiff,

—against—

HOWARD LAWN, LOUIS J. ROTH, WILLIAM J. GIGLIO and FRANK S. LIVORSI,

Defendants.

(And Six Other Actions)

This cause came on to be heard on the motion of the defendants Howard Lawn, William J. Giglio and Frank S. Livorsi for an order dismissing the indictments and informations heretofore filed herein, on constitutional grounds, and for other relief, and good cause appearing,

IT IS ORDERED that the motion to dismiss indictment numbered C 139-304 against the defendant Giglio; indictment numbered C 139-305 against the defendant Livorsi; indictment numbered C 139-306 against the defendant Giglio; indictment numbered C 139-307 against the defendants Giglio, Livorsi and Lawn; and indictment numbered C 139-308 against the defendant Giglio be, and the same hereby is, granted, and the said indictments are hereby dismissed as against the said defendants.

Exhibit "3", Annexed to Affidavits in Opposition to Defendants' Motion to Dismiss Indictment, etc.

IT IS FURTHER ORDERED that the plaintiff return to the respective defendants any and all partnership and personal records produced by the said defendants in response to subpoenas served upon them by the plaintiff, together with all copies, photographs or photostats of such records.

(3715)

IT IS FURTHER ORDERED that the said partnership and personal records produced by the said defendants in response to subpoenas served upon them by the plaintiff, together with all copies, photostats, notes and work sheets and all of their testimony before the grand jury be suppressed as evidence against the said defendants in any criminal proceeding.

IT IS FURTHER ORDERED that no testimony or other evidence of any transaction recorded in any of the partnership or personal records produced by the said defendants in response to subpoenas served upon them by the plaintiff, shall be offered upon any trial of the said defendants unless the plaintiff can establish that such testimony or other evidence was obtained independently and was not derived from the information contained in the said partnership and personal records produced by the said defendants in response to subpoenas served upon them by the plaintiff, or in their oral testimony before the grand jury.

Dated: New York, N. Y., April , 1953.

.....

U. S. D. J.

(3716)

Transcript of Argument Before Hon. Edmund L. Palmieri

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C. 142-72

[SAME TITLE]

Before:

HON. EDMUND L. PALMIERI,

District Judge.

New York, September 7, 1954,
3 p. m.

APPEARANCES:

J. EDWARD LUMBARD, ESQ.,
United States Attorney, for the Government;
By Milton R. Wessel, Esq.,
Assistant United States Attorney.

LLOYD PAUL STRYKER, ESQ.,
Attorney for Defendants.
By Lloyd Paul Stryker, Esq., and
Harold W. Wolfram, Esq., of Counsel.

(3754)

Mr. Stryker: Would you care to have the argument transcribed, if it will be of any help to you. I do not want it unless it will help you.

The Court: I have not so far, but there is always room for a first time. If you think that I may require a transcript and that it would be helpful to me, I will ask the stenographer to take it down, if that is your opinion.

Mr. Stryker: I hope I will say something that is helpful.

The Court: Then let's have a transcript taken.

Mr. Stryker: Shall I go ahead, your Honor?

The Court: Yes, please.

Mr. Stryker: If your Honor please, I appear here for William Giglio, who sits there (indicating), Howard Lawn, who sits there (indicating), American Brands Corp. and Frank Livorsi.

There are several motions before your Honor. The principal motion is the one to which I will first address myself because from that you will see what the other motions are and I do not believe that I will have to argue them at length.

If your Honor please, this is a motion to dismiss an indictment filed in this court, opened in this court, in

(3755)

January of this year, and found by the grand jury of this district in July of 1953.

The indictment contains 10 counts, one of which is conspiracy and the others all relate to violations of the Internal Revenue Act, income tax violations.

Our motion is for the following relief: To dismiss the indictment, to suppress the use of memorandum and so forth, leads and clues obtained by the Government from defendants' books and records produced before the grand jury in violation of their Constitutional rights under the Fifth Amendment, and the oral testimony from the defendants and their oral testimony before the grand jury;

for an order directing a hearing to ascertain the scope and the extent of the suppression order and to ascertain the extent of the use of said books and records, oral testimony and leads and clues obtained therefrom in connection with the present indictment.

Also an order directing the minutes of the proceeding before the grand jury, which found the present indictment, be made available to the defendants; also for an order vacating the stay of Judge Goddard's order directing the return to the defendants of their books and papers produced in violation of their Constitutional rights under the Fifth Amendment, and for an order directing the return of said

(3756)

books and papers to defendants under supervision of the Court.

The Court: Do I understand that this matter has been before Judge Goddard?

Mr. Stryker: Not this matter.

The Court: Do you intend——

Mr. Stryker: If you will bear with me, I intend to discuss that at considerable length, if you will hear me. To understand this case at all, I think it is necessary to take you right back to the beginning of the case.

This prosecution was initiated way back four years ago, four years ago, in September, 1950, by the filing of three informations by the United States Attorney against these defendants, claiming that they had committed misdemeanors under the Internal Revenue Act. Pleas of not guilty were entered to those informations and the defendants were all released on bail.

That, as I say, was September, 1950. October came and went. November, December, and the remainder of the year

1950 without further action in this prosecution as far as the Government is concerned. January, February and all the remaining months of 1951 came and went. In the meantime the informations, the charges I have spoken of, originating in September of 1950, were marked off the calendar; insofar as the records go, nothing was done through the twelve months of 1951. January and February of 1952 came and the first six or seven or eight months of 1953 dragged on.

(3757)

During this period, according to the brief filed by the United States Attorney in the Circuit Court of Appeals in a matter that I will come to presently, they were conducting what they called a continuous investigation into the affairs of these defendants.

I say in passing that it would seem that their investigation—we will not assume that they were not zealous in prosecuting—did not satisfy them either as to the sufficiency of the information or as to the basis for further action.

Then finally on July 14, 1952, then nearly two years after the informations were filed, one of the strangest documents that I ever seen in these courts was served upon the defendants, and, mind you, your Honor, these were defendants in a criminal case, within the full language in the intendment of the Fifth Amendment, subpoenas duces tecum were served on the defendants. The subpoenas duces tecum commanded that they appear on July 14, 1952, at 10.45 in the forenoon to testify and give evidence in regard to the violation of Title 18, Section 371, and to produce all books, all records, including general ledgers, and so

(3758)

forth, of 12 separate organizations, business organizations, of which 4 were co-partnerships.

In other words, these defendants were told under penalty of contempt to come and testify and to produce not only corporate records, concerning which the rule, of course, is different, but their own partnership records before the grand jury.

The defendant Giglio appeared on the day in question and gave some testimony. Then certain questions were asked regarding the whereabouts of these papers, and let me interject at this joint that one of the counts of this indictment charges concealing and suppressing books and assets.

The defendant raised his Constitutional privilege and was told by Mr. Leone, who was assistant as I see from his affidavit and has been the assistant since the beginning until he retired from the office last year. Mr. Leone then excused him and told him that he would have to come down before the Judge.

He came down, I think it was before Judge Davis—I forget whether he was from Florida or Alabama, but some southern State. Outside the door Mr. Giglio said to Mr. Leone, "What is this?"

(3759)

He said, "It is a proceeding to punish you for contempt."

"Am I not entitled to have a lawyer if some proceeding is going to be instituted against me?"

"Oh, no, just you, Giglio."

So they brought him in before Judge Davis.

Now, in the cursory glance that I have had of the 90 pages of brief and nearly as many of affidavits served on

me this morning that I hastily looked at during lunch, I find that what I am about to tell you is amazingly omitted.

This situation, as I will read it to you, seems to one that the Government does not care much to discuss. I don't blame them. I think it is only fair to say here that none of the things about which I complain with all the vehemence of my nature are attributable to Judge Lumbard or any of his staff, none of them. They inherited this prosecution as they find it and of course have to do the best they can.

Now, this grand-jury subpoena was entitled "John Doe, in re John Doe." Your Honor will recall the statement that I made a moment back that according to the Government itself there had been a continuing investigation of the affairs of these defendants from the filing of the informations in September, 1950, down at least until this day in

(3760)

question in July 1952, and no indictments had been found. All that there was was the three informations charging misdemeanors and I do not know whether or not any inference can be drawn from the fact that no indictments were found that the Government did not have the evidence.

So whether or not that was the motive, I cannot say, but in all events it was decided by the Prosecutor that it would be a good thing to get the evidence from the defendants themselves.

Of course, there was the little matter of the Fifth Amendment in the way, but that did not seem to deter the prosecutors in this case. In fact, the Fifth Amendment was not noticed by them at all except to trample it down.

Now, Mr. Giglio was brought before the Judge alone and without counsel, and the following occurred. You will not find this in the Government's affidavits submitted here.

Colloquy

> "Mr. Leone: May it please the Court, this defendant was subpoenaed and it was established that he was the president of the American Brands Corp. A copy of the subpoena is here in court."

Seven corporations and five companies are enumerated and listed upon the subpoena, companies being synonymous
(3761)
with partnerships. The Government renews its application that the witness be compelled, compelled to answer questions, be directed to answer the questions which he refused to answer, or in the alternative that he be punished for contempt of the grand jury.

> "The Court: Well, is he being investigated himself?"

A plain question from the bench to the lawyer for the Government.

> "Mr. Leone: These various companies are being investigated, your Honor."

The Court: Was not the Court advised that there was a pending information in which he was mentioned?

Mr. Stryker: Yes, he was advised by the defendant, not by the prosecutor.

> "The Court: The defendant himself is not under investigation?"

That was a pretty plain question and I should think required a direct and plain answer. This was Mr. Leone's answer:

Colloquy

"Well, it is a John Doe investigation and the witness appeared in response to a subpeona duces tecum.

"The Court: I see."

(3762)

In other words, I cannot read that except by stating that it is a synonymous answer to the Court's question.

"Mr. Leone: The witness was asked to produce certain records of certain companies, and it has been established that he was either a partner in some of these companies or that he was an officer of the corporation. Now, the investigation is a John Doe proceeding and it might very well be that in time a defendant."

But in their brief they say that it was a continuous investigation from September 1950 on.

"That in time he would be the subject of an investigation."

The fact was that he then stood in this court as a defendant in a criminal case on bail, and having entered his plea of not guilty to an information filed nearly two years before this episode.

"I do not say that he is not, but at the present time these companies are under investigation, your Honor.

"The Court: And these corporations?

"All these questions all ask as to the whereabouts of the books, is that correct?

"Mr. Leone: That is correct, your Honor.

(3763)

"The Court: Where they are located?

"Mr. Leone: That is correct.

"I do not see any reason," said the Court, "why I should not answer the question. The Court instructs—Mr. Leone, you are talking about those questions that have been read, the questions that were read relating solely to the corporations?

"Mr. Leone: I think there were questions before the grand jury relating to the partnership.

"I will make that a little clearer as to partnerships."

"The Court: With respect to the whereabouts of the books?

"Mr. Leone: That is correct.

"The Court: The Court instructs you to answer these questions to the grand jury."

Now, then, the witness, the defendant, although Judge Davis was not advised that he was then a defendant in a criminal case, having no counsel, spoke up himself and said: "Your Honor, you conjectured as to whether or not I might be a defendant and whether I am under investigation. I want to inform your Honor that an information is filed against me in 1950 in the Southern District of New York charging me with the wilful violation of failure to

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pay the tax of these corporations in September 1950. I was under investigation.

"The Court: Well, that is beside the point here, because these questions are just simply asking where, if you know, were certain records."

Now, we have it this way then, that, in effect, Mr. Leone denied, or if he did not deny, I think his answers to the Court's questions misled as to the status of the defendant. The defendant then himself a layman states his status and stated it correctly, but the Court having an unsworn statement of a mere witness against the statement of the assistant United States Attorney obviously chose to believe the latter, and ordered the witness back to the grand jury.

Now, when he got back to the grand jury, instead of pursuing the questions which he had read to the Judge about the corporations he immediately embarked upon an inquiry as to the co-partnerships. When I say "he," I mean the assistant United States Attorney.

The Court: Co-partnerships of which your client was a partner?

Mr. Stryker: Yes, just that. I state that in connection with his being fair and generous, let's call it disingenuous answer to the Court. What he was pursuing was as to

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the partnerships, in other words, his personal organizations, not corporations, personal organizations of which the defendant was a part.

And then there came a time in that inquiry when he was asked to produce his records. I need hardly reiterate to a Judge of this Court that he was a defendant in a criminal case, under subpoena, and having been directed to answer under his apprehension by the Judge due to the disingenuous answers of the Assistant United States Attorney. There cannot be any question about that. If it were possible, I think it would be argued by the Government in the affidavits.

Then at a later session of the grand jury in September, it happened to be a different grand jury, but it was the same inquiry as appears from the record. I won't pause here to establish it.

Let me interrupt here for a minute, and I think it is of consequence, later on in January of 1953, I made a motion before Judge Goddard to dismiss the indictments found in September of 1952 after the defendants had been compelled under threat of contempt to testify against themselves and produce their own records. I thought that it was such a scandalous performance that no Judge could fail to give me relief and I did not, apparently, think in error. So I move before Judge Goddard for a dismissal of these six

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indictments and for an inspection of at least some of the grand jury minutes, which he granted, of course, unusual in this court, and after an inspection and two or three days' more of argument, Judge Goddard dismissed the entire six indictments of September 1952 because of the plain and unequivocal denial to the defendants in a criminal case of their plainest and simplest Constitutional rights under the Fifth Amendment, which brings me to what I was about to read.

In his opinion Judge Goddard said:

> "On the next day, July 16th, on the return to the Grand Jury room"—he is talking about July 16, 1952, or the day after he had been down here before Judge Davis—"the next day on the return to the Grand Jury room the attorney for the Government said to Giglio, 'Yesterday morning when you were here the Grand Jury asked you to produce the books

and records requested in the subpoena which was served upon you and you were directed to bring all books and records which were in this area, excluding the books and records which were in Chicago; is that correct?

"Answer: That is correct.

"Have you now complied with that direction?"

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Judge Goddard was talking about the testimony of Giglio before the grand jury in July 1952.

"Have you now complied with that direction?"

Judge Goddard continues:

"In reply Giglio said that he had brought 30 large cartons containing records and would bring the rest later."

In the interim between July 16th and the early part of September he had produced about 80 cartons. I think that somewhere it states it was something like two tons of papers, partnership as well as corporate records, said Judge Goddard.

After those records had been, and I use the word advisedly, extorted from him by the misuse of judicial process, by misuse of a subpoena of the grand jury and by anything but a frank statement by the assistant to the Judge, the defendant having testified about a good many records and the whereabouts and so on of these papers, produced under compulsion of the subpoena in threat of contempt about two tons of his own papers.

Thereafter, and shortly thereafter, and I remind you that from September of '50 down to September 1952 there

had been nothing done, no new informations, no indict-
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ments." But after they had hauled this defendant up before the grand jury and misled the Judge and extracted from him his stationwagonful of his own papers, then these indictments followed.

The defense pleaded not guilty to those indictments and at a later date, I think it was in December 1952, I came into the case and I examined what I tried to tell your Honor, and I reached the conclusion which I think is worth stating because it is fully confirmed by Judge Goddard, that a palpable, deliberate, plain intentional violation of the simplest rights of an American citizen was done.

I have already told your Honor that my motions were granted, as they should have been.

I am going to ask later for the privilege of answering this brief and affidavit, the brief is 90 pages long, so I hope I will have an opportunity to answer it, but in the meantime if you care to look at it, the decision of Judge Goddard is found in 208 Fed. 115, Fed. Supp.

The Court: I will find it.

Mr. Stryker: I apologize for taking so much time, but I really think that it will give your Honor an understanding of the case.

The Court: Do not apologize. Take all the time you
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want. I am frankly so amazed that I find it incapable of believing it.

Mr. Stryker: I should think you would. I want to say to this Court that when I heard what was done, as an officer of this Court and as a lawyer and as an American citizen, I was outraged.

The Court: You had a right to be. But why wasn't Judge Goddard's opinion an end of it?

Mr. Stryker: Now we will come to that. Why was what?

The Court: Why wasn't that an end to the entire matter? He dismissed all six indictments, did he not?

Mr. Stryker: We still have a bit more of history. Judge Goddard wrote an opinion or memorandum in the law journal. It is in the records of this Court.

The Court: After the opinion to which you have referred?

Mr. Stryker: That was the opinion. It is really immaterial to the point, but the point is, of course, under the rule—I think it is Rule 10 of this Court—the appeal lies directly from this memorandum and the time begins to toll from that point. The United States Attorney did not appeal from that, but later—I think three or four weeks later—filed an order with Judge Goddard and appealed from that

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and I moved in the Court of Appeals to dismiss the appeal on the ground it was not timely, and the Court of Appeals granted that motion. I think that is the opinion I was referring to, 28 Fed. 2d, 487. I think, if I am not mistaken, that is it.

Judge Goddard's decision merely dismissed the indictments.

The Court: You were left with the informations?

Mr. Stryker: Yes.

The Court: I see.

Mr. Stryker: Pending this appeal, pending this appeal, this case was brought before the grand jury again in July

of last year, and an indictment as to which I am moving now was found and sealed. We knew nothing of that indictment, nor did the Circuit Court of Appeals know anything about that indictment.

In the meantime the Government was pressing hard for a hearing before the Court of Appeals, and they decided that two strings to their bow would be better than one, even though one remained in obscurity in the files of this court. So then they had a secret weapon and they were pressing for the hearing of the appeal.

When the appeal was dismissed last fall, this indictment

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to which I am now directing myself, as to which I am making this motion, was then opened—I think it was in January of this year—the defense again enters pleas of not guilty.

Now, here, and I ask your Honor to bear with me, I would like in some form of speech to make what I am about to say ring in such tones that your Honor cannot forget it even though you do not come to this case for your decision for three or four weeks from now, because I am going to ask time to file a further brief, at pages 5 and 6 of our moving affidavits we set up in parallel columns—this is Giglio's affidavit, your Honor, if you have it before you, and if you have it you could follow me more easily. You will see two parallel columns there, your Honor, in fine print.

The Court: Yes.

Mr. Stryker: I won't have to read anything except to call your Honor's attention to this, that that parallel establishes this beyond a peradventure that the present indictment now before you which should be struck down is nearly

identical with the indictments which were found by this gross violation of the defendants' Constitutional rights and which Judge Goddard dismissed.

For instance, page 5 of the indictment dismissed by

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Judge Goddard, and so forth, the count here is identical with that. That deals with partnership transactions.

The same as to the next and then on the next page you will see on the left-hand side on the bottom of each quote a charge that he concealed assets, and the charge in this indictment is the same. Any changes between these indictments and the indictments which Judge Goddard struck down are minor, trivial, coincidental. The allegations contained in the indictments dismissed by Judge Goddard are the same as they are here.

That takes me back to the fact that they were charged here with concealing assets. And somewhere about the books—I cannot just put my finger on it. In this inquiry directed to a defendant in a criminal case as to the Fifth Amendment to find out information subsequently appeared in the indictments. It is here in the present indictment.

The Court: Is there any indication that Giglio was warned of his Constitutional rights when he appeared before the grand jury?

Mr. Stryker: He claimed them, your Honor. He was claiming his Constitutional rights and was overridden. I want to answer you categorically. I think I am correct that he was not warned at all of his Constitutional rights. He

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was not warned for a good reason, that he claimed them himself. Does that answer your question?

The Court: Yes. There is no showing that the Prosecutor took the trouble to explain what his rights might be. They were claimed and I take it he was brought down——

Mr. Stryker: Let me be sure that I am answering you correctly. At one point Giglio inquired himself something—if I can put my finger on it—about his Constitutional rights. He did inquire. I do not know if I can put my finger on it or not.

The Court: You can quote it. I would appreciate it if in the course of your affidavit and your brief you would indicate to me whether he at any time during the grand jury proceeding, either before or after the proceedings before Judge Davis, he was given sufficient notice of what his Constitutional rights were.

Mr. Stryker: In my opinion he clearly was not, but I will give it to you accurately.

The Court: I would appreciate it if you would.

Mr. Stryker: Now, then, in September of last year, now nearly four years, nearly four years, from the institution of this prosecution and the making of these men defendants in a criminal case, this indictment was found.

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Now, let me read to you right here, I think it is the place for it, an affidavit made by Mr. Leone and filed in the United States Court of Appeals, you will find it on page 8, if you happen to have Mr. Giglio's affidavit before you.

The Court: Yes, I have it.

Mr. Stryker: Now, then, at that time there was this situation of June, 1952, the Government was rushing to get this appeal heard. We had not had their brief, but it must be heard in June, according to their view. And so in

that connection Mr. Leone filed this affidavit, which has a very distinct bearing on the matter directly before you.

At this point he says "It might appear that the effect of the dismissal of the indictments might be obviated by obtaining superseding indictments. That is September 14, 1953, the date the statute tolled. However, under Judge Goddard's order it also directed the return of documents originally produced, and such indictments will have to be obtained without the benefit of the books and records originally produced by the defendants before the grand jury."

Is it not a fair deduction from that comment that they had been used after they were produced? He is worrying

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about the new indictment. "The Government will not only be limited in its prosecution before the present grand jury, but will be required to meet attacks of any subsequent indictments on the ground that they, too, are the result of the original production of books and records of these defendants."

How well he foresaw.

> "No amount of care," says the man in charge of this prosecution, "can protect against this risk, lest it be omitted, all charges whatever with respect to the partnership entities involved in this complex scheme. This can be far from the full prosecution of the situation involved."

Let me hastily add that they did not omit the partnerships in this new indictment, and according to Mr. Leone the only way that they could secure an indictment that would be any good would be by omitting the partnerships. But having fared so well in his own personal contest with

the Fifth Amendment, he evidently decided to take the risk and take the chance, and the present indictment now before you followed.

The Court: Which did not omit the charges.

Mr. Stryker: It did not. I have read them. You will see on page—I will have it as I go along, the charges were identical, and on page 6 of the affidavit—on page 5 of the

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affidavit you will see at the top left-hand page "Income of the Products Company Limited," and so forth, and the other partnerships, not corporations, but partnerships, and the same is here in the indictment before you.

I am told by the Government that it is mere idle surmise, speculation, as to what happened before this last grand jury finding, raising the curtain on this last act of this four-year drama. There are the two indictments. There are the allegations. There is the plain language of Mr. Leone's affidavit of September 19, 1952; indictments were obtained that they were found by using the papers. That is clear, I think. How did they get the same information and the same allegations in the second indictment?

Now I say to your Honor that the only way in my considered and very strong opinion to determine this issue is by a hearing which has been granted on a number of occasions, although I will admit that it is infrequently granted. But in that connection let me go back to 1921 to a decision by Judge Learned Hand when he was a District Judge. This is case, your Honor, of the United States vs. Kraus, 270 Fed., page 517, and he said there:

"It is apparent, therefore, that not only must

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the papers be returned, but any copies that are in

> the possession of the respondent. A more difficult question arises to prevent the use of information derived from their possession, a question which must not be interjected in the trial. The officials made the first unlawful move."

If they did not make an unlawful move here, I do not know what Judge Goddard had in mind when he dismissed those indictments. Repeating: "The officials made the first unlawful move," says Judge Learned Hand, "and any confusion resulting from it they must undertake to clear up and that no testimony or other evidence of any transactions recorded in any of the papers seized shall be offered upon the trial unless the respondents can show that they got it independently of their wrongful possession and to settle this before trial some reference will be necessary to a master, who will make a record of all purchases and sales of liquor recorded in any record so that they may be identified, if evidence is offered of them at the trial. No such transactions may be proved unless the respondents show before the master that independent proof, not derived from information obtained in the papers."

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Let me stress the words "unless the respondent, the Government, so not by ex parte affidavits—they have tried to do here—but before a master where they are subject to cross-examination. The expenses of that reference will be borne by the prosecution through whose wrong the difficulty first arose."

While I am on Judge Learned Hand, it is always a pleasure to be there, let me quote a sentence from a dissenting opinion, but in my humble view whatever he says

in a dissenting opinion is good law. Now, this is the Remington case and it is 208 Fed. 2d, 567. That is the Remington case.

The Court: I am quite familiar with the Remington case.

Mr. Stryker: I know you are, but let me read——

The Court: The problem of perjury allegations were up several times in the Court and I have had to go on any number of occasions to it. Go ahead. Do not let me deter you, because it has a special point in this case and I am quite happy to hear it again in connection with your own case.

Mr. Stryker: He said there, and it is very short and that is all I will read. I am beginning in the middle of a sentence, but it will give you what I want:

> "Any doctrine, how far the consequences are wrong have gone"

and so forth in the Remington case, the first indictment

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was quashed.

I am handed literally a sheaf of affidavits from revenue agents. High as is my regard for all revenue agents, lofty as their principles may be, I do not believe that Constitutional rights of a defendant which had been trampled down will be determined by ex parte statements of revenue agents. I do not think so.

There are two affidavits from two assistants, Mr. Kilsheimer and Mr. Leone, the general purport of which is that they stated "Now, gentlemen, be sure that you do not use any stuff that we got here from the defendants;" and they both say that they believe the witnesses, the agents did

not. They do not tell us what was done, what evidence they did use and we are left dangling there.

I say to your Honor that in respect to Judge Goddard, and I am happy to tell you the actual respect that I have for Judge Goddard, that I have never in my limited career saw such a scandalous performance as was done here with this subpoena and the transaction before Judge Davis and the resulting indictments.

They have cited what I would guess as 70 cases where somebody came in and said, "I think my wire was tapped and I would like to inspect the grand jury minutes and the

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Court would say 'and so what? How do you know that that affected the indictment or the evidence was used?' " There are innumerable cases there and inspection denied.

That is not our case. Our case is a plain, deliberate, intentional, wanton defiance of the Fifth Amendment of the United States Constitution. That is not speculative. That is not something that we say we think happened. It happened, according to the minutes of the grand jury, which Judge Goddard in his wisdom handed to us and which was the basis of his decision.

Now, in these papers, and I will try to answer them concisely if I am given a chance, and I know your Honor will give me the chance, they make one significant statement: "We have always disagreed with Judge Goddard's opinion."

Frankly, and with no disrespect to Government's lawyers, I do not care whether they do or not. Judge Goddard made a decision, a learned, experienced judge, whose position I need hardly discuss other than to state that he is one of the great Judges here; he made the decision and the Government through failure to perfect its appeal in time,

never stated its opposition to his opinion before the Court of Appeals, and that opinion of Judge Goddard is today,

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right now, at seven minutes of four, the law of this case, whether they like it or not. And in my humble opinion it will go down as one of the great Constitutional pronouncements. It says to the bar, the United States Attorney, to the Government, "I will not permit you to trifle with the Fifth Amendment, and if you do I will find sanctions to upset your work."

That is the philosophy of Judge Goddard's opinion.

Now, a moment more, if I have not too far trespassed over and above all that I have said, and really to emphasize it, the heinousness of this thing, heinous, I am going to briefly call your attention to two Federal cases, just two. Now, in that particular case, the Kewell case, in that case the Judge in charging the grand jury in Minnesota said:

> "It would not be proper for you to call an accused and compel him to testify because that would invalidate any indictment which might thereafter be found against him."

I won't read the rest. It is a quotation of the amendment.

They brought this witness Kewell before the grand jury and he refused to answer questions relating to disburse-

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ments, and he maintained and it is interesting in our case that he was being investigated, a prospective defendant. In our case he was not a prospective defendant, but a defendant. And he was a witness and the answers might tend to incriminate him. The witness in that case was held in con-

tempt and the Court reversed it on the ground that he had reasonable cause to prevent attempted incrimination, since he himself may be drawn into it.

The position taken by the Government in that case was significant indeed. In order to sustain a District Court contempt order, the Government urged in the Court of Appeals that Kewell was not entitled to refuse to testify because the United States Attorney—and I will quote from the Government's brief—has in effect granted the witness Kewell immunity from prosecution by the mere fact that he was called as a witness before the grand jury.

Now a case in the First Circuit, the Mulloney case, 29 Fed. 2d, 66, First Circuit, 1935. Mulloney filed a plea of abatement to the indictment on the ground that his Constitutional rights had been violated when he was subpoenaed by the grand jury and was sworn to testify before it. The issues raised by the defendant's plea of abatement and the Government's answer were submitted to a jury which found

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against the defendant. After the defendant's conviction he appealed to the Court of Appeals of the First Circuit, and among other things the assignment of error were certain portions of the District Court's charge to the jury with respect to his plea in abatement. The first question on the assignment of error that the Court of Appeals sought to resolve was whether Mulloney when called before the grand jury had been a defendant in a criminal proceeding or a mere witness. Quoted with approval from the District Court's charge to the jury as follows:

> "The distinction is important. If there had been previously a criminal information or complaint

> filed in court, or before a magistrate, it would have been a violation of his Constitutional rights to have asked any questions."

This affidavit says they did not ask him much, not much, except to find out about the charges.

> ". . . any questions whatever after he was sworn before the grand jury, unless, of course, he was willing to testify."

They will probably say that he was willing to testify because he did not have to go to jail. But that is not (3784) willingness in my book. And the Court of Appeals of Boston continued:

> "If Mr. Mulloney had been a party when he was called as a witness, if, for instance, a complaint and warrant had been issued against him and he was under bail, to wait the action of the grand jury, and after he had been called and sworn he had been asked how old he was, or how much he weighed or any inconsequential question and he had been compelled to answer, it would have been a violation of his rights then and there, and any indictment against him would have been void."

I shall contend and it will only be a parallel contention because I think that this question, this thing is so raw that this Court will want once and for all to express itself on the subject.

The parallel contention, based on those words, any indictment, and the contention that by the hammering down

and destruction of the Constitutional rights of these men by this assistant, all indictments should be dismissed.

We have got to do something, your Honor, about this Constitution. I do not know where to go except to a Federal court. People are riding it down and sneering at it,

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laughing at the Fifth Amendment, and so forth, everywhere, and this young assistant with a zeal that I suppose is commendable, should be taught to regard the Fifth Amendment as something that he need not bother about at all.

I will show you by the ex parte statements of the Government's revenue agents and the affidavits of two assistants who only state what they believe, or shall this Court go to the heart of this matter and do what Judge Learned Hand did many years ago and have a hearing before your Honor or a master so that we can confront these men and cross-examine them and find out how it came about that this indictment contains the identical allegations of the indictment struck down and which was procured after we were forced to bring two wagon loads of our papers before the grand jury. That is this application. I am not going to take time to argue the other motions. If your Honor agrees with me in my position here, you will not have the work of deciding them. This prosecution will be at an end.

One word more: I have tried, I do not know with what success, to be conservative in my observations about the assistant who did this fearful thing. I could, I assure you, use language far more decorous and graphic than I have

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used. I regret to see that that temptation has not been overcome in the Government's papers and there they filed state-

ments to the effect that these men are concerned with gangsters or the underworld. I do not know what bearing that has, if it were true, except possibly the hope of prejudicing your Honor in some way against the defendants.

They speak of defendant Livorsi as a criminal. It is true that Livorsi was once convicted of, I think, some narcotic charge. He was a neighborhood boy who was known to my client, Mr. Giglio, and after he served his time he came out and he gave him a job. I would like to see one word of proof that he is a gangster. It is true he did do 18 months in jail. Out of the goodness of our heart we gave him a job so he would meet probation requirements. Now, what has that to do with the Constitution, if it were all true and if these men that I represent were the worst men in the United States or on the globe, the Fifth Amendment is there, and no assistant United States Attorney, except over my opposition, is going to strike it down.

The Court: I do not think you need labor the point, Mr. Stryker. Our courts have said very clearly that even criminal aliens are entitled to the protection of the Consti-

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tution. So I do not see how we can go any further afield than that.

Mr. Stryker: I won't. I will stop.

The Court: I did not mean to cut you off.

Mr. Stryker: I am quite through. I only want to say that I am outraged at this irrelevant method, that these men are presumed to be innocent and have suffered under this persecution as few men have. I think it is time to call a halt.

The Court: May I ask you one other question?

Mr. Stryker: Yes, and I will try to answer it.

The Court: Is it your position that if the second indictment of 1953 is vitiated, as you claim, that necessarily the pending information would also be similarly vitiated?

Mr. Stryker: No.

The Court: Then it is your position, if I understand it, that if all of your contentions were sustained, the Government could, nevertheless, if it so chose, prosecute them on the four-year old charge.

Mr. Stryker: There is no question but that that is so. Judge Goddard specifically refused to dismiss them. They were not involved in this particular trespass of the Constitution.

The Court: So that all of your arguments are directed

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against the superseding indictment, at least the one latest in time?

Mr. Stryker: That is right, sir.

Mr. Wessel: May it please the Court, counsel's argument for the past hour has been directed solely and exclusively, I believe, to Judge Goddard's opinion dismissing the earlier indictments. Throughout what counsel refers to as 90-odd pages of memorandum and a similar number of pages of affidavits, the Government has stated that it is not contesting Judge Goddard's decision. It is accepting Judge Goddard's decision. That decision is that the indictments previously dismissed were obtained based upon a violation of the defendants' Constitutional privilege against self-incrimination. For that reason he dismissed, in his discretion, the indictment. It does not have any effect upon the present indictment unless it can be shown affirmatively by the defendants that some of the evidence that was ob-

tained in violation of the defendants' privilege was used in getting this indictment.

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The Government's memorandum and all of its affidavits are directed solely at establishing that first of all the burden of showing that there was use of such information is upon the defendants and, secondly, that in any event the present indictment is completely free of any taint of any kind. In order to understand that I must review again the facts. Counsel has left out a variety of very significant events which transpired between the date of these violations back in 1946 and the present date. The violations involved here are almost exclusively based upon income tax charges for the year 1946. From that time on, two special agents and one revenue agent had been carefully and with the greatest of diligence investigating the facts of this offense. They worked from 1946 until 1950. They collected scores of documents, scores of statements of witnesses, a host of evidence. And finally in 1950 when, if your Honor recalls, the Kefauver Committee was first organized and created by the Senate they were approached by Senator Kefauver's committee and asked whether or not the matter they had was worthy of the Kefauver Committee's consideration. This, your Honor, was two years before any disclosures to any

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grand juries, it was two years before any indictments were obtained and it was several months, two months, before the informations were obtained.

The Kefauver Committee heard the evidence and decided it was a good case, it was something that they wanted to investigate, that they wanted to have hearings about. As a result two executive sessions were held in August of

1950 and finally the first public hearing in Washington was held on August 22nd, 1950, and it was devoted exclusively to this case. At that time there was public testimony by these defendants, as well as by many others, of the most incriminating kind. I say of an incriminating kind with reference to the testimony of the other persons. At that time the defendants were fully aware, if they had not been told before that there was in fact a very definite prosecution in the air somewhere, something was going to happen. They saw the evidence and they knew the thing was dangerous to them. Whether or not at that time they had counsel, I do not know. I believe they were represented by counsel before the Kefauver Committee, but I hate to express that statement to this Court, since I am not sure. In any event, two months after that time, after the Kefauver

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Committee's hearings were concluded with respect to this question, the informations were obtained. Those informations were charges of misdemeanors, as they must. There was a three-year statute of limitations which expired in September of 1950. To protect against that time the statute of limitations, it was necessary to obtain those informations. They were marked off the calendar, however. It was decided that there were much more serious crimes involved and a further investigation was made of it.

For the next two years, between September of 1950 and September 1952 when the earlier indictments were obtained and were dismissed, the investigation continued.

This case is but one of a number of cases, all arising out of the same set of facts. It is by far the most important. The others are pending elsewhere, both civil and criminal in nature. This case is the meat of the whole conspiracy.

I should point out to your Honor that this whole conspiracy was referred to at great length by Senator Kefauver in his book, which involved black market operations. They involved the hiring of gangsters on payrolls who do not do any work but they get probation, they were admitted to pro-

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bation. It involved a great many of other things, all of which are extremely relevant, your Honor, as to whether or not you should exercise any discretion in granting a hearing here.

Counsel has charged——

The Court: You admit, do you not, that whether they stand before me as the blackest of the black, they nevertheless are entitled to the same protection under the Constitution as anybody else? I am under an obligation, a very serious obligation, to sustain the Constitution under my oath as a judge.

Mr. Wessel: Yes, your Honor.

The Court: So that my discretion exercised for or against is to protect the Constitutional rights and not exercising the direction for one type of citizen and in another direction for another type of citizen, can it?

Mr. Wessel: No, there is no question but that the littler the man, the less money he has, or the more he needs the court's protection, and there is no question that defendants, no matter how black they are, are entitled to every possible protection. However, the Court may have certain discretion in deciding whether or not to grant a hearing. And, incidentally, your Honor, the whole burden, the whole point,

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the whole purpose of these motions by the defendants is to discover every little bit of the Government's evidence.

Colloquy

The Court: Let's go into that. Let's examine that very carefully, because it seems to me that we are on the periphery of a point, but we are not touching the point at all. If it is true that a defendant in a criminal case was asked to respect a subpoena duces tecum and in the record of the court from which that subpoena was issued he was a defendant with a standing plea of not guilty and awaiting trial; if that is true, then we begin with a most amazing, a most vital question of disregard of the defendant's constitutional rights. We begin with a fundamental error in a proceeding which may—I am not saying it does—but which may taint all the subsequent proceedings.

While it seems to me that the argument of the burden of proof is a good argument in many cases which I am familiar with, it falls rather flat in a case like this where you are beginning with a scandalous performance on the part of the Government, if it is true that this man was asked to respect a subpoena duces tecum after he pleaded not guilty to an information.

(3794)

Mr. Wessel: It is true that this man was served with a subpoena duces tecum——

The Court: Is it not true that subsequent to the service of a subpoena duces tecum upon a defendant in a pending criminal case, that very defendant was brought before a judge sitting in this court and threatened with contempt if he did not answer certain questions before the grand jury and he was thereafter brought before the grand jury and examined in the matter which affected his own personal status.

Mr. Wessel: Counsel has not pointed out that he was brought before two grand juries, two judges.

The Court: Will you try to please answer my own questions and let me try to arrive at the facts in my own way. Is that true?

Mr. Wessel: It is true that he was brought before a judge, your Honor, and directed to answer certain questions.

The Court: And that that judge was never told that he was a defendant in a pending criminal matter?

Mr. Wessel: Yes, he was told by the defendant himself.

(3795)

The Court: Do you not agree that in view of the fact that we are faced here with two serious questions involving the man's constitutional rights raised by the argument, one the service of a subpoena duces tecum upon a defendant and, two, in bringing him before the Court as a recalcitrant witness before the grand jury in a matter which affected his own situation, his own rights, his own liberty, that the burden is no longer upon the person complaining because the Government admits the fundamental error. The taint is there, and it is proven out of your own mouth by that admission, is it not?

Mr. Wessel: No.

The Court: You tell me why.

Mr. Wessel: Your questions, covering a dozen questions, I am not sure that your Honor realizes that in the one question asked that the Government does not admit that any constitutional rights were infringed.

The Court: Well, let's put it in another way. Let me try to ask the question simply, because you know the case and I do not. Do you condone the action of the prosecutor in serving a subpoena duces tecum upon a defendant who is awaiting trial under an information pending in this court?

(3796)

Mr. Wessel: I think, your Honor—you want my personal view as an officer of this court?

The Court: Yes. I am entitled to your frank and full opinion as a sworn officer of this court.

Mr. Wessel: May I, before I answer that question, state certain facts which I think are essential to the answer to your question? The defendant Lawn, sitting over there, is a graduate of the Harvard Law School. Your Honor, I want to answer your question yes, and then I want to explain it. The defendants differ. I would not serve a defendant, an existing defendant in a suit, with a subpoena where he did not know his rights without advising him of his rights. The question is, does he know his rights?

The Court: Since when is it incumbent upon a defendant to protect himself under the Constitution? Is it not the sworn duty of the prosecutor to comply conscientiously and with great care with all of the provisions and with all of the implications of the Constitutional procedure?

Mr. Wessel: I think completely so.

The Court: Do you feel that because a man has been a graduate from Harvard Law School and may have been

(3797)

editor in chief of the Review or perhaps even sat as a judge of this court, that his constitutional rights are fitted into some small compass and of a quality less persuasive than the constitutional rights of somebody else?

Mr. Wessel: I fail to make myself clear, your Honor. If a defendant is sitting on the witness stand and I ask him, "Did you commit this crime?" If that defendant is a judge of this court, I know he is aware of his rights. He does not have to answer the question, if he does not want to.

My saying to him, "You know that you have a privilege against self-incrimination" is superfluous, is merely superfluous. I think you have indicated that yourself.

The Court: I cannot follow you at all. Let's go back to the subpoena duces tecum. We are not questioning a witness. We are not involved in oral interrogation or perhaps some question of what a witness understands or does not understand may arise. We are dealing now solely with his obligation as the result of the prosecutor's service upon him of a subpoena duces tecum.

Is it your position that that act is an act to be condoned?

(3798)

Mr. Wessel: Absolutely not. There is nothing wrong at all with the service of a subpoena duces tecum upon a defendant in an information. Now it is perfectly proper——

The Court: Let me take you a little further, because I am amazed by your reply, and I would be very interested to see upon what authorities you base that upon. I should think that that is a fundamental error, something not to be condoned and that it would vitiate prima facie everything that occurred after that and that the burden would not be upon the defendant at all, but it would be upon the Government to protect whatever it did afterwards because it began with a fundamental error. But let's go a little further. After that, assuming that the Government can present an individual with a whole maze of investigations and possible indictments. It is not tweedledum that we are dealing with today; it is tweedledee. But you are here now under a subpoena duces tecum and it does not involve you personally, it involves some other corporation or some other individual. And then let's assume that the witness who is

confused and under some form of emotional stress and confusion as to his rights does not answer in a satisfactory

(3799)

way and he is brought before the court to be punished for contempt or is to be directed to answer under pain of being punished for contempt; then let's assume at that point, although the prosecutor could have advised the Court of the fact that there was a pending information that as to that information there has been a standing plea of not guilty and there has been no trial and that this man is awaiting trial; let's assume that all of that is kept from the Court's knowledge and that the defendant was then brought as a witness before the grand jury and made to reply to questions touched upon his own individual status as a partner in various co-partnerships, don't you feel that there we have another profound vitiating element which in fact affects everything the Government does thereafter?

Mr. Wessel: I have not found anywhere in all the papers, and this was all before the Court of Appeals before and they dismissed because the appeal was not timely filed, anywhere any indication of any substantive violation of these defendants' privileges. These defendants were brought before three judges of this court. The first judge was Judge Davis. The second was Judge Weinfeld. And the third was an order upon a stipulation of the parties

(3800)

signed by Judge Ryan. On all three occasions they were directed to answer questions properly by the Court. They did so answer questions thereafter; they produced papers properly according to the orders of the Court. I find nothing whatsoever in these papers that indicates that there has been a violation of the defendants' privileges.

The Court: Do you see the deadly parallel that has been drawn——

Mr. Wessel: There is no question about that.

The Court: ——drawn by their attorney and the affidavit which has been presented here in which he shows that the superseding indictment, that the indictment presently before the Court, follows almost verbatim what was found in the indictment struck down by Judge Goddard?

Mr. Wessel: The almost verbatim is exactly the key to it. The almost—a few things were eliminated.

The Court: Two counts are identical. Let's take those first.

Mr. Wessel: I agree that the present indictment is identical with the old with the exception of two things eliminated: one thing that was eliminated has a bearing on this case and one thing was eliminated as the result of disclosures

(3801)

made by these defendants which Judge Goddard found violated their privilege. We do not say that that did violate their privilege, but since Judge Goddard so found and since the Government's appeal was not timely taken we cannot now contest it.

The Court: You can't. You are bound by it. I feel that I am bound by it. So we have to start with Judge Goddard's decision.

Mr. Wessel: That is precisely what the Government wishes to be done, as a matter of fact.

The Court: Then we are all in agreement on one thing that Judge Goddard's decision is the law of this case.

Mr. Wessel: Yes, your Honor.

The Court: Let's start from there. Count I is identical to Count I, is it?

Colloquy

Mr. Wessel: Do you mind if I explain the counts together, your Honor?

The Court: I would like to know how you can possibly justify the pendency of Count 1 if you admit that it is identical with the indictment which has been struck down and vitiated by the fundamental error.

Mr. Wessel: Judge Goddard, if your Honor please, in so many words, exercised his discretion, his discretion to

(3802)

dismiss the earlier indictment, because he made a specific finding that, and I quote from the opinion:

> "The evidence obtained or the examination of the defendants at least furnished a link in the chain of evidence needed to convict them for the crimes charged."

In other words, made a specific finding that the 1952, the earlier indictment, was based at least in part on violations of the defendants' privileges against self-incrimination. He found as a fact, however, that the informations had not been based upon any violations and therefore the informations should stand.

The Court: We are not talking about the informations. We are talking about the six indictments that he dismissed, and which you agree we have to be bound by.

Mr. Wessel: Yes.

The Court: In other words, we are bound by Judge Goddard's ruling. For good reasons or for bad, we are bound by it.

Colloquy

Mr. Wessel: The Government was bound to obtain a new indictment that was completely free of any of the

(3803)

taint which Judge Goddard found in the old indictment.

When the Government appealed from Judge Goddard's decision in April 1953, it immediately moved that the hearing of the appeal before the Court of Appeals be advanced on the calendar. The reason for that request was because the statute of limitations was running and unless the Government could have it immediately resolved in June it would mean that this indictment, if the Court of Appeals sustained this prosecution, if the Court of Appeals sustained Judge Goddard, would be finally and completely ended.

Therefore, after the Court of Appeals denied the Government's motion to advance the hearing to June, the Government as an act of precaution got the new indictment which it sealed and which was completely free of any evidence of any kind that was derived in any way from any disclosures made by these defendants to the 1952 grand jury.

The Court: That is what you say, but am I expected to accept that statement?

Mr. Wessel: There is no evidence——

The Court: Is it your argument that since you say that, that I must be bound by it?

(3804)

Mr. Wessel: There are a variety of arguments. In the first place, to answer your question——

The Court: Why is your oral declaration binding on me, when I am faced with the fantastic fact that the two counts, the first two counts are identical?

You come before me with the second indictment, which is identical, I am talking about the first two counts, identical with the vitiated indictment, vitiated because of a disregard of the defendants' constitutional rights. And you say to me that that indictment was found in a way which is free from taint.

Mr. Wessel: If I may describe how that indictment was found.

The Court: Why is your statement binding upon me? Why is an affidavit submitted by you or by the Government agent binding upon me?

Mr. Wessel: If I may, your Honor, and I do not suggest that your Honor must believe these affidavits and that there is no question about it, but I do say that the first indictment, that the burden is on the defendant to show that the hearing was illegal, your Honor can assume that once the defendant shows some kind of a violation, I am assuming that there was a violation, that automatically the bur-

(3805)

den shifts to the Government.

The Court: I do not see how you can speak in terms of assuming that there was a violation in the light of Judge Goddard's decision which you have admitted is the law of this case.

Mr. Wessel: But I have not——

The Court: You have not admitted it?

Mr. Wessel: I have only admitted, your Honor, and since there is no way of avoiding admitting it, we have the fact that Judge Goddard exercised his discretion to dismiss the earlier indictment because he found that some evidence had been used to obtain the indictment. In fact, one bit of evidence was in fact used in a very technical sense, which

was later discovered, and the instant it arose from that bit of evidence was excluded from the present indictment.

The Court: I do not see how you can possibly whittle down Judge Goddard's finding. He found that those indictments were so vitiated by disregard of defendants' constitutional rights that he struck them all down and he filed an opinion which is very clear. I have not read the entire opinion, but the excerpts read to me make it entirely clear as to what he did and you did not take an appeal for

(3806)

reasons which were good or were bad.

As I understand, that is still the law of this case, and you have two identical counts, Counts 1 and 2. They are identical in effect and are binding on the Government. They are identical with the vitiated, tainted indictment.

Mr. Wessel: No evidence, if your Honor pleases, that went into the grand jury finding of Count 1 stems in any way from any disclosures that these defendants made in their partnership papers or the testimony before the grand jury. And I say that, your Honor, based upon all the affidavits which have been submitted by the agents and the defendants had no showing whatsoever to the contrary and cannot make it. Their statement that this indictment is based somehow on illegal evidence is completely speculative. There is no showing as to that.

I should like to refer to the facts that were used.

The Court: It seems that they would be entitled to make a very thorough probe of your proceedings in order to ascertain whether that is a fact or not. It seems to me that if what you say is true and that if by drawing affidavits

(3807)

and legalistic arguments you can sustain what was done

here, then the constitutional rights that people claim are not worth very much. They are made out of very malleable material.

Mr. Wessel: If your Honor pleases, the earlier indictments were dismissed. There can be no question about that. They were dismissed because Judge Goddard made a finding that illegal evidence was obtained and used and obtained indictments free from such taint, the old evidence to the extent that it was improper in any way was completely thrown out. Your Honor is assuming, I think, that once a defendant is able to show some violation of constitutional rights, automatically the Government has the burden of showing that no, that is not true, that that was not used in this case.

The Court: I am not saying any such thing. But I am saying that on the facts of this case which are most extraordinary, and where you are faced with the ruling of a judge who has gone into the matter very thoroughly and struck down your six basic indictments, that when you come in here with a so-called superseding indictment, which in part is identical and in other parts almost identical with

(3808)

the six indictments so struck down by a judge, it seems to me that you can no longer validly argue that the burden is upon the defendant to show it. It seems to me that the burden is directly upon you to prove that is free from taint.

All of the arguments in these cases which you refer to and which I am familiar with are not good arguments in this case. This is a very unusual case.

Mr. Wessel: I think they are in this case, your Honor.

The Court: Show me one case like this one in any of the cases you cite.

Mr. Wessel: I can refer, and I should say that counsel referred, which was authorized by Judge Hand in 1921. Hearings are authorized in two kinds of cases: Unlawful search and seizure cases and wiretap cases. In all of the cases referred to motions to suppress evidence were legally obtained either by the results of an unlawful wiretap or unlawful search and seizure. They have never been applied to this kind of a situation. However, in cases involving wiretap, or involving searches and seizures, the courts have held that the burden is on the defendants to show two things. The defendants must first show the violation of the

(3809)

constitutional privilege, as they have done here before Judge Goddard. They must, secondly, show that the evidence somehow illegally was obtained and used in a later proceeding. There are cases on that point and directly on that point.

The case of United States v. Pillon in the Eastern District of New York, 36 Fed. Supp., 567, involved a case where two earlier indictments, not one as in this case, but two earlier indictments had been dismissed because they were based upon alleged unlawful wiretapping. The defendants moved for a hearing in connection with the third indictment, on the ground that the evidence before the grand jury must have come from this wiretap. Judge Byers denied the motion, and he said that defendants had the burden of showing affirmatively that there had been an illegal wiretap and that the evidence obtained from that wiretap had been used by the Government.

Other cases are cited in the Government's brief which I would like to refer to on pages 37 and 38, one the case of United States v. Lydecker, in the Western District of

New York, and United States v. Weinberg. In the Weinberg case—as a matter of fact——

(3810)

The Court: What page of your brief are you referring to?

Mr. Wessel: I am referring to pages 36, 37 and 38, your Honor, of the Government's brief. Also, if I may, to pages 29 and 30. Let me read, if I may, from the *Pillon* case. In that case Judge Byers, that is on page 29, as to which two prior indictments had been dismissed because illegal wiretap evidence had been used. The defendant moved to dismiss on the ground that the evidence before the first grand jury must, as had the evidence in the first two, come from an unlawful wiretap. Judge Byers in denying the motion said, and I quote:

> ". . . having suffered the dismissal of the earlier indictments for the reason stated, it is manifestly improbable that the Government would do such an idle thing as to again rely upon evidence which the Supreme Court had condemned in plain and unmistakable terms."

Applying the same reasoning to this case, at the time the Government obtained the present indictment there was pending in the Court of Appeals an appeal from an order, an existing order of this court. The only purpose of obtain-

(3811)

ing the present indictment was in order to avoid any possible charge at a later time, if the Court of Appeals refused to reverse, that there had been unlawful evidence used in the present indictment. And for that reason, as Judge Byers said in the Pillon case, there is no presumption that the

government used the evidence. Indeed, the assumption is to the contrary.

Judge Clark made the same statement in another case in this circuit, United States v. Markman, 193 Fed. (2d), 574. There, very smiliar to this case, the defendant claimed that he had been improperly induced to testify by promise of immunity before the grand jury. He was later indicted by the grand jury in this circuit. Your Honor, in the promise of immunity, if anything, is much worse than what was done in this case, because here the defendants had all the protection of the court. Judge Weinfeld, Judge Ryan and Judge Davis, they considered the motions based upon their constitutional privilege. In the Markman case the defendant claimed that he was induced to testify by promise of immunity from an assistant Attorney General.

The Court: Don't you see that those cases all rely upon the astute attempts of convicted defendants to cut out

(3812)

situations from whole cloth? That is not the case here. That is not the case here. You have a formidable record of constitutional violations staring you in the face, passed upon by a judge who has ruled in an opinion in which you concede you are bound by.

We start here not from the adroit attempt to convict a defendant, to cut something out of whole cloth and to hoist himself by his bootstraps or by saying that some assistant told me thus and so, and therefore certain consequences flowed from them. You start with a plain and clear and admitted violation of the constitutional privilege, passed upon by a judge of this court. And then you say that while all of that is perfectly true, I am bound by that ruling, the burden is still upon this man to prove that this

was used. Now what is he faced with? He is faced with the secrecy of grand jury proceedings. He is faced with the great difficulty of penetrating the barrier of government security, and properly so in most cases. How could he possibly find these things out except by hearing and except by my exercising discretion to give him unusual opportunities for investigation which are not normally available to a defendant?

(3813)

You are familiar, I take it, with the Remington case, and I think that you will recall that the Circuit Court of Appeals decided that there was certain testimony in that case involving a former wife of that defendant, and the refusal of the trial court to grant the discovery of the testimony of that former wife before the grand jury. And if I recall correctly, the Second Circuit Court held that it was error for a trial court to have refused that discovery. I think they felt that they should have been given a complete right of discovery of that testimony.

If I recall the case correctly, that case stands for the fact, if it stands for anything, that even the secrecy of grand jury proceedings cannot avail against a defendant who has shown a violation of his constitutional rights. You cannot argue the burden of proof cases down.

Mr. Wessel: As I recall the Remington case, if your Honor pleases, the Court held it error to deny the right to inspect his own grand jury testimony, because that was the very perjury for which he was being charged and the prosecution. And I believe it also held that it was improper to deny the defendant the right to see his former wife's

(3814)

testimony.

The Court: I will re-read the case very carefully.

Mr. Wessel: I think, if your Honor pleases, that it has no bearing in any way upon this proceeding.

The Court: It has something to do with the right of discovery as to grand jury minutes.

Mr. Wessel: I believe that the Remington case, and it is cited in the Government's brief in this case as showing the policy against disclosure of grand jury minutes. The Court held, I believe, in that case, as it has in some others, that a defendant on trial for perjury and who lied before the grand jury, he must have the right to see his own testimony, the testimony that he gave around the lie that he stated because otherwise he cannot sustain what was said.

The Court: Let me ask you another question. Let us assume that the Government after a proper investigation, after a full hearing, has been able to establish that the second indictment was turned upon evidence independent of the prior evidence and therefore not subject to the taint; but let us also assume that the Government has in the meantime availed itself of other uses for possible discovery of wit-

(3815)

nesses, for possible investigation of evidence for preparation of the trial for other use, not connected with the grand jury and that two tons of documents were produced improperly by a defendant who is coerced under the improper use of a subpoena duces tecum. Let's assume that. You feel that it is proper for that defendant to be brought to trial under those circumstances, even if the second indictment is free of taint?

Mr. Wessel: You are suggesting, your Honor, that illegal proof was obtained, is that correct?

Colloquy

The Court: I am giving you an hypothetical case, having nothing to do with this case, except by remote analogy.

Mr. Wessel: If any use in this proceeding were made of the evidence which was obtained, as Judge Goddard found, illegally, and I say any use and I mean not only evidence itself, introducing evidence at court, but using somewhere or somehow to find other evidence, if that were done, then perhaps it might be said that somehow it was being used in this prosecution and then might be entitled to a hearing to determine whether or not the present prosecution and indictment was to be vitiated.

(3816)

The Government's affidavits, however, your Honor, say not only that there was no use of the other evidence, from the papers produced, in other words, nothing came from the use of the other evidence alleged to be illegal. That is the very instruction given by the United States Attorney to the revenue agents at the time, and they were told not to use it. They produced some 80 cartons of documents. Those 80 cartons of documents, as the revenue agent's affidavit shows, contained a host of more or less, mostly less, material information. Very little of it was of any value. When I say that I mean the partnership documents and those were the only ones found by Judge Goddard who were unlawfully obtained. The other documents were put in a different category. There is no violation of any privilege against self-incrimination regarding the production of corporate papers. As to the partnership papers, the revenue agent went through them for weeks, I believe it was two or three months. There were two things that he found as a result. First, he found a check and that check established, was evidence, I should say, that the defendants

had made padded purchases. In other words, they had bought something from a third person allegedly for goods,

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but they did not get the goods at all. They just got the cash from the third person. They showed the check to the third person and the third person told him that he recalled that, that it did happen. Long before that event there was documentary and oral testimony to that effect of other persons, other persons and other documents. And the only use that was made of this was to get some additional witnesses. I am not using the names of the witnesses, your Honor, and I am not revealing the names of the witnesses to these defendants. The only use that was made of that check was to get this other witness to say, "Oh, yes, that is right. I forgot about that previous purchase. But there it is."

We could have done several things. First, we could have said we won't use that witness. We will put it aside. We will not use it. We will use all the checks. We will still let the indictment contain the charge based upon legal padded purchases, or we could have said, "We must strike that out of the indictment completely because it is based upon an illegal clue."

These defendants would later be able to come into this court and say, "Look. We would have had a witness who

(3818)

could testify that this didn't happen but he was shown a check. That check came illegally from us."

So we struck that out of the indictment completely.

There was one other thing found. There had been testimony before the Kefauver Committee of the most persuasive kind, so persuasive that Senator Kefauver him-

self complimented the witness and said, "I have never heard a better story," or words like that.

There was testimony that these defendants had made $140,000 and kept it in a little green cash box out of black market operations and that that had not been reported as income. The defendants produced their sales invoices. The revenue agent went through the sales invoices and as the result of his examination of those sales invoices he made the finding that they had not in fact reported those purchases as income. He was told by the United States Attorney, "Now you have found that out from these papers and you can never reveal that in court," and the first time it was ever revealed was in these papers.

That is how far the Government has gone to try to

(3819)

keep this present indictment completely free from any taint.

May I say, if your Honor pleases, this question was before Judge Goddard. Judge Goddard wrote an opinion, and I believe that in the normal course after an opinion of this kind was entered by the Court, counsel for the parties exchanged and settled an order on April 7, I believe, and Mr. Stryker submitted a proposed form of order to be submitted to Judge Goddard, the final paragraph of which reads:

> "It is further ordered that no testimony or other evidence of any transaction recorded in any of the partnership or personal records produced by the said defendants in response to the subpoenas served upon them by the plaintiff, shall be offered upon any trial of the said defendants unless the plaintiff can establish that such testimony or other evidence was

obtained independently and is not derived from the information contained in the said partnership and personal records."

(3820)

In other words, counsel for these defendants were seeking to submit to Judge Goddard an order which would shift the burden of proof, as they now ask the Court to do. Whether or not that order was submitted to Judge Goddard, I cannot say. I find in the file only a letter and this attached order. This is the form of order which we propose to submit.

In any event, the question was before Judge Goddard in signing the order as to who was to have the burden of proof. The fact that Judge Goddard, in signing the Government's order or a form of order close to the Government's order, refused to shift the burden of proof and make the Government prove in the future that no illegal evidence had been adduced is also binding. That is as much a part of Judge Goddard's order before this Court now as what the defendants seek to establish and that is, there was a violation of the privilege against self-incrimination.

If your Honor has no further questions, I would like to proceed back. I hesitate to take so much time, but this is an extremely important matter. If these indictments are now dismissed, and, as I should like to point out a little later, even if these hearings are granted, there is grave danger that the prosecution of these defendants will be

(3821)

completely thwarted. It has been thwarted for many years. After the Kefauver hearings, the investigation continued, as counsel has pointed out, and it continued for two

years. There were a variety of other prosecutions, civil and criminal, which grew out of the same investigation.

It is unfair to characterize it merely as an investigation of these defendants. There were many other companies involved; there were several other individuals involved; there was a large civil liability as well as criminal.

It continued for some few years until finally in March of 1952 a grand jury in this district first received evidence in connection with these defendants. There was considerable evidence in March. For reasons that are not entirely clear, but based in part upon lack of funds and in part because this was a special grand jury, it hung over for a while. Finally, in July the subpoena duces tecum counsel referred to was served upon the defendants. They were not served upon the defendants individually. They were served upon their lawyers. Automatically these defendants knew that they could go and move to quash the subpoenas

(3822)

if there was something improper about them.

As I have said before, one of the defendants is an honor graduate of Harvard Law School. He could not fail to know that he had the right to move to quash.

The Court: Is it your supposition that it became right because of their failure to quash? Was it cured by the fact that they were served on the attorney instead of the defendant, and by the failure of the attorney or defendant to move to quash?

Mr. Wessel: I am trying to show at this time that there was apparent cooperation on the part of these defendants in order to avoid an indictment. They were trying to mislead the grand jury.

I should like to submit to your Honor the minutes of the defendants' testimony before the prior grand juries, those that were disclosed by Judge Goddard, and therefore there is no longer any secrecy about them.

Your Honor, on examining them, will see that everything these defendants said and did were in words such as this:

> "I am perfectly willing to comply with any questions that you ask me"; "I would be very happy to bring them in if I may be granted a little time,"

words like that.

(3823)

The Court: They brought in an impressive number of documents in compliance or purported compliance with this subpoena duces tecum.

Mr. Wessel: If your Honor please, they were not served personally so they were not bound to appear if they did not want to.

The Court: I cannot follow you.

Mr. Wessel: The rules require personal service of a subpoena duces tecum.

The Court: Is it your position that a subpoena duces tecum which would otherwise be in violation of a defendant's legal rights is less so because there is something technically wrong with it?

Mr. Wessel: No, your Honor. What I am discussing—I am sure I have not made myself clear: I am trying to show why the Court should, in the discretion that it does in part have, and I believe part of this is a matter of law, but in part the Court does have discretion as to whether or

not it should hear these motions for hearings now or later on, motions to suppress evidence.

The Court: It would save time at the trial and if the trial judge decides to hold such a hearing, it would necessarily postpone the trial and create more inconvenience and expense than now.

(3824)

Mr. Wessel: I think not.

The Court: What possible advantage could there be to anyone to have a decision as to a possible hearing rendered by the trial judge?

Mr. Wessel: If I may read from the words of Judge Holtzoff, your Honor, I think this is the very nub of what is disturbing me at this time. Judge Holtzoff, speaking at page 48 of the Government's brief, United States v. Carter, referred to in 15 Fed. Rule Decisions, page 367, 372:

> "To permit such unbridled and unlimited inspection in every case may result in a defeat of justice. It may lead to fabrication of counterveiling testimony, to intimidation of witnesses, to bribery of witnesses. . ."

The Court: I know that. We know all that. That is perfectly self-evident. This isn't an unbridled examination of testimony. Here is a case where a defendant in a pending criminal matter, notwithstanding an obvious concealment from the Judge who ruled on it, has purported to comply in a very impressive way with something he should never have been asked to comply with, and he says—a Judge of this Court having ruled and filed an opinion—"I now want to know on what basis I am being charged anew

(3825)

with matters which are in some instances identical with the matters in the prior case and in other instances with matters which are almost identical."

Isn't he entitled to be told or must he be made the victim of legalistic argument of astute Government counsel who say it is not the same?

Please do not accept any of this as being any reflection on you. You inherited a very unhappy responsibility and you have my profound sympathy, but the fact of the matter is that you are here urging that there be no hearing, that he be made to stand trial and that at best the trial judge rule on whether or not there should be a hearing regarding the finding of this new indictment.

Is that your position?

Mr. Wessel: Yes, your Honor, precisely my position, but I think your Honor has assumed, because counsel so carefully and so magnificently, I should say, convinced your Honor that there was——

The Court: He hasn't convinced me of anything. I am trying to find out exactly what your position is and if I have understood your position correctly, you admit the subpoena duces tecum was improperly served, that the prosecutor had no right——

Mr. Wessel: No, your Honor.

(3820)

The Court: Let us get back to fundamentals. An information is pending against John Doe. The Government counsel served a subpoena duces tecum on John Doe's counsel. Is that a proper act by Government counsel?

Mr. Wessel: Yes, your Honor, and Judge Goddard did not find it was improper.

The Court: Then you claim that is proper. Then defendants' counsel advises his client to comply or, as a result of this procedure, the defendant in the pending criminal case produces an impressive amount of documentary evidence and the Government uses that evidence, and, as a result of using that evidence before the grand jury, obtains a series of indictments.

Doesn't it follow any evidence used for the purpose of procuring those indicements rendered those indictments invalid?

Mr. Wessel: As I say, your Honor, the Government is bound by the decision of Judge Goddard to the effect that some evidence illegally obtained was used, and in his discretion he dismissed the indictment.

The Court: It seems to me you and Mr. Stryker are in no disagreement as to the basic principle here. You admit

you are bound by Judge Goddard's ruling and you admit that Judge Goddard's ruling was based upon proper grounds, do you not?

Mr. Wessel: I would prefer your Honor not ask me as to the grounds.

The Court: But you admit you are bound by Judge Goddard's ruling?

Mr. Wessel: Yes, your Honor.

The Court: Admitting you are bound by his ruling, you now face this defendant with a new indictment in which some of the counts are identical, some of them not quite identical. Is not the defendant under those circumstances, and in the face of that ruling, permitted to inquire into whether or not the same fault, the same element of illegality or invalidity paints the second indictment?

Mr. Wessel: No, your Honor.

The Court: You say he must be bound by the ex parte affidavits or ex parte statements of Government counsel and Government counsel's oral representation to the Court must bind him to stand trial at his peril, at his great expense and at his great inconvenience?

Don't you see how it would practically put the Government's counsel's personal position above the Constitution?

(3828)

Mr. Wessel: I think, your Honor, it is inherent in your suggestion that somehow there might possibly be motive on the part of the agents or Government counsel not to state the facts as they are absolutely.

The Court: I am not saying anything. All I have is Judge Goddard's opinion and the performance of Government counsel before Judge Davis, a rather shocking and unpleasant transaction, to say the least. That is all I have. We admit that we are at least on sound ground that we have facts all of us agree upon.

Mr. Wessel: But your Honor has found—and this is the link that is missing in the chain of logic that counsel, Mr. Stryker, has created. There is a finding of a violation of Constitutional rights, there is a new indictment, there is no link between those two. There is a presumption which is thought to be created by counsel that there must be some connection. The law is all to the contrary.

In the search and seizure cases, which is a Constitutional privilege as great as the privilege against self-incrimination, the defendant cannot merely show unlawful search and seizure. He must do more. He must show that the evidence has been used. There is something more than just one step.

(3829)

Judge Goddard said, "Return the documents that were taken," and the Government has offered to return those documents.

The Court: He dismissed six indictments. What more terrifying exercise of discretion could he have used against the Government than that? He dismissed six indictments.

Mr. Wessel: That is the terrifying exercise of discretion, your Honor, which so terrified the Government that it got the new indictment, completely and wholly based entirely upon legitimate evidence.

The Court: Both the defendant and I would like to find out how you did that. Aren't we entitled to know under these unusual circumstances?

Mr. Wessel: The affidavits state what was done.

The Court: Should we accept those affidavits and swallow them whole without further investigation?

Mr. Wessel: I think so, your Honor.

The Court: I don't see how I would be complying with my oath as a Judge of this Court. I would be placing myself in a position of being a rubber stamp to the Prosecutor's office.

Mr. Wessel: If your Honor please, there is somehow

(3830)

in the Court's mind the feeling that merely because these are affidavits and not subject to cross-examination there is something wrong with them. There isn't anything that could be questioned about these affidavits. If there is some question, let them raise it. I think the dangers of allowing unbridled cross-examination——

The Court: It is not unbridled. Don't you see that this is an exceptional case? There are very exceptional circumstances. There are some very, very serious charges

made by counsel which you have not even attempted to rebut, in essence.

Mr. Wessel: If your Honor wishes me to go into the whole question of violation of Constitutional rights with regard to the first indictment, I should like to hand up now the Government's brief on appeal from Judge Goddard's decision.

The Government felt that in the first place it was unnecessary to reargue the question of Constitutional violation because it was not reached.

The Court: You mean a brief was never filed with the Circuit Court?

Mr. Wessel: It was filed, your Honor, but because the earlier appeal was dismissed by the Court of Appeals on motion of these defendants because the appeal had not been

(3831)

timely filed, the Court of Appeals never got to the merits.

The Court: But Judge Goddard's opinion is binding upon you. You have admitted it is binding upon you. You say that with one hand and with the other hand you attempt to whittle down the effectiveness of that opinion.

The fact is, and you have to stare this brutal fact in the face, that six indictments were struck down by Judge Goddard.

Now, Judge Goddard needs no compliments from me, but we can at least agree he is a man of great experience and wisdom who has been here for many years, and to exercise this discretion to the extent of striking down six of your indictments, all of your indictments, as a matter of fact, and stripping you bare right down to your prior four-year old or then three-year old information, was a

very drastic and terrifying act of discretion which he exercised.

Mr. Wessel. Should the Court now add upon that, your Honor, add upon what Judge Goddard has already done, held us up for two years because he found a violation and punished the Government for it, perhaps properly and perhaps not?

The Court: There is no question about it. It was (3832)

proper. You are bound by Judge Goddard's opinion. I can't overemphasize that. You don't like his opinion, but it has not been appealed, overruled or modified.

Mr. Wessel: I say, your Honor, without regard to the question, we are bound by it. This Court does have discretion, too, and for this Court to add upon Judge Goddard's opinion the burden of an additional hearing of proof which would allow these defendants to inquire into the sources of all the evidence which we now have would be a penalty which would make it almost impossible to ever try this case.

The Court: I don't see why you have to go to that extent.

Mr. Wessel: I should like to submit an affidavit to your Honor which was left out of these papers deliberately, because accusations such as counsel referred to are not going to be made, but there are other facts which should be brought before this Court as to what might happen to this prosecution in the event this Court allows a hearing and inquiry into the source of the Government's evidence.

The Court: I am completely unimpressed as to what would happen to this prosecution or any other prosecution.

If any prosecutor treads the Constitution under foot, I
(3833)
don't care with respect to what defendant, whether he is a felon, an alien or who he might be, if he treads the Constitution under foot, he will have to take the consequences and there will be no limit to the extent to which I or any other Judge should punish him for doing that, because that is what we are here for.

If we are going to tread the Constitution under foot because we are over anxious to convict a particular defendant for some reason having nothing to do with the proper legal evidence in the case, then neither you should be here nor I should be here.

Mr. Wessel: Your Honor, I quite agree with what you said. There should be as great a duty upon the prosecutor to uphold the legal evidence as upon the Court.

The Court: All your arguments with respect to the Constitution being flaunted and Senator Kefauver's investigation, all these things leave me completely unimpressed, because the issue is a much more profound issue here than whether or not you should be able to prosecute this case against this defendant, or as to whether or not Senator Kefauver was right when he said this was the most amazing case he ever heard. It has nothing to do with the issues before me.

(3834)

Mr. Wessel: Your Honor, I submit—I come back—the mere fact that there has been a finding of a violation of Constitutional rights under the cases, under the decided law in this Circuit and in this country, the Federal courts, does not give rise to any presumption of use and right to a hearing and burden on the part of the Government or

otherwise. Those cases are referred to in the Government's brief.

The Court: You say all Government counsel has to do is to submit affidavits by Government agents or make his own statement in court that the new indictment is without taint and he can repeat verbatim all the charges in the prior indictment and all the Court has to do is accept them as binding? I refuse to accept them.

Mr. Wessel: Should I read the decision?

The Court: You had better not. I have to do a great deal of studying in the case. I am prepared to do it. I do not regard this in the light you regard it. I do not feel that I am here to accept blindly ex parte statements where there has been no opportunity for cross-examination and proper inquiry, where there has been, as I feel there probably has been here, a scandalous disregard of Constitutional rights. (3835)

Mr. Wessel: May I just read one quotation from Judge Learned Hand in the Second Circuit Court, not when he was District Judge but thirteen years ago?

United States v. Goldstein, 120 Fed. 2d, 485, which was affirmed by the Supreme Court. He said, in referring to statements by the Government, just exactly the same as is being submitted to your Honor.

> "The prosecution denied that they were useful as clues, or that they had helped in any way except as confirmation of information which it already had. The record contains nothing to contradict the testimony of those gentlemen who had prepared the case and who swore that legal sources"—there is a part left out—"were the sources of their informa-

> tion. We should not therefore have been justified in sustaining a finding that the 'taps' had served as clues, even if one had been made and if the prosecutor had the burden of proof upon it."

And there have been dozens of cases all cited at pages 42 and 43 of the Government's brief in which the Courts have accepted affidavits of Government counsel of this kind. Certainly, the Government prosecutor is bound by as great or a greater duty of protecting the Constitution.

(3836)

Prosecutors are sworn to uphold the Constitution. The power to indict is the power to destroy, and before the Court ever gets into the picture in the sense of the trial judge hearing the merits, unless the Government prosecutor will uphold those rights as fully as the Court and as fully as defense counsel, the American system of protection of Constitutional rights and Democracy must be destroyed; but, on the other hand, your Honor, there is also the need to convict criminals, and if defendants are to be allowed upon no showing of any kind the right to an unbridled investigation into the sources, if your Honor please, of evidence——

The Court: I think you and I have talked ourselves to the point where we see where we clearly disagree. I don't think this is a case of unbridled inquiry into the Government's case.

Mr. Wessel: Counsel wishes to inquire——

The Court: You have got to convince me. I am going to read all of the cases you cited. If those cases do stand for the proposition that even though the Constitutional rights have been trod under foot, a new charge can be based upon separate and distinct evidence as proven by ex parte

statements without more, if that is the law, then of course you are right. I would be very much surprised that that would be the law.

(3837)

What answer do you have to the case in which Judge Learned Hand appointed a master to make an investigation in the Kraus case?

Mr. Wessel: I have not reached that. I have notes of what I have discussed. It is now five after five.

The Court: Tell me why you disagree with Judge Learned Hand in the Kraus case.

Mr. Wessel: There is a standard procedure for hearing on a motion to suppress evidence in a search and seizure case. It is covered by Rule 41(e). Rule 41(e) says where there has been unlawful search and seizure and where the evidence has been used somehow, or where counsel wishes to suppress that evidence that was unlawfully obtained, there can't be a hearing. That is the one kind of hearing authorized by the rules.

There is one other kind of hearing authorized by the Supreme Court in the wire-tap cases. Nardone v. United States.

The Court: You say that the defendants whose rights may have been frustrated or violated by prosecutors in search and seizures and in wire-tap cases are in special category from the defendants whose rights may have been

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violated under other provisions of the Constitution?

Mr. Wessel: And the cases referred to in the brief so state, your Honor.

The Court: Maybe it is because the courts have never had such cases.

Mr. Wessel: I think the answer is a little different. The question is whether there shall be a pretrial hearing on questions of this kind, or whether the evidence shall be objected to at trial.

The Court: It seems to me that you are making an assumption which is not justified, which I think is invalid. That assumption is that in protecting the rights of defendants under the Constitution we are necessarily bound by the previous printed word. That may not necessarily be so. Maybe this is the first time a thing like this has ever happened.

Mr. Wessel: It is not. The privilege against self-incrimination is one of the great rights which defendants have under the Constitution. Another such right is the unlawful extorted confession. A defendant cannot move before trial to suppress such a confession. He cannot. He must wait until trial. The cases are clear about that.

The Court: If the cases are as clear as you say, I should

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be able to decide this motion without any difficulty. I will spend some time in the library and read the cases.

How much time do you wish for a reply brief?

Mr. Stryker: Your Honor, as gathered from the arguments, I really will need a good deal of time. This is a long brief and I would like to answer it very clearly. I think I can. I would like to get the minutes for your Honor and myself. I don't think with 90 pages of brief and I don't know how many pages of affidavits it would be unreasonable, because I am sure the Government will tell you they have worked on these papers for at least four weeks, if I had the same.

Mr. Wessel: May I say this: There is also a question of a trial date for this case? The Government is now press-

ing and has always and will continue to press for a trial date at the earliest possible time.

Mr. Stryker: They didn't press very much for two years while they waited and let it go off the calendar.

Mr. Wessel: When your Honor has disposed of this motion and has decided what should be done here

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The Court: I would appreciate it if you would consider getting your brief in within two weeks. The reason for that is if you ask me to give you four weeks, it will mean that I will have to carry this case over into another term of the court and beyond the month of October when I have another commitment which will take me outside of this jurisdiction.

Mr. Stryker: I hate to do that. I have a murder case coming up in Brooklyn, a difficult case. I am eager to do this, but I took two hours at lunch and I made a cursory reading. I will do the best I can. Two weeks, what would that date be?

The Court: The 20th, the week of Monday the 20th. Say if you could get it to me by the 22nd, which is a Wednesday, two weeks from tomorrow.

Mr. Stryker: Could you give us until Friday?

The Court: It would give me the end of that week and the following week to examine it. I will have a great deal to do, too.

Mr. Stryker: Could we have the Friday of that week?

The Court: All right, the 24th.

Thank you both.

Mr. Stryker: Sorry to have kept you, your Honor.

(Adjourned to September 22, 1954.)

(3841)

Opinion of Hon. Edmund L. Palmieri

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C 142-72

[SAME TITLE]

APPEARANCES:

Hon. J. Edward Lumbard
United States Attorney for the
Southern District of New York
Attorney for the United States.

Milton R. Wessel, Esq.
Assistant United States Attorney
Of Counsel

Lloyd Paul Stryker, Esq.
Attorney for Defendants
40 Wall Street
New York 5, N. Y.

Harold W. Wolfram, Esq.
40 Wall Street
New York, N. Y.
Of Counsel.

PALMIERI, D. J.

In September and October 1952 defendants were indicted for alleged violations of the internal revenue laws and for an alleged conspiracy to violate those laws. Six

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indictments were filed. They were dismissed in March

1953 on the ground that the defendants' constitutional rights had been violated. See *United States* v. *Lazen*, 115 F. Supp. 674 (S. D. N. Y. 1953). The present indictment which charged offenses similar to those charged in the dismissed indictment was filed in July 1953. Defendants move (1) to dismiss the present indictment, (2) to suppress the use of all material obtained by the government through the violation of defendants' constitutional rights, (3) to have a hearing to ascertain the scope of the suppression order and the extent to which the Government used the illegally obtained material in securing the present indictment, (4) to inspect the minutes of the grand jury that returned the present indictment, and (5) for other relief.

Defendant's first four motions, as above enumerated, are based on the violation of their constitutional rights in connection with the prior indictments against them as found in *United States* v. *Lazen*, 115 F. Supp. 674 (S. D. N. Y. 1953). Defendants argue that the prior finding of a violation of their constitutional rights and the fact that the present indictment is very similar to the prior ones places upon the government the burden of proving that the illegally obtained information was not used before the grand jury to obtain the present indictment. They ask for a hearing and for inspection of grand jury minutes in order to determine whether the illegally obtained material was used to obtain the present indictment. If it is found that it was used for this purpose, they want the indictment

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dismissed. If not, they request an order suppressing the future use of all the illegally obtained material.

Assuming that a hearing may be held, the first issue before me is whether defendants have made a sufficient

showing to entitle them to a hearing and to inspection of the grand jury minutes. Pre-trial hearings are held in cases in which there is reason to believe that the prosecution made use of information received as a result of wire tapping. See *Nardone* v. *United States*, 308 U. S. 338 (1939). In those cases a hearing will not be held unless "claims that taint attaches to any portion of the Government's case . . . satisfy the trial court with their solidity and . . . are not merely a means of eliciting what is in the Government's possession before the submission to the jury." *Nardone* v. *United States*, supra at p. 342. Surely the rule should be no different in the instant case, and I shall therefore determine whether defendants' claims that illegally obtained evidence may have been used to secure the present indictment have the required "solidity."

Defendants' main support for their claim that the illegally obtained material or leads stemming from it may have been used to obtain the present indictment are three facts. One, that the prior indictment was returned only after the government had secured material in violation of the defendant's constitutional rights. Two, that the present

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indictment is very similar to the prior one. And three, that a revenue agent implied that some of his computations were based on documents stored in a room in which the illegally obtained documents were also kept.

The Government's claim that only untainted material was used to obtain the present indictment is, in my opinion, substantiated by affidavits of considerable weight. Affidavits have been submitted from all the revenue agents who have been responsible for the investigation leading

to the indictment of the defendants and from all the United States Attorneys who have been responsible for the prosecution of this case. These affidavits show that the activities of the defendants have been under investigation since 1948 and that three revenue agents spent a substantial period of time on this investigation before defendants appeared before the grand jury that returned the prior indictments in 1952. The affidavits show that long before 1952 the Government had in its possession copies of bank checks, bank statements, books and other records pertaining to the defendants' activities which had been secured from banks, third persons, a New Jersey Equity Receiver, government agencies, and material abandoned by the defendants; and that much of this material was kept in the same room as the illegally obtained material. The affiants also state that the revenue agent referred to this material as the basis for his computations, that the illegally obtained material was largely irrelevant deliberately shuffled and contained no new evidence or leads thereto. The Government affiants ad-

(3721)

mit that the tainted material contained corroboration of evidence that the Government had previously acquired but state that this corroborative evidence was in no way used in obtaining the present indictment.

From the affidavits presented by the defendants and the Government it is clear that defendants' claim does not have the "solidity" required to justify holding a hearing. Granting a hearing in this case on the basis of the showing made by the defendants and the Government would indeed be subordinating "the need for rigorous administration of justice to undue solicitude for potential . . . disobedience

of the law by the law's officers." *Nardone* v. *United States*, *supra* at P. 342. I find no basis for exercising my discretion to grant a hearing or inspection of the grand jury minutes and these motions are denied. See United States v. Flynn, 103 F. Supp. 925, 929-931 (S. D. N. Y. 1951).

Defendants' motion to dismiss the indictment is also denied. The weight of the affidavits presented by the Government is much greater than that of the post hoc propter hoc and the conjectural arguments advanced by the defendants. These affidavits leave no room for an inference that the Government used illegally obtained material in securing the present indictment, the only basis on which it is claimed that the indictment should be dismissed.

Defendants' motion to suppress the use of all the illegally obtained material copies, notes and all leads there-

(3722)

from must also be denied. Defendants can only complain if this material is used against them. See *Hale* v. *Henkel*, 201 U. S. 43, 69-70 (1906). The United States Attorney has sworn that this material will not be used in the future course of this case, and at this stage of the proceedings, that this oath is sufficient. The granting of defendants' motion to suppress at this time would necessitate an investigation of all of the Government's evidence. Such an investigation would entail a great deal of useless effort because much of this material, which has been collected since 1948, will not be used at the trial. Of course, if during the course of the trial defendants have reason to believe that illegally obtained material is being or may be used against them, they can object at that time and it will be incumbent upon the trial judge to rule on their objections.

Defendants also ask me to vacate a stay of an order which directed the return to the defendants of the illegally obtained material, and to direct the return of said material. The United States Attorney has already offered to return the papers in question, and this offer was rejected by defendants. Although I do not believe that it is necessary for me to vacate the stay and order the return of the partnership and personal records produced by defendants, I hereby do so. This may be considered an order to that effect.

Finally, defendants have moved for discovery and in- (3723)
spection under Rule 16 of the Federal Rules of Criminal Procedure, for production of evidence under Rule 17(c), and for a bill of particulars under Rule 7(f). The defendants have not submitted a memorandum of law on these motions. I am prepared, however, to decide these motions on the basis of my own research.

It is clear that the motion under Rule 16 must be denied. Defendants have not asked for designated books, papers or other tangible objects and they have not shown that the items sought may be material to the preparation of their defense. In the light of their failure to comply with the requirements of Rule 16, they are not entitled to the relief for which they ask.

Nor are the defendants entitled to production of evidence under Rule 17(c). Their motion is in dragnet form and they seek to bring into their net all the books, papers, documents and records that the Government has in its possession. Defendants are not entitled to this relief. *United States* v. *Iozia*, 13 F. R. D. 335, 338 (S. D. N. Y. 1952). Defendants cannot, within the spirit of Judge

Weinfeld's ruling in the Iozia case, sit back and ask the Government to produce all the relevant evidentiary documents so that they may avoid the trouble of searching for them in their own files or elsewhere. "If defendants insist upon proceeding with catch-all descriptions, they must at least list the evidentiary documents that are available to them elsewhere and exclude them from those demanded of the United States Attorney." *United States* v. *Cohen*, 15 F. R. D. 269, 273 (S. D. N. Y. 1953).

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Defendants' motion for a bill of particulars is very particularized and constitutes, in effect, an attempt to seek out the Government's evidence prior to the trial. Defendants are not entitled to this. See *United States* v. *Flynn*, 103 F. Supp. 925, 932 (S. D. N. Y. 1951). However, in order to obviate surprise at the trial and to the extent that information was not previously furnished to them, defendants should be informed of the source and amount of income on which it is alleged in the indictment that a tax was due to the United States, the amount of tax that it is alleged was due, and those portions of the income tax returns upon which the indictment is based that the Government claims are false.

This case will be placed on the Criminal Trial Calendar for October 28, 1954 so that a suitable trial date can be fixed.

October 21, 1954

EDMUND L. PALMIERI
U. S. D. J.

(3725)

Defendants' Motion to Renew or Reargue Motions For Bill of Particulars, Etc.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C 142-72

[SAME TITLE]

Sir:

PLEASE TAKE NOTICE that upon the affidavit of Lloyd Paul Stryker, sworn to the 28th day of October, 1954, the affidavit of Herman Holzer, sworn to the 27th day of October, 1954, the indictment and upon all of the proceedings, motions and papers heretofore had herein and heretofore had in connection with Indictments No. C 139-304, No. C 139-305, No. C 139-306, No. C 139-307 and No. C 139-308, the undersigned will move this court on the 8th day of November, 1954, at 10:30 o'clock in the forenoon, at Room 318 of the United States Courthouse at Foley Square, Borough of Manhattan, City of New York, to renew and/or to reargue defendants' motions

(a) pursuant to Rule 16 of the Federal Rules of Criminal Procedure, for an order directing the attorney for the Government to permit the defendants, at such time and place and in such manner as the court may prescribe, to inspect and copy or photograph all books, papers, documents or tangible objects obtained from or belonging to the defendants, or obtained from others by seizure or by process, and

Defendants' Motion to Renew or Reargue Motions For Bill of Particulars, Etc.

(b) pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure for an order directing the attorney

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for the Government to produce before the court, at a time and a place to be fixed by the order entered herein, the books, papers, documents or objects or portions thereof referred to in the subpoenas heretofore served by the defendants upon the attorneys for the Government in order that this court may pass upon and permit the inspection thereof, and

(c) pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure for an order directing the United States Attorney to serve upon the undersigned a bill of particulars more extensive than that heretofore ordered by this court.

Dated: New York, N. Y., October 28, 1954.

Yours, & c.,

LLOYD PAUL STRYKER,
Attorney for Defendants Giglio, Livorsi, Lawn and American Brands Corp.,
Office & P. O. Address:
40 Wall Street,
Borough of Manhattan,
City of New York.

To:

J. EDWARD LUMBARD, JR., ESQ.,
United States Attorney for the
Southern District of New York.

(3844)

Affidavit of Lloyd Paul Stryker, in Support of an Application to Renew and Reargue Certain Motions

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C 142-72

SAME TITLE

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

LLOYD PAUL STRYKER, being duly sworn, deposes and says:

1. I am the attorney for the defendants herein and make this affidavit in support of an application to renew and to reargue certain motions heretofore made herein.

2. A brief history of this litigation may be helpful to the court.

3. On September 14, 1950, three informations were filed in this court. One information (C 133-194) charged the defendant Giglio with a violation of § 145(a) of the United States Code, consisting of an alleged failure to pay any part of his income tax for the year 1946, except the sum of $4,000. The second information (C 133-195) charged the defendants Giglio, Lawn, Roth and Livorsi with violating the same section by unlawfully causing the corporate defendant to fail to pay any part of its income tax for the year 1946, except the sum of $100. The third

Affidavit of Lloyd Paul Stryker, in Support of an Application to Renew and Reargue Certain Motions

information (C 133-196) charged the defendant Livorsi with a violation of the same section, consisting of an alleged failure to pay any part of his income tax for the year 1946, except the sum of $4,000. All of the defendants appeared,

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pleaded not guilty and were released on bail. The Government's investigation into the dealings of the individual defendants and their business ventures continued over the course of the ensuing two years while the informations were marked off the calendar. Finally, that investigation arrived at the point where the defendants against whom the original charges were still pending were directed to appear in a "John Doe" proceeding before a grand jury sitting in the Southern District of New York by virtue of subpoenas duces tecum which directed that each of them give evidence in regard to the violation of the conspiracy statute (Title 18, § 371, United States Code). The subpoenas also directed the production before the grand jury of the books and records of twelve business organizations, eight of which were corporations and four of which were partnerships.

4. The grand jury subsequently found six indictments against these defendants on September 15, 1952. All of the defendants moved to dismiss these indictments as well as the informations filed in 1950, on the ground that rights guaranteed to a defendant in a criminal case by the Fifth Amendment to the Constitution of the United States had been violated in the grand jury proceedings which preceded the indictments. The defendants also moved, under Rule 16, for an order directing the Government to permit the defendants to inspect and copy all books and papers obtained

from or belonging to the defendants or obtained from others by seizure or by process; for an order, pursuant to Rule 17(c), directing the attorney for the Government to produce all books and papers in the possession of the Government in order that the defendants might be permitted to inspect the same; and for an order, pursuant to Rule 7(f)

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of the Federal Rules of Criminal Procedure, directing the United States Attorney to serve upon the defendants a bill of particulars of the indictments.

5. Judge Goddard disposed of only one motion, namely, the defendants' motion to dismiss the indictments because of the violation of the defendants' constitutional rights before the grand jury which found the same.

6. On March 27, 1953, Judge Goddard ruled as follows:

> "The motions to dismiss the indictments numbered 139-206, 139-304, 139-305, 139-306, 139-307, 139-308 filed against Giglio, Livorsi, Lawn, and Roth, are granted and the Government is directed to return, to the respective defendants, the partnership and personal records produced by them in response to the subpoenas."

7. Judge Goddard's opinion continued as follows:

> "As the indictments are dismissed, it is unnecessary to consider the other motions which are directed to the indictments."

Affidavit of Lloyd Paul Stryker, in Support of an Application to Renew and Reargue Certain Motions

The opinion is reported in full *sub nom United States* v. *Lawn*, 115 F. Supp. 674.

8. The Government appealed from Judge Goddard's order to the Court of Appeals for the Second Circuit. The appeal was subsequently dismissed by the Court of Appeals on October 19, 1953, on the ground that it was untimely (*United States* v. *Roth*, 208 F. 2d 467).

9. In the meanwhile, and on July 23, 1953, a grand jury in this district found a single indictment now pending in this court against these defendants. This indictment remained sealed until January 26, 1954, when it was opened in the presence of the defendants who appeared and pleaded not guilty.

(3847)

10. The present indictment contains ten counts. Except for relatively immaterial variations, the separate counts of the present indictment are identical, word for word, with the indictments dismissed by Judge Goddard on the ground that the defendants' constitutional rights had been violated before the grand jury.

11. The defendants, then moved to dismiss the present indictment, and for other relief, on the ground that tainted evidence had been used before the grand jury in order to procure it. The defendants likewise moved with respect to the present indictment under Rule 16, under Rule 17(c) and for a bill of particulars pursuant to Rule 7(f). These motions came on to be heard before Honorable Edmund L. Palmieri on September 7, 1954. The entire oral argument

of counsel, which began at 3:00 P. M. and ended at around 5:00 P. M., was devoted to the question of whether or not the present indictment should be dismissed because of the violation of the defendants' constitutional rights before the grand jury which found the original indictments. Judge Palmieri reserved decision pending the receipt of the defendants' reply brief which was submitted to him on September 24th, along with a letter from my office in which he was requested to defer his decision on all of the other motions, namely, the motions under Rules 16, 17(c) and 7(f), until he had rendered a decision on defendants' motion to dismiss the indictment. In this letter we stated:

> "We wish to call Your Honor's attention to the fact that if the indictment is dismissed, the other motions become moot. If the indictment is not dismissed, then we respectfully request an opportunity to be heard on the other motions."

(3848)

12. On October 21, 1954, Judge Palmieri denied the defendants' motion to dismiss the indictment. In addition, and without hearing further argument, Judge Palmieri disposed of the other motions. The defendants now move to renew and/or for reargument of their motions under Rule 16, Rule 17(c) and Rule 7(f) of the Federal Rules of Criminal Procedure.

(3849)

* * * *

The Motion Under Rule 7(f)

31. When the defendants moved for a bill of particulars with respect to the indictments which Judge Goddard

Affidavit of Lloyd Paul Stryker, in Support of an Application to Renew and Reargue Certain Motions

subsequently dismissed. Mr. Leone interposed an affidavit in opposition, in which he stated (at p. 8):

> "The defendants, William Giglio, Livorsi, Lawn and American Brands Corporation move for a bill of particulars addressed to indictment C 139-307. The Government will consent to giving the defendants the particulars generally demanded in demands nos. 1, 2 and 3; thus it will inform the defendants of the description of the asset or assets that were hidden and the value of the total assets that were hidden."

32. The items of the bill of particulars demanded by the defendants with respect to indictment No. C 139-307, to which Mr. Leone thus consented, were as follows:

(3857)

> "1. A description of the assets of the defendant William Giglio, claimed to have been concealed by
>
> (a) William Giglio
>
> (b) Howard Lawn
>
> (c) Louis J. Roth
>
> 2. The nature of each such claimed concealment.
>
> 3. The value of each such asset claimed to have been concealed."

33. In his affidavit, Mr. Leone further stated (at p. 8):

> "Under count 2, the Government will consent to give the defendant, Livorsi, the particulars demanded in counts 1, 2 and 3."

Affidavit of Lloyd Paul Stryker, in Support of an Application to Renew and Reargue Certain Motions

34. The particulars demanded, to which Mr. Leone thus consented, were as follows:

> "1. The description and nature of the assets of Frank Livorsi, the defendant, claimed to have been concealed.
>
> 2. The nature of each such concealment.
>
> 3. The value of each such claimed concealment."

35. Mr. Leone further stated (at p. 8):

> "As to demands under count 3, the Government will consent to giving American Brands Corporation the information requested under items 1 and 2."

36. Items 1 and 2 of the particulars demanded, to which Mr. Leone thus consented, were as follows:

> "1. A description of the assets of American Brands Corporation claimed to have been misappropriated, diverted and converted by the defendants
>
> (a) William Giglio
>
> (b) Frank Livorsi
>
> (c) Howard Lawn
>
> (d) Louis J. Roth
>
> 2. The nature of each such claimed misappropriation, diversion and conversion."

37. All of the items, which the Government thus consented to furnish the defendants, are included, in substance,

in the defendants' present demand for a bill of particulars. Thus, our notice of motion (p. 4) which relates to counts Seven, Eight and Nine of the present indictment, reads as follows:

> "with respect to *Count Seven* relating to the alleged concealment of assets of William Giglio, *Count Eight* relating to the alleged concealment of assets of the defendants Frank Livorsi and *Count Nine* relating to the alleged concealment of assets of American Brands Corporation, state in connection with each of said counts:
>
> 1. Itemize the assets of each defendant claimed to have been concealed and state which of the defendants is alleged to have concealed such asset or assets and when.
>
> 2. The nature of each such claimed concealment.
>
> 3. The value of each such asset claimed to have been concealed."

38. I respectfully submit that these items of particulars are no less necessary to the defendants now, under the present indictment, than they were to the defendants under the previous dismissed indictments. I respectfully submit that the defendants are in no better position adequately to prepare for trial and to avoid surprise, if they are denied these items now, than they were under the dismissed indictments.

39. In the bill of particulars served upon us by the Government on October 25, 1954, a copy of which is an-

nexed hereto and made a part hereof, the Government states, in Paragraph 1, that the amount of income of Eatsum Food Products Company, Limited, on which it is alleged in the indictment that a tax was due to the United States, amounts to $91,600.00. It then attributes, in Paragraphs 4 and 5, the sum of $127,164.70 as additional income to each of the defendants William Giglio and Frank Livorsi

(3859)

from the said Eatsum Food Products Company, Limited.

40. There is no further explanation of the discrepancy between the $91,600.00 claimed to be additional income to Eatsum Food Products Company, Limited and the $127,164.70 charged to Giglio and the $127,164.70 charged to Livorsi as additional income from that source.

41. I respectfully request that the Government be directed to particularize and describe the nature and source of the income attributed to the defendant Giglio and to the defendant Livorsi from Eatsum in order that these defendants may properly prepare for trial.

WHEREFORE, your deponent respectfully prays that the motion to renew and/or reargue the defendants' motions under Rules 16, 17(c) and 7(f) of the Rules of Criminal Procedure be granted and that the relief requested herein be granted.

(Sworn to by Lloyd Paul Stryker, on October 28, 1954.)

(Copy to Bill of Particulars attached.)

(3860)

Affidavits in Opposition to Defendants' Motion to Renew or Reargue Motions For Bill of Particulars, Etc.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C 142-72

[SAME TITLE]

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:
SOUTHERN DISTRICT OF NEW YORK)

MILTON R. WESSEL, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney and am in charge of the prosecution of the above-entitled matter. I am fully familiar with all the facts and prior proceedings herein.

2. This affidavit is submitted in opposition to defendants' motion to reargue their motions made pursuant to Rules 7(f), 16 and 17(c) of the Federal Rules of Criminal Procedure. Defendants' motion to reargue is made pursuant to Southern District local rule 9(h) which provides in part:

> "There shall be served with the notice a memorandum, setting forth concisely the matters or controlling decisions which counsel believes the court has overlooked. No oral argument shall be heard unless the court grants the motion and specifically directs that the matter shall be reargued orally."

Affidavits in Opposition to Defendants' Motion to Renew or Reargue Motions For Bill of Particulars, Etc.

3. Defendants' main motions were disposed of by opinion of Honorable Edmund L. Palmieri, filed October 20, 1954. Rather than restate the grounds, both factual and legal, of the Government's opposition to those motions, the Court is respectfully requested to refer to the affidavits and memorandum submitted by the Government in opposition to those motions. The motion for reargument does, however,

(3888)

call for consideration of certain additional facts by the Court.

MOTION FOR REARGUMENT

4. Defendants' motion for reargument, like the main motions, is based only upon an affidavit of counsel and not upon the sworn statements of defendants. No memorandum of law was served with the notice of motion, as required by the rules. The grounds of the motion are as follows: (References are to defendants' affidavits).

(a) Judge Palmieri improperly decided the main motions without affording defendants an opportunity to be heard and submit legal memoranda (Pars. 11-12).

(b) As to the Rule 16 motion (Pars. 13-26),

(1) the Government is bound by consent which it previously gave in connection with the dismissed indictment (Pars. 15-18); and

(2) the Government's previous consent and affidavits in opposition to the main motions

adequately identify the desired documents and establish their materiality (Pars. 17, 19-26).

(c) As to the Rule 17(c) motion (Pars. 27-30),

(1) for the first time the Government's affidavits in opposition to the main motions identify the documents involved (Par. 28);

(2) defendants cannot obtain some of these documents elsewhere (Par. 30).

(d) As to the Rule 7(f) motion (Pars. 31-41),

(1) the Government previously consented to part of defendants' requests in connection with the dismissed indictments (Pars. 31-8); and

(2) defendants need an explanation of Eatsum partnership income attributed to defendants Giglio and Livorsi (Pars. 39-41).

5. This affidavit will deal with these subjects in the order set forth above.

(a) *Consideration of Main Motions*

6. Defendants' principal objection to the Court's ruling on the main motions is that Judge Palmieri refused to

grant their request for additional delay in order that they might be heard orally and submit a memorandum of law on those motions. (Paragraph 11). They are correct that Judge Palmieri refused to delay his disposition of the main mo-

tions, after giving defendants from September 7 to September 24 to submit a memorandum; but defendants' failure to be heard and to submit a memorandum is entirely of their own doing.

7. As defendants themselves point out (Paragraph 4), the main motions were similar to ones made by them in connection with the earlier dismissed indictments. When the main motions were made in early April, 1954, counsel stated in an affidavit:

> "A memorandum of the pertinent authorities will be submitted to the Court."

But when the motions were heard *six months later,* defendants did not submit a single memorandum of law, even though two moving and one reply memoranda of law (totalling 30 pages) submitted by them to Judge Goddard on the earlier motions were very much in point and could easily have been adopted.

8. During oral argument before Judge Palmieri, defense counsel made several references to the Government's memorandum of law, and requested an extended period to answer it. After considerable discussion with the Court, defense counsel agreed to submit a memorandum on September 24, two weeks later.

9. On September 24, defendants indeed submitted a memorandum, but it dealt with none of these motions. In an accompanying letter, defendants requested opportunity to be heard on these motions at a later time. The following Monday, September 27, the Government addressed a

letter to Judge Palmieri (copy of course being submitted to defendants) pointing out that defendants' request for more time on these motions would inevitably delay the trial, and unqualifiedly opposing such a delay. A copy of (3890)
the Government's September 27, 1954 letter is attached hereto.

10. In spite of this notice that the Government would oppose further delay, defendants did not submit any memorandum to the Court between September 27 and the filing of Judge Palmieri's opinion on October 20. *They have not done so yet,** in spite of the requirement of local Rule 9(h) (dealing with motions for reargument) which provides:

> "There shall be served with the notice a memorandum, setting forth concisely the matters or controlling decisions which counsel believes the court has overlooked."

In his opinion Judge Palmieri made reference to this when he said:

> "The defendants have not submitted a memorandum of law on these motions. I am prepared, however, to decide these motions on the basis of my own research." (p. 7)

11. On several other occasions defendants have similarly requested delay, or have acted in such a manner as to cause delay of trial. Some examples are as follows:

*A short memorandum was served November 1, 1954.

Affidavits in Opposition to Defendants' Motion to Renew or Reargue Motions For Bill of Particulars, Etc.

(a) Judge Palmieri directed that this case be placed on the Criminal Trial Calendar on October 28 in order that a trial date might be fixed. On that day the parties appeared before Honorable Sylvester J. Ryan and were heard. Defense counsel requested a trial date no earlier than May 1, 1955, *over six months distant*. He based this request on the grounds that this motion to reargue had just been filed, that voluminous documents would be made available to defendants as a result of this motion, and that all that time would be needed to analyze those and the partnership papers to be returned.

After hearing the parties fully, Judge Ryan fixed December 6 as the trial date. Defense counsel then made reference to a pending murder trial which would be tried in November and to the fact that the case might last over part of the Christmas season.

Judge Ryan offered to set the case down for trial January 3rd provided counsel would promise not to request further delay. Counsel refused to provide such assurance and Judge Ryan then set the

case for trial on December 13, stating that this would provide counsel a suitable vacation after the murder trial and ample opportunity to prepare this case. Judge Ryan directed defendants to be ready for trial on the adjourned date.

(b) One of defendants' principle contentions in seeking delay before Judge Ryan was that they had not had

sufficiently opportunity to examine documents in the possession of the Government. (Reference is made to this need for time in the affidavits in support of the present motion. [Stryker affidavit Par. 24; Holzer affidavit Par. 10]). In fact, defendants' accountant, Mr. Holzer, states that when the partnership documents directed to be returned by Judge Goddard are received, he and his associates will "have many months of work on these papers" (paragraph 10).

Actually, however, defendants could have had these documents at any time after Judge Goddard's opinion was filed in March, 1953, over a year and a half ago. Not only have they voluntarily allowed the documents to remain out of their possession, but they have on occasion even refused to take them back.

Thus, after Judge Goddard's decision, defendants voluntarily stipulated to a stay of that portion of Judge Goddard's order directing return of the documents, pending determination of the appeal. A copy of this stipulation is attached. After the appeal was dismissed they still made no move to obtain the documents, although the present indictment was unsealed in January 1954. Finally, on March 9th, 1954, the Government offered to return the documents, but on March 10 defendants refused to accept them. Copies of the Government's March 9 letter and defendants' March 10 reply are attached. In its September 7 memorandum of law (page 56),

the Government again stated it had no objection to returning the documents. Again defendants made no move to get the papers.

Finally, after Judge Palmieri's opinion was filed on October 20, the Government again offered on October 22 to return the documents whenever defendants wanted them. A copy of this October 22 letter is also attached. Again no reply was received until *after* the hearing before Judge Ryan, when defendants finally agreed to take back the documents.

(3892)

(c) Another example of delay is defendants' timing of the present motion for reargument. Although Judge Palmieri's opinion was filed on October 20, 1954, the present motion was not made until *eight days later*, on the morning of October 28 just before the hearing before Judge Ryan when reference was made to this motion as one basis for delay of the trial. And, although the rules require only five days notice of motion, defendants gave the Government *twelve days notice*.

In order to avoid any such delay, the Government has offered to advance the return date of this motion to a date earlier than November 8; a copy of this offer of October 29 is also attached.

(d) Still another example of delay was defendants' failure to move to dismiss the Government's appeal from Judge Goddard's order, from the time of filing the appeal on April 29, 1953 until late Septem-

ber, five months later, in spite of the fact that all during that time they knew the appeal was defective in being untimely filed, and in spite of the fact that the delay resulted in the expense and burden to them of printing briefs, perfecting the record on appeal, etc.

12. The Government respectfully requests the Court to consider defendants' objection that they were not heard orally on the main motions and that they did not submit a memorandum of law, in the light of the December 13, 1954 trial date, and in the light of the history of these motions.

(b) RULE 16 MOTION

* * * *

(3893)

(c) RULE 17(c) MOTION

* * * *

(3895)

(d) RULE 7(f) MOTION.

23. Finally defendants seek to reargue their Rule 7(f) motion. The principal ground (Pars. 31-8) is that the Government previously consented to give much of this information to them. As stated above in paragraphs 14-15 of this affidavit, that concession should not now bind the Government and the fact that defendants now refer to it for the first time is ample evidence that they do not seriously believe it is binding.

Affidavits in Opposition to Defendants' Motion to Renew or Reargue Motions For Bill of Particulars, Etc.

24. Finally, defendants say they need an explanation of the Eatsum partnership income attributed to the defendants Giglio and Livorsi (Pars. 39-41). This is information

(3896)

which defendants can readily ascertain by examining the tax returns and bill of particulars furnished them immediately after the filing of Judge Palmieri's opinion. The Government should not be required to explain details which defendants can easily ascertain for themselves. It opposes this motion for the reasons set forth at pages 86-92 of its memorandum. The motion should be denied on the grounds set forth in Judge Palmieri's opinion at page 8.

HOLZER AFFIDAVIT

* * * *

(3897)

CONCLUSION

28. Defendants' motion for reargument is based upon no new facts sufficient to change the order already entered. The motion should accordingly be denied in all respects.

(Sworn to by Milton R. Wessel on November 1, 1954.)

(3898)

EXHIBIT, ANNEXED TO AFFIDAVIT OF MILTON R. WESSEL IN OPPOSITION

MRW ewc

September 27, 1954

Honorable Edmund L. Palmieri
United States Court House
Foley Square
New York 7, N. Y.

Re: United States v. Giglio, et al.

Dear Judge Palmieri:

This is with reference to defendants' letter of September 24, 1954, with which was enclosed their Memorandum in support of the motions now pending before you.

Trial Date

Together with the several other motions now pending is the Government's request that the Court fix a date for the trial of this cause at the earliest practicable time. Decision in that connection, together with decisions on the other motions, was reserved by Your Honor pending the submission of defendants' Memorandum on September 24, 1954.

Defendants' September 24th letter requests that Your Honor reserve decision on all of these matters until decision has been made with regard to the motion for a hearing. This further delay the Government most unqualifiedly opposes.

Because of the importance of these motions, the Government did not protest the three-week adjournment given to

defendants to submit their Memorandum on the present motions. However, it should be pointed out that the Mem-
(3899)
orandum in support of the motions should have been submitted on September 7, the adjourned return date. Indeed, in Mr. Stryker's affidavit in support of his motion for a bill of particulars, he concluded:

> "A memorandum of the pertinent authorities will be submitted to the Court."

In order to avoid the anticipated delay in answering defendants' moving Memorandum, the Government had prepared, and submitted its Memorandum of Law on the return date, in sufficient time before argument to permit oral response by counsel for defendants. The Government should not now be penalized by according defendants additional delay.

In spite of counsel for defendants assertions that three weeks was needed to answer the Government's 92 page Memorandum, defendants have answered only a small part of that Memorandum dealing with the question of their right to a hearing.

Of course the Government has no desire to preclude defendants from answering whatever arguments they can, nor does it wish to deny the Court the assistance of whatever authorities defendants may cite. Accordingly, in the event the Court chooses to allow defendants further time to submit Memoranda in connection with the other pending motions, it is respectfully requested that the Court fix a trial date as soon as it has decided whether or not to grant a

hearing to defendants. Simultaneously, defendants can be given a period of time before trial to submit any additional Memoranda desired.

(3900)

As was stated at the argument, the Government's efforts to bring these defendants to trial have been thwarted for several years. With increased delay comes increased difficulty in proof. To assure a fair and just trial to defendants as well as to the Government, it is essential that the Court fix an early trial date.

Defendants' Memorandum

Defendants have submitted a 16 page Memorandum in which they cite but four cases. As on oral argument their demands for a hearing are founded not upon authority but upon their claim that the rights and privileges infringed herein automatically require a hearing.

Defendants' Point I

Defendants' Point I apparently is designed to counteract the authorities cited by the Government at pages 41-3 in support of the proposition that the Court should accept the prosecutor's word as to the sources of the evidence submitted to the indicting grand jury.

In reply defendants cite not one case. (pp. 3-7). They state only that because Judge Goddard refused to accept Mr. Leone's word that there had been no *legal* violation with regard to the first indictment, this Court should not believe the Government now as to the *factual* basis for the present indictment.

Exhibit Annexed to Affidavit of Milton R. Wessel in Opposition

It is at once clear that Mr. Leone's assertions of fact to Judge Goddard were not disputed. It was only his conclusion of law which Judge Goddard found erroneous. Judge Goddard made no suggestion that he had found the prosecu-

(390)

tor to have misstated any facts in connection with defendants' first motions to dismiss. In any event, whatever happened before should not provide the basis for disbelief of the present affidavits.

Defendants' Point II

The second point in defendants' Memorandum states that the Court has *power* to order a hearing herein. This apparently is in reply to pages 47-52 of the Government's Memorandum stating that the hearing requested herein is premature, and that the Courts have authorized such pretrial hearings only where unlawful wiretaps or unlawful searches and seizures have been involved.

The question is not whether there is *power* in the judiciary to order a hearing under the present circumstances. Rather the question is whether this Court is bound by the already denied principals of law denying hearings to defendants except where unlawful wiretaps and unlawful searches and seizures are involved.

In support, defendants cite but one case, *United States v. Price*, decided in this District in 1908. That decision was of course written long before the Nardone case and Federal Criminal Rule 41(e). Furthermore it is not in conflict in any way with the authorities set forth in the Government's Memorandum at pages 57-52 which held that pretrial hear-

ings should be granted only where unlawful wiretaps and and unlawful searches and seizures have taken place.

(3902)

Defendants' Point III

The last of defendants' points argues that the burden of proof is upon the Government to show that unlawful evidence was not used. Defendants, by citing three cases, argue that once a Constitutional violation is shown, the burden automatically shifts.

This argument is apparently in opposition to the authorities set forth at pages 31-41 of the Government's Memorandum which show that the defendants' burden is to show both a Constitutional violation and *use* of the evidence thereby unlawfully obtained.

Not only have defendants not answered the authorities cited by the Government, but the very authorities cited by them establish that defendants have the burden of proof such *use*. For example, in the Goldstein case cited by defendants, the Court stated that defendants have the burden of showing not only Constitutional violation with regard to wiretaps but also

"some use of them".

(Defendants' Memorandum—Page 13)

Indeed the Goldstein and Koplin cases cited by defendants were relied on also by the Government. (Government's Memorandum, Page 39).

Finally, even were the burden upon the Government that burden has been satisfied by the showing set forth in the Government's affidavits. This the defendants must initially

have recognized for they sought to make such a showing in their moving affidavits. However, no mention of that showing was made on the argument or in their Memorandum.

(3903)

The hearing sought ~~for~~ herein is not a trial; the right to examination should be accorded defendants only where there is some question to be resolved. No such question is indicated.

Defendant Roth

For whatever value the opinion of eminent defense counsel is worth, it is interesting to note that defendant, Louis Roth, represented by Mr. Jack Rosenbloom of Garey & Garey, Esqs., pleaded guilty in this case several months after these motions were made.

It is accordingly respectfully requested that the Court deny defendants' request for a hearing and fix a trial date at the earliest possible time.

Very truly yours,

J. EDWARD LUMBARD
United States Attorney

By .....
Milton R. Wessel
Assistant U. S. Attorney

cc: Lloyd Paul Stryker, Esq.
40 Wall Street
New York 5, N. Y.

EXHIBIT, ANNEXED TO AFFIDAVIT OF MILTON R. WESSEL IN OPPOSITION

STIPULATION AND ORDER

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

C 139-206

UNITED STATES OF AMERICA

—v—

LOUIS J. ROTH,

Defendant.

C 139-304

UNITED STATES OF AMERICA

—v—

WILLIAM GIGLIO and LOUIS J. ROTH,

Defendants.

C 139-305

UNITED STATES OF AMERICA

—v—

FRANK LIVORSI and LOUIS J. ROTH,

Defendants.

C 139-306

UNITED STATES OF AMERICA

—v—

WILLIAM GIGLIO and LOUIS J. ROTH,

Defendants.

C 139-307

UNITED STATES OF AMERICA

—v—

WILLIAM GIGLIO, FRANK LIVORSI, HOWARD LAWN, LOUIS J. ROTH and AMERICAN BRANDS CORP.,

Defendants.

Exhibit, Annexed to Affidavit of Milton R. Wessel, in Opposition

The defendants Howard Lawn and William J. Giglio, having produced certain books, records and documents before a Grand Jury for the Southern District of New York, and this Court having dismissed the indictments (3905) herein and having further ordered that the United States of America return to the respective defendants any and all partnership and personal records produced by them in response to subpoena duces tecum served upon them in July, 1952, and the United States of America having by notice of appeal dated May 5, 1953 appealed to the United States Court of Appeals for the Second Circuit, and said appeal now being on the General Calendar of said Court of Appeals and being as yet undecided;

IT IS HEREBY STIPULATED AND AGREED between the undersigned that such portion of the order of the Honorable Henry W. Goddard as directed the return of documents and papers produced by defendants Howard Lawn and William J. Giglio be stayed pending the hearing and determination of the appeal from the aforesaid order provided that the books, records and documents involved be impounded by this Court and subject to its further orders;

Exhibit, Annexed to Affidavit of Milton R. Wessel, in Opposition

IT IS FURTHER STIPULATED AND AGREED that an order to the foregoing effect may be entered by this Court without further notice to either side.

Dated: New York, N. Y., September 4, 1953.

J. EDWARD LUMBARD
J. Edward Lumbard,
United States Attorney for the
Southern District of New York.
Attorney for U. S. A.

LLOYD PAUL STRYKER
Lloyd Paul Stryker
Attorney for Defendants Giglio,
Livorsi and Lawn.
40 Wall Street,
New York, N. Y.

So ordered:
September 9th, 1953.

EDWARD A. CONGER
U. S. D. J.

(3900)

EXHIBIT ANNEXED TO AFFIDAVIT OF MILTON R. WESSEL IN OPPOSITION

JBK
115164
C 139-307 · elf

March 9, 1954

Lloyd Paul Stryker, Esq.
40 Wall Street
New York 5, N. Y.

Re: *United States* v. *Giglio, et al.*

Dear Sir:

As you know, during the appellate proceedings concerning Judge Goddard's decision in the above-entitled case, the personal and partnership books and records covered by Judge Goddard's decision were ordered impounded by the District Court.

The appellate proceedings now being concluded in this case, it may be that your clients will desire to obtain possession of these personal and partnership books and records. If so, I suggest that a simple stipulation be prepared which provides for the release of the documents from the prior impounding order. The stipulation can then be so ordered by a District Judge and the records may then be returned to your clients.

Very truly yours,

J. EDWARD LUMBARD
United States Attorney

EXHIBIT, ANNEXED TO AFFIDAVIT OF MILTON R. WESSEL IN OPPOSITION

LLOYD PAUL STRYKER
Counsellor at Law
40 Wall Street
New York 5, N. Y.

HAROLD SHAPERO
HAROLD W. WOLFRAM

March 10, 1954.

J. Edward Lumbard, Esq.,
United States Attorney,
Southern District of New York,
United States Court House,
Foley Square,
New York 7, N. Y.

My dear Judge Lumbard:

Re: JBK — 115164 — C 139-307

We have your letter of March 9th, referring to the personal and partnership books and records covered by Judge Goddard's decision.

At present, our intention is to request that these papers be returned to us under the supervision of the court in connection with a motion which we intend to make to suppress copies, leads and clues which may have been obtained therefrom. It is our belief that the books and records to be returned to the defendants should be available in court so that the judge may pass upon the motion to suppress and several related motions which we intend to bring.

Very truly yours,

LLOYD PAUL STRYKER.

EXHIBIT ANNEXED TO AFFIDAVIT OF MILTON R. WESSEL IN OPPOSITION

MRW
115164
C 142-72 mR

October 22, 1954

Lloyd Paul Stryker, Esq.
40 Wall Street
New York 5, N. Y.

Re: United States v. *Giglio, et al.*

Dear Sir:

By opinion filed October 20, 1954, Judge Palmieri has ordered that the partnership and the personal records produced by defendants in accordance with grand jury subpoenas served upon them in 1952 be returned to defendants.

By stipulation these records are still physically located in the United States Court House, Room 501.

This is to advise you that these records will be returned to you at any time you wish to have them picked up.

Very truly yours,

J. EDWARD LUMBARD
United States Attorney

By: .....
MILTON R. WESSEL
Assistant U. S. Attorney

(3909)

EXHIBIT, ANNEXED TO AFFIDAVIT OF MILTON R. WESSEL IN OPPOSITION

MRW
115164
C142-672 mbb

October 29, 1954

Lloyd Paul Stryker, Esq.
40 Wall Street
New York 5, N. Y.

Re: *United States* v. *Giglio, et al.*

Dear Sir:

As you know, on October 28, 1954 Honorable Sylvester J. Ryan set the above-entitled matter down for trial on December 13, 1954 and directed that you be ready on that date. Judge Ryan's order granting you an adjournment in excess of six weeks was made in the light of your representation that defendants required a greater amount of time to analyze the documents in the possession of the Government, some of which might be made available to you as the result of a motion for reargument just filed by you.

Your motion for reargument is made on 12-day notice and is returnable November 8, 1954. I am perfectly agreeable to your making the motion returnable at a time earlier than November 8, 1954.

Very truly yours,

J. EDWARD LUMBARD
United States Attorney

By: .....
MILTON R. WESSEL
Assistant U. S. Attorney

(3910)

Defendants' Reply Affidavit in Support of Motion to Reargue Motion for Bill of Particulars, etc.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

LLOYD PAUL STRYKER, being duly sworn, deposes and says:

1. I submit this affidavit in reply and in support of defendants' motion to reargue motions under Rules 16, 17(c) and 7(f) of the Federal Rules of Criminal Procedure.

2. In his affidavit, sworn to November 1, 1954, Mr. Wessel seems to be preoccupied with the question of delay, which he attributes to the defendants and, therefore, to counsel for the defendants. Mr. Wessel, according to a previous affidavit filed in this case, has been in charge of this prosecution only since August 2, 1954. He, therefore, cannot be expected to have any direct knowledge of the real cause for the delay in this prosecution. I will present the facts to keep the record clear.

3. This case was begun on September 14, 1950, by the filing of informations against the defendants. I will itemize the subsequent proceedings and the delay involved in connection therewith:

Government's Delay: 2 yrs., 1 mo.	Sept. 14, 1950	—Informations found and ordered sealed.
	Sept. 25, 1950	—Defendants appear and are released on bail.
	Oct. 2, 1950	—Defendants plead not guilty. Informations marked off the calendar.
	Oct. 20, 1952	—Indictments filed. Defendants plead not guilty.
Defendants' Delay: 2 mos.	Dec. 17, 1952	—Lloyd Paul Stryker substituted as attorney of record.
	Dec. 31, 1952*	—Defendants move for various relief, including motion to dismiss indictment because of violation of defendants' rights before grand jury.
Government's Delay: 3 mos.	Jan. 21, 1953	—Motions argued before Judge Goddard.
	Feb. 20, 1953	—Judge Goddard permits defendants to inspect grand jury minutes pertaining to their interrogation before the grand jury.
Government's Delay: 1½ mos.	Mar. 27, 1953	—Motion to dismiss indictments granted by Judge Goddard.
	May 5, 1953	—United States Attorney files notice of appeal to Court of Appeals.

*All of the delay, in connection with the defendants' motion before Judge Goddard to dismiss the original indictment, is attributed to the Government on the obvious ground that such delay was caused by the illegal acts of the Government.

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Government's Delay: 4½ mos.	Oct. 19, 1953	—Motion to dismiss appeal granted by the Court of Appeals.
Government's Delay: 2 mos.	Dec. 11, 1953	—Government's motion for rehearing denied by Court of Appeals.
Government's Delay: 1½ mos.	Jan. 26, 1954	—Present indictment opened. (It had been found on July 23, 1953, and ordered sealed.) Defendants requested until April 12th for motions.
Defendants' Delay: 2½ mos.	Apr. 12, 1954	—Government asks for adjournment of defendants' motions. *Defendants ready.*
Government's Delay: 5 mos.	May 5, 1954	—Government asks for further adjournment of motions. *Defendants ready.*
		(3881)
	May 19, 1954	—Government asks for further adjournment of motions to July. Defendants insist that if motions are to be adjourned they be adjourned to September 7, 1954.
	Sept. 7, 1954	—Defendants' motions argued and submitted.
	TOTAL:	Government's—3 yrs., 6½ mos. Defendants'—4½ mos.

4. Thus, the total delay in this case attributable to the Government has been approximately three years and six and one-half months, while that attributable to the defendants has been approximately four and one-half months.

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5. Mr. Wessel refers to the fact that a memorandum of law was not served, as required by the Rules, five days before the return date of this motion. On November 1, 1954, such a memorandum of law was served which is timely for a motion returnable seven days later on November 8th. Furthermore, the affidavits served twelve days before the return date of the motion set forth in full the matter which the defendants are relying upon, so much so, that Mr. Wessel was in a position to answer as fully as he desired in his affidavit of November 1, 1954.

6. When Mr. Wessel requested that we accelerate the return date of this motion, we acceded without hesitation and consented that it be placed on the calendar for November 4th. Mr. Wessel states that although five days notice of motion was necessary, the defendants gave the Government twelve days notice. The fact is that motions in the Criminal Part are returnable only on Mondays and our motion was brought on for the first Monday for which five

(3882)

days notice could be given.

7. Mr. Wessel fails to state in his affidavit that when counsel for the defendants appeared before Judge Ryan, for the purpose of fixing a trial date, and called the attention of the court to the fact that the defendants were being deprived of an opportunity to examine *their own books and papers,* Judge Ryan suggested to Government counsel that they permit such an examination, pointing out that their refusal to permit such an examination might result either in a delay or a disruption of the trial. Government counsel nevertheless persisted in refusing such examination and

refused my offer to proceed at once with the motion for reargument.

* * * *

(3883)

11. Our motion under Rule 7(f), predicated for the most part on items which the Government previously offered to reveal to the defendants, and based on the plain justice and fairness of the situation, cannot be defeated either on the grounds of alleged delay or for any other reason.

* * * *

(3884)

13. I call the court's attention to the fact that on October 25, 1954, we were served with a bill of particulars of part of the Government's claim, which gives our accountant, for the first time, something specific and definite to work on in connection with an examination of the books and records.

14. It is a little difficult to understand what Mr. Wessel is driving at when he refers to the fact that the partnership papers were available to the defendants since March 9, 1954, and that the defendants did not avail themselves of the opportunity to take those papers back. The reason we refused to take these papers back in March is made perfectly clear by my letter of March 10, 1954, a copy of which is attached to Mr. Wessel's affidavit, in which I informed the Government as follows:

> "At present, our intention is to request that these papers be returned to us under the supervision of

the court in connection with a motion which we intend to make to suppress copies, leads and clues which may have been obtained therefrom. It is our belief that the books and records to be returned to the defendants should be available in court so that the judge may pass upon the motion to suppress and several related motions which we intend to bring."

We thought then, and still believe, that those papers should be before the court if it is to determine whether leads and clues were obtained therefrom by the Government.

15. Mr. Wessel states (Par. 27, pp. 10-11): "* * * defendants' failure to obtain the return of the partnership records was the result of their own choosing. Undoubtedly they would not have taken the risk of leaving the papers in the custody of the Government or that of the court for such an extended period, had they not copies of the material documents in their possession, or completed their analysis

(3885)

of the records. It must be concluded, therefore, that they finished their study of the demanded records long ago." In the first place Mr. Wessel here obscures the fact that these are *not* the records which we are seeking to examine now. Therefore, whether the defendants do or do not have copies of *these* papers and whether they did or did not complete an analysis of *these* records, is utterly irrelevant to our present motion under Rules 16 and 17(c) which relate to entirely different documents, i. e., documents which the Government still has in its possession and which it is not required to return to the defendants.

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16. No "direction" by a judge of this court that this case be tried on December 13, 1954 (assuming *arguendo* that there has been such a "direction," which I cannot concede) could stand in the way of the defendants' plain right to inspect documents in the Government's possession and to be informed, by a bill of particulars, of certain aspects of the Government's vague and general claim of concealment of assets. The issue of delay, which seems to have bemused Mr. Wessel, is entirely irrelevant to the issue presented here, which is simply whether or not the defendants are entitled to inspect books and records under Rules 16 and 17(c) and to have a further bill of particulars under Rule 7(f). It is no answer to defendants' motions to say that the defendants are required to go to trial on a specified date in the future, even if we assume that such a date has been fixed.

(Sworn to by Lloyd Paul Stryker on November 3, 1954.)

(3886)

Defendants' Motion to Reargue Motion to Dismiss Indictment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C 147-72

[SAME TITLE]

SIR:

PLEASE TAKE NOTICE that upon the original notice of motion, dated April 6, 1954, and upon all of the affidavits and exhibits annexed thereto, and upon the indictment herein and all of the proceedings heretofore had herein, and heretofore had in connection with Indictments Numbered C 139-304, C 139-305, C 139-306, C 139-307 and C 139-308, the undersigned will move this court on the 8th day of November, 1954, at 10:30 o'clock in the forenoon at Room 318 of the United States Courthouse, at Foley Square, Borough of Manhattan, City of New York, to reargue defendants' motion for an order

(a) dismissing the indictment;

(b) suppressing the use of all memoranda, work sheets, photostats, copies, notes and all leads and clues obtained by the Government from the defendants' books and records produced before the grand jury in violation of their constitutional rights under the Fifth Amendment, and from the defendants' oral testimony before the grand jury;

(c) directing a hearing to ascertain the scope and extent of the suppression order and to ascertain the extent of the

use of the said books, records and oral testimony and leads and clues obtained therefrom in connection with the present indictment;

(3869)

(d) directing that the minutes of the proceedings before the grand jury which found the present indictment be made available to the defendants;

(a) vacating the stay of Judge Goddard's order which directed the return to the defendants of their books and papers produced in violation of their constitutional rights under the Fifth Amendment; and

(f) directing the return of such books and papers to the defendants under the supervision of the court.

Dated: New York, N. Y., November 1, 1954.

Yours, &c.,

LLOYD PAUL STRYKER,
Attorney for Defendants,
Office & P. O. Address:
40 Wall Street,
Borough of Manhattan
City of New York.

To:

J. EDWARD LUMBARD, JR., Esq.,
United States Attorney,
Southern District of New York.

(3870)

Supplementary Memorandum

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C 142-72

[SAME TITLE]

PALMIERI, D. J.

Defendants' motions are denied in all respects except as hereinafter indicated.

Defendants have asked me to reconsider my denial of their motion for discovery and inspection under Rule 16 of the Rules of Criminal Procedure. They explain their failure to comply with the requirements of Rule 16 by stating that they believed that the Government would consent to this motion because it had consented to allow defendants to inspect and copy books and records belonging to or abandoned by them when a motion under Rule 16 was made in connection with the previous indictments against the defendants.

(3912)

In the papers submitted in connection with their motions for reargument, defendants have for the first time designated the records which they wish to inspect and made a showing of their materiality as Rule 16 requires. But since they have failed to enumerate the records which they inspected and may have copied previously, they have still

not complied with the requirements that a request made under Rule 16 be reasonable.

However, since the trial of this case has been long delayed, I shall overlook this defect if it is corrected by the submission of a proper order accompanied by appropriate supplementary papers in compliance with Rule 16 of the Rules of Criminal Procedure.

Settle order on notice.

November 9, 1954.

EDMUND L. PALMIERI
Edmund L. Palmieri
U.S.D.J.

(3913)

Order

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C 142-72

[SAME TITLE]

Defendants above named having moved by notices of motion served October 28 and November 1, 1954 to reargue motions served April 6, 1954 and denied by opinion filed October 20, 1954, said motions having been referred pursuant to Local General Rule 9[h] to Honorable Edmund L. Palmieri on November 4 and 8 respectively,

Now, after reading defendants' notices of motion dated October 28 and November 1, 1954, the affidavits of Lloyd Paul Stryker, verified October 28, 1954 and November 3, 1954, the affidavit of Herman Holzer, verified October 27, 1954, defendants' memoranda of law served November 1 and November 3, 1954, and defendants' letter dated November 5, 1954, all submitted in support of the said motions to reargue, the affidavit of Milton R. Wessel, sworn to November 1, 1954 and the Government's Memoranda of Law served November 4, 1954, submitted in opposition to the said motions to reargue, due deliberation and consideration having been had thereon, and the Court having rendered its decision by opinion filed November 10, 1954, it is

(3916)

ORDERED that on or before November 17, 1954, the United States of America will produce the following docu-

ments for inspection, photostating, microfilming, photographing, or otherwise copying by all defendants:

1. Documents relating to any corporate businesses of the defendants and produced by defendants in alleged compliance with 1952 Grand Jury subpoenas;

2. Documents allegedly abandoned by defendants; and

3. Documents relating to defendants' buisnesses and obtained by the Government from a New Jersey receiver;

and it is further

ORDERED that except as above specifically granted, the the said motions to reargue be and the same hereby are denied in all respects

Dated: New York, N. Y.
November 16, 1954.

EDMUND L. PALMIERI (S)
Edmund L. Palmieri,
United States District Judge.

Transcript of Appearance Before Hon. Gregory F. Noonan

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C 142-72

[SAME TITLE]

Before:

HON. GREGORY F. NOONAN,

District Judge.

New York, December 13, 1954

APPEARANCES:

J. EDWARD LUMBARD, ESQ.,
United States Attorney
for the Government;

By Milton R. Wessel, Esq., Assistant United States Attorney.

LLOYD PAUL STRYKER, ESQ.,
Attorney for Defendants.

(4018)

Mr. Wessel: The Government is ready, if your Honor please.

Mr. Stryker: I understood from Mr. Lumbard that this case was to be adjourned until January 10th.

Is that correct, Mr. Wessel?

Mr. Wessel: If the defendant is willing to have the case marked peremptorily against the defendants for Janu-

ary 10, and if counsel will make a representation that no further adjournments will be asked for at that time, then your understanding is correct.

Mr. Stryker: I have acquiesced rather than agreed, but I presume they are the same, for trial on January 10.

I told Mr. Lumbard, however, that by so doing I did not wish that consent to be treated as an admission that our rights had been fully protected by certain motions that we have made heretofore in this court.

All I am saying is that I am not waiving any of the applications which we have heretofore made, amongst which is for a bill of particulars.

I told Mr. Lumbard on the telephone that, I would take

(4019)

that position, but that I would nevertheless consent to go to trial on the 10th, although I am not ready by reason of the denial of inspection of the books of the defendants and by reason of the denial of a bill of particulars, and the denial of other applications which we have made on written papers.

The Court: They have been passed on by this court, Mr. Stryker?

Mr. Stryker: Oh, yes.

Mr. Wessel: And there has been a motion for reargument and that has been passed on also.

Mr. Stryker: That is correct.

The Court: All right, January 10.

Mr. Wessel: Would you Honor direct witnesses to return on that date?

The Court: All witnesses in the case of William Giglio, Frank Livorsi, Howard Lawn, American Brands Corpora-

tion and Louis J. Roth are directed to reappear in this court on January 10, 1955.

Mr. Wessel: Is the case now marked peremptorily for that date?

The Court: I will mark it peremptorily for trial for January 10th, with the reservation that Mr. Stryker points out, and without acquiescing in it in any way.

Mr. Wessel: Thank your, your Honor.

(Adjourned to January 10, 1955.)

(4020)

Transcript Of Trial

New York, N. Y., January 10, 1955,
10:30 o'clock a.m.

APPEARANCES.

J. EDWARD LUMBARD, Esq., United States Attorney, for the Government;

By Milton R. Wessel, Esq.,
Arnold G. Fraiman, Esq.,
Assistant United States Attorneys,

and

Ira L. Tilzer, Esq., Tax Attorney, Internal Revenue Service.

LLOYD PAUL STRYKER, Esq.,

and

HAROLD W. WOLFRAM, Esq.,
Attorneys for Defendants.

* * *

(1)

New York, N. Y., January 11, 1955
10:45 o'clock a.m.

Mr. Stryker: If your Honor please, I have two or three preliminary motions that I would like to make and in order that I may have freedom of discussion and not be thought that I am saying anything for the jury's benefit, if it were agreeable to your Honor I would be glad to make them in chambers.

The Court: Very good. Let's step into chambers.

(The following proceedings took place in chambers.)

* * *

(3)

Mr. Stryker: Now my first motion, if it please your Honor, is a renewal of a motion which I made before Judge Palmieri for a further bill of particulars.

This motion relates primarily to counts 7, 8 and 9. I can summarize them and save you trouble.

The Court: All right, sir.

Mr. Stryker: Those counts, in effect, charge that there was a concealment of assets, a diversion of assets, an concealment of assets. They do not charge or state what the assets were, what they consisted of, where they were diverted, when they were diverted, what they were.

We are left totally and completely in the dark as to one of the serious charges in this case, namely, the secretion and diversion of assets.

* * *

(3b)

Judge Goddard, in view of the fact that he dismissed the indictments, said that it wasn't necessary to pass on the other motions which, of course, was obviously correct.

So no bill of particulars was furnished then, although I think I should add at this point—this is the place to add it—that when the matter was before Judge Goddard, Mr. Leone interposed an affidavit which at page 8 he said, "The

(3h)

defendants, William Giglio, Livorsi, Lawn and American Brands Corporation move for a bill of particulars ad-

dressed to indictment C-139-307. The Government will consent to give the defendants the particulars generally demanded in demands Nos. 1, 2, and 3; thus it will inform the defendants of the description of the asset or assets that were hidden, and the value of the total assets that were hidden."

Consent.

Now, those items, I should say, are the items, although separately numbered, in other indictments, precisely the items that are here, and I might interpolate to say that this indictment now before you, which is a single indictment of ten counts, is almost verbatim repetitious. In fact, I have an affidavit here—I will come to it presently—showing parallel columns of the charges made in the dismissed indictments, but I am a little ahead of myself.

Mr. Leone stated, page 8 of his affidavit, as to demands under count 3, "The Government will consent to giving American Brands Corporation the information requested under items 1 and 2."

Items 1 and 2 of the particulars demanded, to which Mr. Leone then or thus consented, were as follows:

(3j)

One, a description of the assets of American Brands Corporation claimed to have been misappropriated, diverted and converted by the defendants Giglio, Livorsi, Lawn and Roth; the nature of such claimed misappropriation, diversion and conversion.

I am quoting from an affidavit of an assistant United States Attorney who then had it, this Mr. Leone.

Now, of course, it wasn't necessary to give that bill of particulars because there was nothing to give particulars

about at that time. Indictments all went because of the violation of their constitutional rights.

* * *

(3j)

All right. Now, when this indictment now before you was opened, promptly thereafter I made a motion covering

(3m)

various grounds, all of which really are before you now. One, of course, was for a bill of particulars on this concealment count. Let me say to you for whatever you may think my opinion, if anything, may be worth, I think a denial of a bill of particulars here is a fundamental reversible error. I say that, and that is my opinion.

I suppose I shouldn't be eager to correct reversible errors, but I am if I can, and I am giving this court this opportunity.

* * *

(3n)

Mr. Wessel: May I just correct that? Judge Palmieri did grant a bill of particulars.

Mr. Stryker: Wait a minute, now. Just a second, Mr. Wessel. He denied it, and then I made a motion——

Mr. Wolfram: Mr. Wessel is right. He granted just certain particulars with respect to the indictment, with

(3r)

respect to the income tax returns, but not——

Mr. Stryker: I am sorry. I think Mr. Wessel is quite right. All right. I then made a motion to reargue the the motion for a bill of particulars, directed to the point that I began so many minutes ago with your Honor—please tell us what assets were converted or misappropriated. Let us

know what they were so that we will be able to assert this against another charge, can prepare for trial and know just what it is we are confronting, not a vague statement. It might be assets; it might be automobiles; it might be stocks and bonds; might be a million categories. Please tell us that so that later on, in the trial, you can't rummage around and then by chance find something or other on which we are not prepared, and about which we have not been advised and say "those are the things we meant."

All right. I reargued that motion before Judge Palmieri. He was very patient with me, very polite, but he did not grant my motion.

Now I have always reserved all my rights under all the motions that I have made. I did so the last time this case was in court before Judge Kaufman, to fix a date for trial.

Mr. Wolfram: Judge Noonan.

(3s)

Mr. Stryker: Judge Noonan, yes, to fix a date for trial, so that the motion—in fact maybe I had better read to you right here just how this case was marked.

On December 13, 1954, Mr. Justice Noonan marked this case for trial peremptorily, with the reservation that Mr. Stryker points out, and without acquiescing in it in any way.

Now, the reservation was this—and I am quoting from my affidavit, which in turn quotes the stenographer's minutes. I say here—I quote from what I said to Judge Noonan:

> "I told Mr. Lumbard, however, that by so doing"
> —that is, that I would acquiesce rather than agree
> in January, on January 10th as the trial date, and

thereby hangs another story that I will come to in a moment—but "I told Judge Lumbard that, however, by so doing I do not wish that consent to be treated as an admission that our rights had been fully protected by certain motions that we have made heretofore in this court. All I am saying is that I am not waiving any of the applications which we have heretofore made, amongst which is for a bill of particulars. I told Mr. Lumbard on the telephone that I would take that position, but that I would nevertheless consent to go to trial on the 10th, although I am not reason by reason of the denial of inspection of the books of the defendants, by reason of the denial of the bill of particulars and the denial of other applications which have been made on written papers."

(3t)

Now then, that at long last brings me to the point on the bill of particulars. If your Honor will just be good enough to glance at the indictment—do you have it?

The Court: I have got the original here.

Mr. Stryker: I have it here somewheres, I think. Here it is.

Now I will direct your attention to count 7, count 7. Without reading all the intervening material, it charges that on or about the 1st of September—no. It charges that—well, I better read it:

"From on or about the 1st day of September, 1947, and up to and including the date of the filing of this indictment, at the Southern District of New York, and elsewhere, William Giglio, Howard Lawn and Louis J. Roth, the defendants, an income tax

return for the calendar year 1946 for said William Giglio having been filed, stating the net income of
(3u)
said William Giglio for said calendar year to be the sum of $286,690.01, and the amount of tax due and owing thereon to be the sum of $232,978.73, did wilfully and knowingly attempt to defeat and evade the payment of a large part of the taxes due and owing by William Giglio to the United States of America for the calendar year 1946, in that they did conceal the assets of William Giglio."

Now what is that? How do I prepare for trial for that? How do I plead that as a matter of double jeopardy?

Now, count 8 is about the same; count 9 is even worse. It charges the defendants, "did wilfully and knowingly attempt to defeat and evade the payment of a large part of the taxes due and owing by American Brands Corporation for the calendar year 1946; in that they did misappropriate, convert and divert assets of the aforementioned corporations to their own use and benefit."

Now your Honor, whose experience with the criminal law is not slight, would tell me at once that you could hardly prosecute a man for larceny by saying that somebody stole some assets. There are several specific fundamental reasons why we ought to have a bill of particulars.
(3v)
One: if we don't have a bill of particulars we don't know what that charge—and it is the most poisonous charge in the indictment—is. We don't know how to open to the jury; we don't know how to cross-examine the witnesses, and we don't know where or how to prepare for trial and to defer-

mine—to secure evidence in our defense of that charge. Now that is just obvious, I think.

I submit, with all due deference to Judge Palmieri, whom I greatly respect, that his denial of our motion for a bill of particulars, under the circumstances that I have narrated, was a fundamental and reversible error; and so my first motion directed to you, sir, is that a bill of particulars under this head be granted to us, and, of course, that would involve, if your Honor were to agree with me, not handing me something at eleven o'clock and telling me, "Go and prepare by three this afternoon."

* * *

(3w)

Mr. Stryker: Yes. Well, anyhow, I said to Judge Lumbard, "Well, I am not ready. I have acquiesced, which means simply an agreement to go to trial, but I am not ready, and I am going to tell that, I want you to know, to the judge before whom we come," which I did.

All right. Now then, coming back to the question before the house, which is one of three or four motions I have before you, I just don't see, Judge, how anyone can expect me to do my job as an officer of this court, defend these men on a charge of misappropriating assets, if I am not told what they are, so that I can defend against it.

Before I proceed with others, maybe it would be orderly to stop right here and hear Mr. Wessel, whatever he wants to say, and maybe your Honor will pass on that.

The Court: Well, I will tell you before I hear Mr. Wessel—I see he has strong views to the contrary—I am going to deny your application for particulars. I will stand on Judge Palmieri's consideration of the problem, so I will deny that application.

(3z)

Colloquy

Mr. Stryker: You know, it is hard to teach an old dog new tricks, and I understand that under the rules—I have been told so many times—no exceptions are necessary, and if occasionally one emerges from me, will you not regard it as impolite to you?

The Court: I welcome the warning, but if you neglect it, why it won't be held against you.

Mr. Stryker: Am I correct in that? I think I am, am I not?

The Court: I think so. I don't think we need exceptions at all, but I don't think it ever hurts.

Mr. Stryker: All right, that is your Honor's ruling on that.

* * *

(3aa)

Mr. Stryker: Now I come to a renewal of the motion before Judge Palmieri to dismiss this indictment upon the ground it is predicated and founded upon illegal evidence.

In my motion papers before Judge Palmieri, which, by the way, I should like to have added as a part of the record of this case, I refer specifically to a notice of motion dated April 6, 1954, and to the accompanying affidavit of William Giglio, verified, I think, on the 6th of April, accompanying affidavit of Mr. Lawn and Mr. Livorsi. I will make this as painlessly brief as I can.

The Court: All right.

Mr. Stryker: If you will be good enough to glance——

(3bb)

The Court: I will take your word for it, Mr. Stryker, that the indictments are substantially word for word.

Mr. Stryker: That is pretty nearly accurate, including the charges on the books and records.

* * *

(3cc)

Now I submit that here in this motion to dismiss this indictment upon the ground that it was based upon evidence illegally obtained, which motion was denied later by Judge Palmieri, and which I am now renewing, because everything in this case is now before your Honor, the whole case, naturally, I want to say that that motion of mine is no light formal motion. Certainly it does not lack sincerity, nor does it lack, I think, clarity; nor does it lack support both in law and in fact.

I won't detain you—I am really perhaps taking too long to read you what every lawyer and judge always loves to read, several opinions of Judge Hand, in which he says that the person that makes the first mistake ought to be responsible for it. If I can put my finger on that, it is in one of my briefs, I would just like that very much, I enjoy that language very much.

Now, I refer to—I won't do more than refer to it—United States v. Goldstein, 120 Fed. (2d), 485, to U. S. v. Krause, 270 Fed. 578, in which the court said:

> "The officials made the first unlawful move"—and there is no doubt that that is not a mere lawyer's argument now, it is an adjudicated fact in this case—and I continue the quotation—"and confusion (3ii)
> resulted from it. They must undertake to clear up."

I should add here, in Judge Palmieri's opinion, he specifically refers the question of the leads and clues to the trial court, which is now you.

You can see, your Honor, what a problem this presents to me, and with all the respect, I think, to the Judge, because if leads and clues were obtained from the illegally obtained

evidence, which led to that, led to this present indictment, that would render the indictment unfounded.

The Court: Can I see his memorandum? Judge Palmieri's?

Mr. Stryker: The excerpt I read?

The Court: Where does he talk about leads and clues?

Mr. Stryker: I have it here, Judge. Here is an excerpt which might help you.

The Court: Thank you. (After reading.) This is a different position. This doesn't go to the invalidity of the indictment. In other words, he is talking about the suppression for use at the trial or in any subsequent time of the improperly obtained material.

Mr. Stryker: Well, the suppression of all evidence. I

(3jj)

think you are right about that. I think you are correct.

The Court: Yes.

Mr. Wessel: I should say, your Honor, my affidavits submitted to you are in connection with that very subject.

The Court: All right, we will come to that in a few minutes.

Mr. Stryker: Well, now, here is the point: if I had been granted—and with all and perfect respect to Judge Palmieri, I believe I should have been granted, because the situation was very analogous to the one presented to Judge Goddard—we would have determined once and for all whether these gentlemen are correct about what was done before the grand jury. If the minutes supported them, I suppose that would end that issue fast. I, of course, can't see the minutes, and I don't know what they say.

Now, because we have not been able to make that inquiry, which I tried to make, bringing it on in a timely way,

as I think my chronology has already shown, all of that problem is really injected not through any fault of mine in this trial, and the very purpose, as your Honor knows so well, of these various motions to suppress evidence, and so

(3kk)

forth, which the courts uniformly hold should be made before the trial, is to prevent confusion at the trial, so that they don't get off on a siding, trying some other issue.

Now I don't know, I can't state, of course, what leads and clues they used. All I can give you are parallel counts in the indictment and say to you, please give us an opportunity to find out. That is all I can say. That is what I did say, and that is what Judge Palmieri denied and what I am presenting to you; because it is all before you. Whether Judge Palmieri ordered this specific thing before you or not, it is before you, and I say one thing more on that and then I will come, I hope, to the end:

I say in all seriousness and with perfect respect that I have for you, for every judge of this court, the denial of that opportunity under any circumstances, and particularly under the particular and peculiar circumstances of this case, is a denial of a fundamental right, and such a denial, in my view at least, could be error.

The Court: Well, I am running the risk of that, Mr. Stryker. I am going to deny your motion, not only because Judge Palmieri reached that conclusion, and apparently

(3ll)

after considerable stock taking and reflection, but I would also say that if I had the problem put before me de novo, and the assistant United States attorneys swore to me that this testimony had not been presented before the grand jury, I

would take their affidavits on the basis of my experience with them since I have been here.

Mr. Stryker: Would you, if that particular United States attorney also swore or stated that nothing wrong was ever done before the grand jury, and we later showed what had been done?

The Court: Which are talking about, the assistant United States attorneys who are here now?

Mr. Stryker: No, no, Leone.

The Court: No, no, I am talking about Mr. Wessel.

Mr. Wessel: For the sake of Mr. Leone, may I please make reference——

The Court: The group who were before the grand jury in 1953.

Mr. Wessel: May I just make a statement as to what Mr. Stryker referred to? Mr. Leone made a conclusion of law in an affidavit as to the effect of what happened before the grand jury was not improper. That was his (3mm) conclusion. Judge Goddard held he was wrong, but he did not say that Mr. Leone had made any improper statement of fact.

Mr. Stryker: I say it is irrelevant and perhaps certainly not an impertinent question, but I was wondering as your Honor said that, how you would have decided this first motion before you, if it came to you instead of Judge Goddard?

The Court: The time hasn't come where I can quickly differ with Judge Goddard. I can tell you.

Mr. Stryker: You what?

The Court: The time has not yet come when I will quickly differ from Judge Goddard.

Mr. Stryker: I am sure if I was on the bench I wouldn't either, but—however, exception then. Well, wait a minute. Pardon me. I am not quite through. I hope you won't think I have been too verbose.

I would like at this time to move to dismiss the three informations filed in September 1950, upon the ground that they have not been brought to trial for a reasonable period of time, in effect have been abandoned, and I would like to move to dismiss them.

The Court: How does that fit into the trial of this case, Mr. Stryker?

(3nn)

Mr. Stryker: Well, I will say very frankly that I don't think it does, actually, except you have the whole case before you.

The Court: I think that is a motion which, after all, I know nothing about, and which I would assume would be referred to the judge handling——

Mr. Stryker: Maybe you will consent to that, will you?

Mr. Wessel: I am afraid I cannot, Mr. Stryker.

The Court: All right.

Mr. Stryker: Then you deny it?

The Court: Not on the merits, but on the procedural ground that I don't know anything about it.

Mr. Stryker: All right.

I have a motion here for the severance of the indictment with respect to the defendant Howard Lawn. I may have one or two motions after we impanel a jury, I know, which would come properly then or now.

The Court: I should think it should come now, following a procedural question, probably.

Mr. Stryker: I would bow to you much more.

Well, I then move to sever this indictment with respect to the defendant Howard Lawn, upon the ground that to try him jointly with the other defendants would be preju-

(3oo)

dicial to him. He is mentioned only to a very slight degree in this whole indictment. I have got a note of it. I think the concealment counts, if I stand corrected, but I think they are the only counts—I have got it here. I can tell you what counts he is in. He is not in the first; he is not in the second; he is not in the third.

The Court: 7, 8, 9, 10, I think.

Mr. Stryker: I think he is in 7, 8—he is in 7. I know he is not in 8; he is in 7 and 9, and I guess the general catch-all conspiracy count, which prosecutors always love, as you know.

The Court: Yes.

Mr. Stryker: Well, I won't detain you on that subject. He isn't charged with filing a false income tax return himself. He is charged with doing this indetermined, undefined, inscrutable thing of concealing somebody's assets. Whose assets? What? How? Where? When? I don't know.

All right. Now Howard Lawn—I hope you will not hold it against him—is a high "A" graduate of Harvard Law School——

Mr. Wessel: His average was 64 Mr. Stryker. He was not an "A" graduate, but he is magna cum laude from

(3pp)

college.

Mr. Stryker: Well, then, he was magna cum laude.

The Court: Admitting he got off to a bad start, how did he turn out afterwards?

Mr. Stryker: Well, I think, however, that as a graduate of Harvard Law School—and I have known graduates of Harvard Law School who were not A's, who sometimes achieved more at the bar than others. Maybe you have seen that, too?

The Court: I keep hoping.

Mr. Stryker: Now, he was an assistant United States attorney over in Jersey, and was for a considerable time the head of the criminal branch of the United States Attorney's office. He is a man that so far as I know bears an unimpeached reputation. If I may say herein private, I think that he was thrown in this indictment for trimming, I mean, window dressing, not the trimming in the other sense, although maybe that is so, too.

Now, here he has to sit in court, heaven knows how long. Mr. Wessel, who I think is a good deal of an optimist in addition to being a very able gentleman, was hopeful this case would take several days. I don't know how many of these Federal cases you have been through,

(3qq)

but——

Mr. Wessel: Mr. Stryker, I must correct you. I never said I was hopeful of that. I said if the cross examination was of the same length as the direct examination, which I did not anticipate, I thought the case would conclude in seven court days.

Mr. Stryker: I think you are probably correct. At any rate, whatever it is, he has to sit through there, hours and days and dreary weeks, listening and being affected by all this evidence adduced against others. Now why?

Why would it not be a fair and a reasonable thing to sever the charge as to him? And on the grounds stated in the rules and on general grounds, I respectfully, and I may say, I humbly pray, that you will look with favor on that application.

Mr. Wessel: May I say a word there, your Honor?

The Court: He is alleged to be a part of the conspiracy, is he?

Mr. Stryker: Oh, yes—well, if they are—I never can get those things straight, the parts of the conspiracy, which of course are the old chestnuts that are in the counts and some kind of something, overt act, I don't know what, that he talked to somebody or said something, I don't know what; I don't understand it.

(3rr)

Mr. Wessel: May I just say a word with regard to that motion?

The Court: Yes, go ahead.

Mr. Wessel: Actually, in this case the conspiracy count is the very essence of the whole case. It is the whole case, in so far as the meat of what these defendants did. There were four of them. Two of them were partners, Livorsi and Giglio. They had as their brains for the very things they did Louis Roth, an accountant, who has since pleaded guilty, and Howard Lawn, a lawyer.

He was, what, Mr. Stryker says, a very able man. I take it he still is. A very great part of a very complicated corporate partnership and personal relationships, which are the essence of the conspiracy and the essence of the tax evasion in this case, were the idea of Howard Lawn. To sever him from the case, to sever him as a conspirator,

would be not only to require the trial of two separate and perhaps long and difficult cases and bringing the witnesses from all over, but to unduly prejudice the Government in its attempt to bring these defendants to justice.

The Court: I think I will deny the application for severance.

* * *

(3ss)

(In the courtroom.)

(12:30 p. m.)

The Court: I might say to the jury panel that has waited so patiently that I apologize for keeping you waiting. There is just no way of avoiding it, and what we have done is settle the rules of the game, you might say, so that things will go that much more smoothly when we do start.

All right.

The Clerk: United States against William Giglio, Frank Livorsi, Howard Lawn and American Brands Corporation.

Gentlemen, are you ready?

Mr. Wessel: The Government is ready, if your Honor please.

Mr. Stryker: I am not ready, but I have agreed to go to trial.

The Court: All right.

(Impaneling of jury begun.)

The Court: I think this will be a good time to break for lunch and resume at 2:15. I will tell the jury in the box and out, I think it would be better if you did not discuss this case. In the first place, I doubt that you know

anything about it; and in the second place, I am going (4)
to ask you in any event not to discuss it even now, and from now on those of you who do serve as jurors, I will tell you that regularly.

* * *

(5)

AFTERNOON SESSION

(Impaneling of jury continued.)

(At 3:43 jury duly impaneled.)

The Court: I think we should have two alternates. We will take a five-minute recess and then we will get the two alternates.

Don't discuss the case, despite how little you have heard of it.

(Jury retired to jury room.)

(Short recess.)

(Impaneling of alternate jurors begun.)

(Two alternate jurors duly impaneled at 4:00 p. m.)

The Court: Well, ladies and gentlemen, I think we have gone far enough for one day. We will start with this case at 10:15 tomorrow morning. I will ask you all to be prompt. Be here ahead of time because a lot of people have to get here at the same time, and if any one of us is late, why, we tie up everyone else. I will try to be prompt and I will ask you to do the same.

Now, every time that you leave this court you must keep in mind that you are not supposed to discuss this case with (6)

anyone. Don't discuss it with your fellow jurors, don't discuss it with anyone else, and don't let anyone else discuss it with you. Your thoughts in this case must be your own until you get into the jury room for final deliberation, because as the trial progresses, you will have one impression or another, and it is important that you not start crystallizing these temporary impressions. You hold all your thoughts together and don't discuss them with anyone until the case is finally submitted to you.

Mr. Wessel: Your Honor, may I request a five-minute conference in chambers with Mr. Stryker off the record?

The Court: All right, we will excuse the jury now until 10:15 tomorrow morning.

(Jury excused.)

(Discussion in chambers not reported.)

(Adjourned to January 12, 1955, at 10:15 a. m.)

(7)

(At start of the day:)

(The following motions were made, argued and decided in chambers:)

Mr. Stryker: If your Honor Please, I move to dismiss counts 7, 8 and 9 of the indictment, on the ground that they do not state facts sufficient to constitute a cause of action.

For clarity, although I discussed this in connection with the bill of particulars, I will take half a minute to draw your Honor's attention again to the significant and relevant

parts of those counts. The seventh count charges that the defendants did conceal the assets of William Giglio. That is all—period.

The eighth count charges that they did conceal, Livorsi's assets. The ninth count charges that they did misappropriate, convert and divert assets of the aforementioned corporations for their own use and benefit.

The Court: That is all would be needed to defeat the payment of the tax.

Mr. Stryker: I am not reading all the words; that is the part I am directing myself to. Three counts mention assets without describing them—without ascribing any value to them. Now it is my contention that in order to allege and prove the defendants concealed and diverted

(8a)

assets and attempted to defeat and evade the tax due the United States, the assets must be shown to have had value for that purpose, and not some other purpose.

An asset is not necessarily a thing of value for the purpose of payment. An asset may be worthless. This is fully recognized by the Treasury Department. Section 39. 23(a)-3 of the income tax regulations, provides that where the use of the asset is simply to terminate the tax payment on discontinuing the business or discarding the asset, you may claim a loss measured by the difference between the base and the salvage value of the property. The next subsection 4 provides that if the stock of a corporation becomes worthless, the cost or other basis is deductible by the owner for the taxable year in which that event occurs.

Thus an asset within the purview of the law may be property which has lost "its usefulness in the business,"

or which has lost its value entirely. Under such conditions a taxpayer may have an asset, but the disposition of that asset could scarcely be employed as the basis of a charge of concealment for the purpose of defeating or evading the payment of a tax to the United States.

Now in order to charge the crime of attempting to (8b)

defeat and evade the payment of the tax due, the "assets" —I quote that word from the indictment—involved in the concealment or the misappropriation must be an asset which might be applied in payment, because the concealment or the misappropriation of an asset without value in no wise constitutes the crime of attempting to defeat or evade the tax.

I will make this as short as I can. A very illustrative case, to use an expression that my friend Ted Kiendl always uses, and you probably heard it——

The Court: Yes.

Mr. Stryker: In White v. United States, 67 Fed. (2d) 71, the defendant was indicted under the Bankruptcy Act. He was charged with intent to defeat the Bankruptcy Act in that he did "knowingly, fraudulently and feloniously conceal personal property," of the bankrupt corporation of the total value of $17,000, a more particular description of which being to the grand jurors unknown.

The Court: I get the point.

Mr. Stryker: The indictment, of course, was far more precise than the indictment before you, since it attributed a definite value of $17,000 to the personal property alleged to have been concealed. None the less, the Circuit Court (8c)

reversed the conviction on the ground that the indictment failed to state facts sufficient to constitute the statutory crime charged. The court emphasized that the indictment not only failed to apprise the defendant of the nature of the accusation, but also was not sufficient certainly to enable the accused to plead double jeopardy if he ever again were indicted.

There are other cases, in 20 Fed. (2d) 36, page 39—they are all in the memorandum.

I won't quote all of these cases but just give you enough so that you have no point clearly before you.

* * *

(8d)

Now without detaining you with fundamentals, our Constitution requires that a defendant, an indicted person in effect—I am not quoting it verbatim, but this is it—must be apprised of the nature of the crime in a sufficient way to enable him to meet it and plead it as double jeopardy. One word more and I have finished with this particular motion. I think that the difficulty that has been presented has been highly exascerbated by the fact that not only does

(8g)

the indictment fail to tell us what the charge is but your Honor in your wisdom declined to give us a bill of particulars. I should perhaps add this footnote: even if we had the bill of particulars it would not cure the faulty indictment.

The Court: Were these cases called to Judge Palmieri's attention?

Mr. Wolfram: We did not make a motion to dismiss for insufficiency previously, your Honor.

The Court: You did not use them to implement your motion for the bill of particulars.

Mr. Stryker: I do not think we did. That is my motion on that.

Mr. Wessel: I should like to make a few comments, and will ask Mr. Tilzer to argue on the law, inasmuch as he is far more acquainted with the matter than I am.

I should say first that the disposition by Judge Palmieri on the bill of particulars is almost a fortiori with regard to this motion. If Judge Palmieri found they were not entitled to particulars, it follows, as I said, a fortiori, they would not be entitled to the dismissal of the indictment on the same grounds, to wit, that the indictment does not state sufficient facts. This indictment charges the concealment of assets. In fact, the defendants paid practically no part

(8h)

of the tax which they even admitted they owed. The method by which they concealed all of the assets, all the assets they had, the particular items which they concealed, are matters of evidence, and the courts have held with regard to a bill of particulars motion that kind of evidence should not be disclosed in advance of trial.

I think, in other words, that the particular items Mr. Stryker said should have been stated in the indictment would be merely statements of the evidence and would be stricken on that ground.

* * *

(8i)

Mr. Wolfram: In two counts they describe the return filed without describing what the true return should be.

Mr. Wessel: That count does not relate to the false return. It assumes the return filed was true. Perhaps I

should explain that a little more. These men filed tax returns in which they said they owed $500,000 and in fact they owed $800,000. The Government claims the tax evasion with regard to the $300,000 they did not admit they owed, and evasion of the payment of the $500,000 that they said they owed. They did not pay anything. Part of it was the evasion of the tax, and that they did not even

(8rr)

report $250,000-odd. Part was evasion of the payment of the tax, and with the exception of the $16,000 paid by way of estimated taxes, all the taxes were concealed.

Mr. Stryker: It does not say that. It does not say that all. It says assets were concealed. It does not say all assets were concealed. I think you are mistaken.

Mr. Wessel: It also does not say the amount which was paid; it does not have to.

Mr. Stryker: We are not evading the indictment on the question of the income tax return, but debating at this moment the simple question whether we are apprized of the assets, the things themselves, that we are supposed to have concealed or diverted. We are not told.

Mr. Wessel: That is precisely the question that was before Judge Palmieri, were they or were they not entitled to identification of those things.

Mr. Stryker: He was dealing with a bill of particulars, and this is with respect to the statute and the Constitution.

The Court: I think the problem is basically the same. Also, the motion made after the indictment and after the

(8s)

jury is selected is a little late. I am going to deny the motion.

Mr. Stryker: I had always supposed that the sufficiency of an indictment, that question, could be urged at any time.

The Court: I think that is correct.

Mr. Stryker: All right.

Mr. Wolfram: May Mr. Stryker take an exception.

Mr. Stryker: Yes. I will just take one on the record.

I have one more motion and I am through with the motions, if you will be patient with me.

Mr. Wolfram: There is one more, a subpoena.

Mr. Stryker: That is Mr. Wessel's motion.

I move to dismiss this indictment upon the ground that the Government of the United States has given the defendants immunity by virtue of the illegal acts which it performed in subpoenaing the defendants in a criminal case before the grand jury and requiring them to testify against themselves and to produce their own personal partner records. I think you will perhaps be glad to bear with me a moment on that, because it is an interesting question of law. The first consideration under this head is that the Federal courts uniformly so far as I know have held that

(8p)

there is a vast distinction between a person whose status when he appears before the grand jury is merely that of a witness and one whose status is that of a defendant.

The Court: May I ask one other question: is there any Federal statute comparable to the State statute on immunity?

Mr. Tilzer: There is none, your Honor.

Mr. Stryker: No.

The Court: In a State court if you do testify the immunity is automatic.

Mr. Stryker: That is right.

The Court: And the Federal rule is different.

Mr. Stryker: I cannot cite a Federal statute and I do not think there is one. In support of the last statement I have United States v. Price, 163 Fed. 904, Mulloney v. United States, 79 Fed. (2d) 566, and other cases.

* * *

(8q)

The Court: I am going to deny that motion, because I do not believe any immunity was created by the presentation of books. This was before the grand jury returned the indictment that Judge Goddard dismissed.

Mr. Stryker: I want to be strictly accurate. It was before a grand jury. I think a second grand jury actually found the indictment. Is that accurate?

The Court: All right. Well, I will deny the motion.

Mr. Stryker: Exception.

Mr. Wessel: There is one application the Government does have, your Honor, with regard to a series of subpoenas duces tecum served by the defendants on five separate Government agencies. They have been served on the United States Attorney, on the Department of Justice, on the Department of Agriculture, on the Reconstruction Finance Corporation, and on the Treasury Department. Those sub-

(8w)

poenas all call for documents relating to three persons whom the defendants I take it anticipate may be witnesses in this case.

The Court: This subpoena question does not have to be disposed of at this instant, does it?

Mr. Wessel: The various agencies, of course, are very concerned.

The Court: I am more concerned about the jury at this point than about the agencies. We will hold the agencies are not in contempt until I dispose of this motion.

Mr. Stryker: Just a word. I agree with what you said, of course, but when we have subpoenaed these things we think we are entitled to them, and they come up rapidly in the trial.

The Court: What I would suggest is that we put this over. Is it going to be a lengthy argument?

Mr. Wessel: It should not be.

The Court: 9:45 will give us a half hour before the jury comes in tomorrow.

Mr. Stryker: All right.

The Court: And we will dispose of the motion then. If it comes up before that I will take the time to dispose of it.

(8x)

Mr. Stryker: Let me add for the record that I am not sure I indicated that the two motions I made before you this morning to dismiss the counts 7, 8 and 9 and dismiss the indictment on the ground of immunity are made upon the ground that the defendant have been denied their constitutional rights.

The Court: I understand that.

Mr. Stryker: In both respects. I just want to be sure I have the constitutonal point there.

The Court: Yes, I understood that.

* * *

(8y)

OPENING STATEMENT ON BEHALF OF GOVERNMENT

Mr. Wessel: May it please the Court, Mr. Stryker, Mr. Foreman, Members of the Jury:

* * *

(1)

Now there will be, I believe, a good many witnesses in this case. Some of them will be experts and will discuss technical subjects; most will not be. Although this is generally referred to as an income tax case, unlike most income tax cases there are not going to be a great many documents.

The reason for that is because the Government charges, and it will prove, that these defendants destroyed a good bit of the documents which would incriminate them, and therefore most of what you hear will be from live witnesses on that stand.

* * *

(3)

Now, there are a number of other things about count 1.

* * *

I will be more brief on the other counts, because I am covering some of the general principles on this count. Count 1 also refers to "at the Southern District of New York."

Now, that means that these defendants did something within this district. The Southern District of New York includes Manhattan, and various other counties.

The important part, and the reason that is in the indictment, is because in order for this court to have jurisdiction the acts referred to must have taken place in this district; and it is an important part. It may sound technical, but it is an important part of this trial, that as part of your

findings that you find that what these defendants did, they did do in the Southern District of New York.

Now, the first words, "on or about the 12th day of September, 1947," at the moment they seem somewhat unimportant. As I go through the indictment you will see that the dates referred to in the middle of September, 1947, are all important.

(13)

As the evidence unfolds in this case, you will see, and I will later refer to in the opening, a most remarkable series of events, transactions, conversations, occurrences in the middle of September, 1947. I want you particularly to pay attention to the evidence, because you will hear one witness say, "This happened on September 16th," but he may not associate it with anything else. You will hear somebody else say, "This happened September 14th," but he won't know that that fits in.

At the end you will see that this remarkable series of events, in the middle of September, 1947, all refer to and relate directly to the filing of a tremendous number of income tax returns, and a broad, overall conspiracy to evade taxes, which all culminated in the middle of September, 1947.

So I want you to pay, if you can, particular attention to the events that take place around that time.

* * *

(14)

Count 1 refers to the filing of a false partnership return for Eatsum Food Products Company in September, 1947.

(27)

It was for a fiscal year ending May 31, 1946. That partner-

ship return was due to be filed two and a half months after May 31, 1946. It is June, July, August 15, 1946. It wasn't filed until September 15, 1947, and you will find that all these returns were filed September 15, 1947, after, long after they were due, and, more than that, after the defendants had gotten rid of all their assets so that when they were filed, the Government couldn't find a penny. That is what that paragraph in the conspiracy count refers to, the filing of these late returns as part of the conspiracy to defeat and evade taxes and the payment of taxes.

* * *

(28)

OPENING STATEMENT IN BEHALF OF DEFENDANTS.

Mr. Stryker opens to the jury.

* * *

(33)

The Court: Ladies and gentlemen, we will take a five-minute recess and then we will have the first witness ready. Don't discuss the case.

(Jury excused.)

(Short recess.)

Mr. Wessel: The Government calls as its first witness Miss Eva Silver.

(Jury present.)

EVA SILVER, called as a witness by the Government, being first duly sworn, testified as follows:

* * *

(11)

Colloquy

HALLIE WILKINSON CARY, called as a witness by the Government, being first duly sworn, testified as follows:

* * *

(16)

(At beginning of the day, Jan. 13, 1955, the following motions were made in chambers, argued and rulings made:)

* * *

(21a)

Mr. Fraiman: If your Honor pleases, as you undoubtedly know from our memorandum, the defendants have issued six subpoenas.

The Court: I have not seen the subpoenas.

Mr. Wolfram: I better get them.

Mr. Fraiman: I gave one copy to your clerk last night. We did not have the six individual copies.

Mr. Wolfram: I have the original (handing to Court).

Mr. Fraiman: The subpoenas are issued to the Secretary of the Treasury, the Treasury Department, the Department of Agriculture, the Reconstruction Finance Corporation, the Department of Justice and the U. S. Attorney for the Southern District of New York. The subpoena which has been issued on the U. S. Attorney for the Southern District of New York contains fourteen items, and if I am not mistaken those fourteen items are more or less a summary of those other subpoenas. All those fourteen items—what I mean is that the other five subpoenas do not contain anything different from the fourteen items listed in the Department of Justice subpoena.

Mr. Wolfram: The theory is that the United States Attorney has the documents and we get them through the

(21p)

United States Attorney rather than the Departments.

Mr Fraiman: For convenience, I would like to refer to the Department of Justice subpoena, to serve all purposes, and not go from one subpoena to another.

The first point I would like to make is that the subpoena itself is entirely too broad. It states, for instance as item number 3, all information in the Government files regarding any past, pending or contemplated criminal prosecution of David George Lubben. There is no time limitation set there.

The Court: I will quash number 3, subject to Mr. Stryker changing my views when he gets a chance.

Mr. Fraiman: The same thing applies, your Honor, to item number 7 and item number 13, which are the same requests.

The Court: Yes, anything in such broad language I am not going to hold. What about the others?

Mr. Fraiman: As a further point, I think it might be wise to go through them individually. The first one refers to the tax returns for Lubben from 1943 to 1949. This case involves in the indictment practically only one year, or a year and a half, the year 1945 running over into 1946. The tax returns themselves are filed in September 1947.

(21q)

Yet the subpoena here asks for the years 1946 and 1949. It seems to me to be entirely too broad and extensive.

The Court: On the breadth and extent of it, if it does not put the Government to any undue burden, I assume those

are available. It is not as though you had to go to warehouses to look for the papers.

Mr. Fraiman: I do not know how available they are.

The Court: Can a subpoena duces tecum be issued for the purpose of impeaching a witness and preparing for cross-examination?

Mr. Fraiman: That is it.

The Court: That I do not have too clear an idea about.

Mr. Fraiman: As to that, your Honor, I have spent a good deal of time searching to find any court that allowed income tax returns of witnesses to be subpoenaed. In the Iosia case they considered that point but did not decide it at the time. No other court has ever allowed income tax returns of witnesses to be produced. The Government feels that 17(c) requires that any documents that are produced be evidentiary in nature. The only purpose for which these documents could be produced would be to attack the credi-

(21r)

bility of one of these witnesses.

The Court: In other words, your argument is that unless the defendants could use this in their own case——

Mr. Fraiman: In their own defense, yes, your Honor.

The Court: Rather than in the cross-examination of Lubben—that it is an improper use of 17(c)?

Mr. Fraiman: Yes, your Honor, that is correct. And if the defendants can show in some way—I cannot conceive of any way in which these documents could be used by these witnesses in any way other than to attack the credibility of the witnesses.

The Court: We do not have any authorities on either side?

Mr. Stryker: We have some good authorities.

The Court: On the use of a subpoena duces tecum?

Mr. Stryker: Yes.

The Court: I do not remember your memorandum.

Mr. Fraiman: On page 4 of my memorandum the case cited says the subpoenas can be used for evidentiary purposes only, where 17(c) provides for production of evidentiary documents in court, and there are other cases on that.

(21s)

The Court: May I ask Mr. Wolfram, do you have any cases right on that point?

Mr. Wolfram: Not directly on the question of the production of income tax returns.

The Court: Production of the documents for cross examination not on matters of defense?

Mr. Wolfram: Yes. I think we ought to get back on the theme a little bit here by putting this application in its proper setting. This has been described as sort of a 17(c) subpoena. I think it would be a little more accurate to call it a subpoena or notice to produce, or anything you wish, with regard to a prospective Government witness. In other words, I think we could do the same thing orally before your Honor that we could through the subpoena, but what we have done in the subpoena is given the Government a little advance notice.

The Court: Let us take that point of view for the time being.

Mr. Wolfram: It describes it a little more aptly. What we are doing now is asking your Honor to permit us to examine papers and documents that will become relevant and very important when certain people whom we feel may be prospective Government witnesses are called. It is

(21t)

not a question of getting evidence for our own case, but to get the documents to show the bias and the motive of the witness who we feel will be called; and confine it at the present moment to Lubben, Roth the accountant and to a witness by the name of Mike Cohen.

On the first issue, which is the return of David George Lubben for the years 1943 to 1949——

The Court: Before you get into that, have you any case where a subpoena duces tecum has been used, or the Government has been compelled to produce records which are ordinarily of a confidential nature?

In other words, these are not the Government's records to be handled freely, but Lubben's records? If you ask for my income tax record, it is not open to anybody except those auditing it. Have you any records that have been made available for cross-examination of a person who is merely a witness in the proceeding?

Mr. Wolfram: United States v. Beekman, 155 Fed. (2d) 580, referred to in our memorandum. That case illustrates the situation I am referring to.

The Court: Those are not confidential records?

Mr. Wolfram: Yes, there was a very strong contention in that case that the records were confidential. The Government maintained the record were confidential and need

(21u)

not be produced, and that is what the trial court held. The Court of Appeals reversed on that very issue. There were two questions involved, whether the records were relevant and whether they were confidential. The Court of Appeals held for the defendant on both issues and reversed the judgment of conviction. There are a number of quotes to the effect—here is one from a District Court——

The Court: You do not have that Beekman case here, do you?

Mr. Wolfram: No, I do not.

The Court: I should have brought it up. Those were records of disciplinary proceedings completed.

Mr. Wolfram: They were.

The Court: Against the retailers, who testified against somebody else.

Mr. Wolfram: Yes.

The Court: What was the claim of confidence based on there?

Mr. Wolfram: The regulation of the Office of Price Administration which is the same thing here we have, a Federal regulation or statute.

The Court: Is it a Federal statute about the tax returns?

Mr. Lumbard: There is, your Honor, a Federal statute

(21-22)

relating to the income tax returns. These records produced in the Beekman case distinguish it in this respect: it was made clear these were not criminal proceedings but a disciplinary action taken. It was made clear on the record of that case that the records did not pertain to the criminal proceedings, but to civil actions already completed. The question was asked by the judge in that case, Are you referring to criminal offenses, and the answer was no. The civil penalties were taken against these four people who testified.

Mr. Wolfram: There is no criminal case against Lubben as far as I know.

The Court: What was the policy in that case? Why shouldn't his records be exposed in that OPA case if he sold over the ceiling?

Mr. Wolfram: At the bottom of our brief on page 3, that case from the Court of Appeals, in the Beekman quote. We have recently held, they say, that when the Government institutes criminal proceedings in which evidence otherwise privileged under a statute or regulations becomes importantly relevant, it abandons the privilege. That refers to both the statutory and the regulation privilege.

Mr. Lumbard: But, if your Honor please, that quotation recites two cases, and the court recently held that the

(21-23)

Government has produced the privileged documents, and it is true they do have to produce them in the situations that existed in those cases. The documents the Government objects to producing on the ground they are confidential are the very documents they were prosecuting the defendants with; they were not documents to impeach credibility at all, but documents that were going to be used by the prosecution, to introduce into evidence themselves as the basis of their case against the defendants.

Mr. Wolfram: And in the Beekman case the Court extended it to the files of the OPA, which were not going to be produced. The OPA had no intention of producing them and the Court of Appeals in that Beekman case extended the doctrine in the Krulewich case.

The Court: I somehow feel that the income tax files are different from the OPA files. But the privilege in the income tax case is more particularly a privilege on behalf of the taxpayer than the Government. Take it as an extreme example, if the Maritime Commission were in a

lawsuit based on some of its documents and then attempted to prevent the defendant getting a fair view of the entire picture by imposing some regulation of its own as to confidence, strictly for its own selfish purpose. I would tend

(21-24)

to cut through that regulation. But the income tax files are not files that that confidence should be taken from. It is the whole policy there to get the taxpayer to make disclosures with the assurance that those disclosures are for the Internal Revenue Office alone, and I don't think that just because a person takes the stand as a witness he thereby waives that privilege.

Mr. Wolfram: If your Honor please, that privilege is not——

The Court: He does not waive that privilege.

Mr. Wolfram: As is evident from the State court proceedings, even supplementary proceedings, where the witness is being examined on a judgment. The creditors claim he must reveal what his income tax return shows, that he cannot hide that from creditors. If that return becomes relevant on cross-examination he cannot show prejudice. I do not believe he has that privilege.

The Court: It seems to me if this were a civil case we were trying and the Government were a party, this would be turned down quickly, and the Internal Revenue Bureau would not be required to give the returns. The fact the Government is a party I think changes it only to the extent to which these returns relate to matters of defense, and

(21-25)

the fact that Lubben was tied up or allegedly tied up with these defendants does not change the rule as to credibility

generally. I mean as to making these documents available on questions of credibility generally. If these documents have any bearing on the defense and if by having these documents we get the whole picture rather than a fragment, I would say you were entitled to them, but only upon such a showing. I do not know that there is even any contention——

Mr. Lumbard: Your Honor, I believe from what Mr. Wolfram has said on the record he does not want them for that purpose, that if these individuals were not called as witnesses, he had no desire for the documents.

Mr. Wolfram: In what I said, I made the statement that at this particular point the only thing in issue is whether these documnets are available to us in connection with the proposed cross examination of a prospective Government witness.

Mr. Stryker: That is the only thing you have before you.

The Court: There is a motion to quash on that. I will grant that motion. After the examination, if on the facts developed before me as I then see them, I or the Government can see any relevancy, I will be perfectly glad to look

(21-26)

at the returns for you if that would help. If you can see any materiality as a matter of your own defense. It is like the question that we had here earlier: if can best be passed on after the cross examination has been developed.

Mr. Stryker: Our real idea, I think, was to have these things available. If they are available that is really all we want. Then if I call on them for use, that is a matter for your Honor to decide then. Let me say that this will, in

my opinion, relate to, let me say, probably number one, the vital issue in this case, the veracity of Lubben. His filing of a return which he knew was not a proper return, predicated, I say, on other proof, bears on his veracity. In order to develop that I have to have the return.

The Court: At this point, balancing the interest you have, and I recognize the interest you have in that return—balancing that against the undesirability of making these returns available for matters of credibility alone, I am going to quash that portion of the subpoena.

Mr. Wessel: May I make the statement that there would be no need for a motion to quash if it were not for the fact in most of these instances it is an imposition to get government agencies to go searching through old files. Of course

(21-27)

as to these which are in my possession now, there would be no need for the motion and that could be taken up at the time they are requested in court.

Mr. Stryker: Mr. Wessel, I had no idea of a blanket search-all subpoena. The things I am asking for I could not imagine you not having.

Mr. Wessel: I am sure we do not have them.

Mr. Stryker: Many things you must have. Of course I do not know what you have. But when it comes to that question, again on veracity of what the return was and what he knew the facts were, that raises the vital issue of credibility. I cannot properly develop that unless I have the returns in question before me. Also it bears on another item, namely, his motive in giving his evidence here; and I shall try to develop his motive was to get himself out of his own troubles and put others in. All of that I will develop.

(21-28)

If they have these things or whatever they have here, and that they will be available, if in your good judgment, at the right time, in the proper setting, you think I ought to have them, I will be satisfied.

Mr. Fraiman: The Government is happy to comply with whatever ruling the Court makes.

Mr. Wessel: I am afraid it is almost impossible. The returns are here, your Honor. For example, there are so many things asked for—the OPA files—I don't even know where they are. The returns are here.

Mr. Fraiman: As to the second item, I think that the first item is improper at this time; the second item even more so, which asks for the background material concerning each one of these returns, and would be equally improper to be produced, and places a tremendous burden upon the Government.

The Court: Mr. Wolfram, do you have anything you want to say about 2? I intend to go along with the United States Attorney.

Mr. Wolfram: Well, I think the first thing we ought to find out, your Honor, is whether these documents are available or not.

I think one branch of our application under the cases must be an application to have the documents placed in

(21-29)

your Honor's possession and impounded and made part of the record on appeal, if they are not made available to us.

I think the Beckman case makes that clear. Of course, if the documents are not available, then there is no obligation to place them in the custody of the court and have them impounded.

Colloquy

The Court: I start off with a feeling against making available such things as confidential investigations and reports of Government agencies. Those are reports which are made for the information of the Government, and until they are acted upon publicly, a frequent or a ready invasion of the confidence of those reports is just going to make it impossible for Government agencies to do business.

Mr. Stryker: Judge, Mr. Wolfram will state this far better than I can, but if I can put my two cents in, in that case a number of butchers testified, and they had various proceedings with the OPA. Now, those records were refused by the District Judge and the conviction was reversed on that ground, on the theory, as I understand it—Mr. Wolfram will probably state it better—on this theory, as I understand it: one of them being motive, the motives of these butchers, Government witnesses, to come in and

(21-30)

give their testimony, possibly with a view to protect themselves and out of fear of retaliation or incrimination on the part of his particular authority.

As I understand that case, I think that would be applicable here. I am well aware and entirely sympathetic of the idea that many things are confidential, but when it comes to showing a jury the motive of a witness to fabricate, and the fact of whether he is fabricating, I think the philosophy of those cases, and certainly it is the philosophy of the law, generally, that defendants on trial for their liberty should not be hampered in showing by whatever evidence is available, their motive for testifying in the way they have done, and also whether what they have said is true or not.

Mr. Wessel: May I make one statement, your Honor, because I think we are talking without reference to the facts. There are—and I am not referring to sealed indictments, which they are, but which I cannot refer to—I am referring to open indictments: there are two in New Jersey which relate to this general subject. There was the Shotwell case in Chicago, now on appeal, which lasted for a long time, months, I believe. There were two other cases, one which resulted in a criminal conviction on a plea of guilty,

(21-31)

and one of which resulted in a civil suit, which was settled because of voluntary disclosure, I believe.

Those are just some of the proceedings which have resulted from this general overall conspiracy that has been referred to.

I might add that—and this is, of course, not for the jury—that the Kefauver Committee went into this in great detail, and there are tremendous files in their possession.

The Alcohol Tax Unit, I believe, went into this in great detail. The OPA went into this in great detail. The Bureau of Internal Revenue went into this in great detail.

I am sure there are other Government agencies that went into it in great detail.

I have not the slightest idea where all those documents are. If there is a foundation laid for a particular kind of document or a particular document, I think at that time perhaps reference can be made to where that is, and it can be found.

It is impossible, I believe, to satisfy this demand at this time, therefore I think the real question is, isn't it burdensome on the Government to demand it in this form and

(21-32)

competence can be considered when the matter is presented in the specific fashion to your Honor.

Mr. Stryker: Let me make just one comment there. Our subpoena runs not just to your office, Mr. Wessel, here, but to the Department of Justice——

Mr. Wessel: And four other departments.

Mr. Stryker: And the Bureau of Internal Revenue, the OPA, and subpoenas have been served, in addition, in addition to the one on you.

Mr. Wessel: And I have been on the telephone since last Thursday with heads of various agencies.

Mr. Stryker: I bet you have.

Mr. Wessel: Almost making it impossible to get any work done. What do we do? Do we have to show these things? Where are these things? Where is our file? It is almost impossible.

Mr. Stryker: I think this: when it comes to any confidential file—and although there is a privilege about a man's income tax generally for himself, but under these cases that is gone when a vital question to the issue arises—but I strongly feel that your Honor should order these things presented to your Honor. It is very much like a situation where a witness—where the contention is made

(21-33)

on reasonable grounds that the witness has perjured himself before the grand jury, and that question arose here in this building, in the Hiss case, and the solution of it—which I think is the proper one—was for the judge, himself, to examine the grand jury minutes.

He did so, and he even found that I was right, that this man Chambers had perjured himself, gave me certain

parts of the grand jury minutes which enabled me to force the witness to admit that he perjured himself.

Now I couldn't have done that at all if I hadn't had the material, and ordinarily we have no access, of course, to the grand jury minutes.

Now this is similar to that, as I see it.

Mr. Fraiman: I think this is completely distinguished from the instant case.

Mr. Wessel: I think we are not meeting the point. I could bring to his Honor right now enough documents, within this demand, to keep him busy for two years. I personally have read only a part, believe me, only a part, and I have worked day and night for some time. I went away for a week and worked from eight o'clock in the morning until two o'clock the following morning so I could

(21-34)

read just the part that I considered relevant to the Government's direct case. Now his Honor cannot possibly read it. When the foundation is laid I think it should be presented.

Mr. Stryker: I think this is again, if I may say so, really—yes, I was about to say I think this is definitely a problem that is impossible of solution ex parte without the benefit of the facts and the circumstances.

I am not interested in reading the 5000 pages, however interesting, of the OPA just for the fun of it. I am interested in anything that bears or could properly bear directly or indirectly on the veracity of the witnesses involved, and we ask to have those things avaliable in that they may become material on the question of credibility.

At that time, I don't know—this is not just to annoy the Government; I don't want to put him to any more work than I want to put myself to, but in these things, I think,

will be matters that you will find germane to credibility, and I mustn't forget—I am reminded—of course motive, which was definitely the decision of our Court of Appeals here on those butchers case, the Beekman case.

The Court: For the time being, though, I do recollect the

(21-35)

breadth of the language, and I am not going to compel the Government to comply with it.

Now I will go along with your suggestion; we will review this as the trial progresses, and see if you can be more specific.

On number 3, that again is that extreme breadth, and I think that at this time is too broad.

Number 4, I don't know why the defense—you say informer's fees are confidential?

* * *

(21-36)

The Court: I certainly won't stop you on informer's fees, I don't think. You can cross examine him on that.

Mr. Stryker: You think I can?

The Court: I think you can.

Mr. Stryker: Of course—of course.

Mr. Fraiman: If your Honor please——

Mr. Stryker: Suppose he says "no". He didn't get them, and they are sitting there with documents that he did. Heavens, I ought to know that.

(21-40)

The Court: Yes.

Mr. Fraiman: Assuming, your Honor, that the defendants are entitled to know whether or not Mr. Lubben was receiving or is receiving informer's fees in this case,

I don't see the relevancy of whether or not he has ever received informer's fees in the past.

Now, am I correct in assuming he is not asking for that information?

Mr. Stryker: No, you are not. I want to find out if he is subpoenaed for them.

Mr. Wessel: Let me just say this: as I understand the ruling, we are required to have the records available for your Honor when the foundation is laid.

Mr. Stryker: That will suit me fine.

The Court: Now, we have got item number 5, the OPA's material, and there again you have the very broad language, "all data, memoranda and reports."

Now here again it seems to me there is a need for greater specificity, and I assume that as the trial progresses you will be able to give us more specifically what it is that you need, and I will pass on that question when the time comes.

Mr. Fraiman: That, I think, takes us down, your Honor, to item 9, 10.

(21-41)

The Court: That again is the same problem, where you have this broad sweeping request. Does that cover the rest of them?

Mr. Fraiman: The only other item, your Honor, which I don't think they can possibly be entitled to, is probation reports under item 11.

Mr. Stryker: Well, there is an investigation made by the Government. There is a man, Roth, whose credibility will definitely be a strong issue, and I should like to know all the facts that bear on that.

Mr. Wessel: This is not a discovery motion, Mr. Stryker. What the probation department at the request of the Court—not of the Government in the sense of the executive branch—what the probation department determines is only based upon other documents which may be available to you, and your own investigation. The probation department has made an investigation. It has no facts of its own. It is based upon the man's background which is as accessible to you as it is to the Government. When I say the Government, the probation department.

Mr. Stryker: That isn't correct.

Mr. Wolfram: And that isn't the issue. I think when the Government puts a witness on the stand and has infor-

(21-42)

mation about that witness——

Mr. Fraiman: The probation reports are not available to the Government, Mr. Wolfram. We do not have access to those reports.

The Court: You are taking, in a sense, the private documents of the court and saying because the United States attorney does something, that the court itself, must release these documents.

I am not disposed to give you the probation report. Incidentally, I haven't checked what the regulations, rules or statutes are with respect to them. Have you?

Mr. Fraiman: Probation reports?

The Court: Yes.

Mr. Fraiman: I have been unable to find exactly why they are considered confidential and why the Government does not have access to them.

Mr. Wessel: It is my understanding it is the Court's own rule based upon the probation section, Title 18, and

the Court, itself, in connection with its own probation officer, has made these rules.

Mr. Wolfram: If we are through with that discussion—I don't want to rush you—we have a motion that we must renew technically; that is the motion to suppress evidence

(21-43)

obtained illegally by the Government before the grand jury which found the indictments which Judge Goddard dismissed, and also to suppress leads and clues. There is nothing before your Honor on that issue right now, but as the trial develops there will be.

The Court: Fine.

Mr. Wolfram: May we have the subpoenas returned to us so that we can offer them at the proper time?

The Court: Oh, sure. You want to offer everything that comes over the desk.

Mr. Stryker: Taking, again, highly respectful exception, I will make this last observation in moving out, and that is, that when a man is on trial for his liberty he is entitled to find out whether or not the people testifying against him are liars, and all this talk about competence and this and that and somebody's department has the record or something, all of it goes down the river when it comes to a question of adequately defending an American citizen against perjured testimony.

Mr. Wessel: Let me just say in brief, if your Honor please, in brief response, Mr. Lubben is not on trial here, although Mr. Stryker wants to make him and all the agents and everybody else involved for the Government on trial.

(21-44)

The Court: As the third lawyer in the room I disagree with both previous lawyers, and I will say that Mr. Stryker's

statement, I think, is an overstatement, that there are policies and concerns of the people of this country which are at times——

Mr. Stryker: If you are talking about military matters, I agree.

The Court: No, not even that far—that are at times in conflict with giving complete unlimited access of documents, even to a defendant on trial.

We will call this off for a while.

* * *

(21-45)

JOHN J. REGAN, called as a witness by the Government, being first duly sworn, testified as follows:

* * *

(43)

(Jan. 13, '55 p. m.)

(Discussion in chambers:)

Mr. Stryker: I hold in my hand a copy of the New York World Telegram for January 12, 1955—that is yesterday—and I read this short article:

> "Huge Income Tax Fraud Trial Starts. The Federal Government opened a $850,000 income tax fraud trial here today against three defendants, one a former assistant United States attorney, with a statement that one man pocketed $64,000 in cash from the sale of the magnificent country estate of Mike Jacobs, and never paid a penny tax. Frank Livorsi, 51, an ex-convict, of 15 Bolton Avenue, Atlantic Beach, Long Island, was the man who in 1946 bought the Rumson estate."

I don't know that I have to go on. There it is. Would you see it there?

Mr. Wessel: Right at this point, as soon as your Honor has read it, I should like to make a statement.

The Court: Just a second.

Mr. Stryker: I first offer in evidence the article appearing on page 25 of the New York World Telegram for Wednesday, January 12, 1955, headed "Huge Income Tax Fraud Trial Starts," and referring—although I offer the whole article, specifically to the statement, "Frank (62-1)
Livorsi, 51, an ex-convict," and so on.

Mr. Wessel: I think you just made an offer, and I have a right to make an objection.

Mr. Stryker: Yes.

Mr. Wessel: I object to the offer on several grounds, if your Honor please; on the first ground that I think it would be improper to have in evidence at this trial any evidence to Mr. Livorsi's criminal conviction unless he takes the stand. Secondly, because that does not link in any way to the Government and to the prosecution in this case. It is an act on the part of the newspaper over which the Government has no control.

With regard to that subject, may I state the following: your Honor and I am sure Mr. Stryker is fully familiar with Mr. Lumbard's announced specific policy of following the Bar Association standards with regard to statements to the press. Every one of his assistants and me specifically included among them has been instructed most carefully and most definitely that under no circumstances are we to make any statements of any kind to the press which in any way reveal facts not in evidence before the court.

I have made no such statements. I will not make any such statements.

(62-2)

There are two members of the press apparently in full-time attendance on this trial. At the end of each session they come up—I assume they speak to Mr. Stryker—they certainly speak to me. They ask me to clarify figures. I will state a figure if it was part of an opening statement if it was part of the cross examination of a witness or direct examination.

I give no facts of any kind which are not before the court, and if I have, it certainly has not been intentional.

I have never and never will make reference to Mr. Livorsi's criminal conviction and do not intend to do so, and would censure myself if I did. Therefore I object to the offer.

Mr. Stryker: One moment. I haven't in my motion even intimated that Mr. Wessel is responsible for this himself. I accept gladly his statement and his associate's. I am familiar with Judge Lumbard's policy which I think is excellent. As far as I know his assistants, including those here, have followed it. That isn't the point. The point is that here is an article, circulated widely. It is the evening paper of this part of the country, setting that forth.

Now you know—your Honor knows that if this hap-

(62-3)

pened in London that the most serious consequences would ensue for the newspaper, and for the editor, who might be jailed or imprisoned. I am not interested in that and I know that we haven't such plenary power, although I have done my best in the Bar Association to get legislation through to that effect.

My sole point is that inasmuch as this is a paper of wide circulation in the Southern District, read by almost everyone, that this statement—go ahead, Mr. Wessel, read it. This statement so prejudices the defendants in this case that a fair trial could not ensue, and I therefore move for a mistrial.

Mr. Wessel: May I make one more comment?

The Court: Yes.

Mr. Wessel: Yesterday, your Honor, I bought two separate editions of the Telegram. This article was not in them. This apparently is one edition of the Telegram. I have also looked and each of the agents has looked, working on the case, for other publicity. There has been some in a paper in Long Island which is not part of this district. There has been some in a New Jersey paper which is not part of this district.

Mr. Stryker: All right.

Mr. Wessel: There has been none, so far as I know, except for this one edition, and one of several editions of

(62-4)

the World Telegram, and none that I know of refers to—that is, none in this district refers to his conviction, although I can't say that I have seen everything. This is certainly not prejudicial. I would certainly agree with Mr. Stryker that it calls for instruction to the jury that they are not to read the papers but I don't think it is in any sense prejudicial or grounds for a mistrial.

Mr. Stryker: That would be worse than anything. That invites them to go home and dig up the file or get the husband or wife to go out and get it, and there is no kind of an instruction that can be given on this that I can con-

ceive of that wouldn't exascerbate this ill. I don't think I need to say any more.

The Court: Well, I don't think we have reached a point where a mistrial can be compelled by what a newspaper does. I mean if that ever happens why the evils on one side would be small compared with the evils that could bring. So I am going to deny the motion for a mistrial.

I am going to instruct the jury, not with any specific reference to this article at all, but to tell them generally, and I think I can impress upon them the importance of their not reading the newspaper articles of this case.

(62-5)

Mr. Stryker: Off the record.

(Discussion off the record.)

Mr. Stryker: Your Honor will, I take it,—oh, I respectfully except to your Honor's denial of my motion, and you will take, I imagine, the exhibit, but for the definite limited purpose of the record here, not, of course, for the jury.

The Court: I think it should be marked for identification so that we will have it in the record of the case.

Mr. Stryker: All right. Will you mark that, then?

The Court: But not for the jury.

Mr. Stryker: For identification.

Mr. Wessel: I think the first section which indicates what edition, might also properly be a part of it.

Mr. Stryker: Does it say? I don't know.

The Court: I never can tell. I have looked at those editions and I never can tell.

Mr. Fraiman: This is in the All Sports Final Edition.

The Court: This is a very late paper.

Mr. Fraiman: The latest.

(62-6)

Mr. Tilzer: I think that is the latest.

The Court: That, incidentally, is important because ordinarily our jurors would be out of town before that paper hits the streets.

Well, that is speculating, and I don't intend to discuss that article at all.

I will just talk to them generally.

(62-7)

AFTERNOON SESSION

(Discussion in chambers not transcribed.)

(Newspaper clipping marked Defendants' Exhibit A for identification.)

(Jury present—2:15 p. m.)

The Court: Mr. Foreman, and ladies and gentlemen, I perhaps should have told you this yesterday. From time to time there may be some reference in the newspapers to this case. That happens fairly regularly with respect to cases here, and it is most important that you do not read the articles about this case.

Now there are many million people in the metropolitan area and they read the newspapers because that is all they know about what goes on, but there are 14 people in the Southern District of New York who should not and who I will ask not to read the newspapers about this case.

Now, the reason is this: Newspapers are written, not for jurors. They are written for the general public who have interests, not only in what the evidence is, and what

it proves, but what is said. If I said some outlandish thing on the bench, that might be news, but it wouldn't be proof

(62)

of anybody's guilt or innocence in any respect whatsoever, and it might be highly prejudicial to this jury, passing upon the guilt or innocence of three men.

So your job is so important, and it is so important—as a matter of fact, everything we do, these long arguments that take place outside of your presence, all of the arrangement of the court, these various little steps that you will appreciate, perhaps, as you serve a longer period of time, are done for the sole purpose of keeping your reception of this case limited to the evidence that is properly before you.

Now, that doesn't mean that anything is being deliberately withheld from you that would help you, but it does mean that over hundreds of years, people who work in the courts have learned that you can confuse the evidence by bringing to the jury's attention a whole lot of other things.

For that reason I am going to ask you not to read the newspapers. They serve everybody in this district except you. They will not help you at all.

So much in the administration of justice depends upon the good faith of the persons who perform duties with respect to it.

(63)

There is no way, short of locking up the jury, as is sometimes done, and which I hope I never have to do, of prohibiting you from looking at those newspapers, if you want, just as there is no way of keeping me from misbehaving in the performance of my duty in many ways, if I want. But it comes down to the oath which you took as jurors, the same as the oath which I took when I was

appointed a judge, and that is that you will in good faith carry out the duties that you have undertaken, and one of the things is stay away from newspapers.

Have somebody in your family cut out the clippings, if there should be any, and there may not be any of any great extent at all. Have somebody in your family cut out the clippings, but don't read them until this case is over.

All right.

And if by any chance any of you have seen it—I think there have been very few; I doubt if there are six inches of coverage—if you have seen anything in them at all, disregard it, because, with the greatest respect to the attempts they make to be accurate, the only thing that we are sure is accurate as we can make it is the evidence that we hear here, so disregard everything you have read.

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JOHN J. REGAN, resumed.

* * *

(65)

DAVID GEORGE LUBBEN, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Wessel:

Q. Where is your home, Mr. Lubben? A. In San Juan, Puerto Rico.

Q. And what is your business? A. I sell school and church supplies.

Q. Would you tell the Court and the jury, Mr. Lubben, some of your background, by way of education, and where you were born? A. I was born in the City of Chicago, and

I went to Our Lady of Angels school, and Our Lady of Sorrows first, and then Our Lady of Angels, as grammar school, and went one year to Crane Technical High School.

Q. Would you also state your business background generally, please? A. Well, sir, I have always been a salesman, and I worked for a number of companies, primarily in the food field—candies, crackers and cookies, sir. And I worked for one of the largest chains in the United States. I was merchandising manager of crackers and cookies.

Q. What was the name of that company? A. The Kroger Company of Cincinnati.

Q. During what period of time did you work for them?

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A. I believe it was in '41 and '42, sir.

Q. Would you state for the jury, sir, the companies with which you were associated after the Kroger Company, and the periods of time during which you were associated with those companies? A. For about one year, sir, in the year 1942, part of 1942 and maybe '43, I was associated with the Burry Biscuit Company in Elizabeth, New Jersey, and then a company was formed, in fact I believe it had already been in existence; the name was Eatsum Food Products, and I was in charge—had an arrangement whereby we packaged candies, in smaller packages, and sold them, and I was with that company, sir, until some time in 1944, I believe it was about April, when I made an arrangement and I took over, I bought, the Eatsum Food Products Company from the Burry Biscuit Company.

I operated that company till about April or May of 1945. It was a proprietorship, sole ownership. And then, sir, some time I believe it was in April or May, it became

a partnership, and I operated Eatsum Food Products as a partnership until March 8th or 9th of 1946, at which time, sir, I was no longer in the partnership and I went with another company, the General Confections, Inc. That was from 1946, some time in March 1946, until March or April

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of 1946 when that company went into receivership.

Q. These companies with which you were associated from about 1942 until 1948, were they in one general line of business? A. Yes, sir. The main business, sir, was the candy business, sir. We bought and sold and manufactured candy.

Q. And you were familiar at that time with price controls and ration controls and so forth? A. Yes, sir.

Q. Would you please describe to the jury the general market conditions with regard to your type of food products during that period 1942 until about 1946? A. Well, the market conditions were such that no matter how much you had, you never had enough, and the orders were always greatly in excess of available supplies.

Q. Were there any price controls or ration controls in effect with regard to sugar? A. Yes, sir. Yes, there was rationing on sugar, and in order—in order to have a sugar certificate, I mean a ration of sugar, you had to be in business prior to a certain date, and if you were not in business prior to that date you had no case history, if I remember the words correctly that they used, and if you did not have

(90)

that it was very difficult to get sugar.

Q. Would it be fair to state that sugar was in very short supply during that period? A. Yes, sir. It was rationed, sir.

Q. Sometime in 1945 you said you formed a partnership; is that correct? A. Yes, sir.

Q. Would you name the person with whom you formed that partnership? A. Mr. William Giglio and Mr. Livorsi and their wives Mr. Roy Hankermeyer, Mr. Ronald Stone and myself.

Q. Was there anyone else in the partnership? A. I don't recall anyone else, sir.

Q. If I mentioned the name, Frank Loperfido, would that refresh your recollection any? A. Yes. I do not recall that he was a partner or not. Yes, he was a partner, sir.

Q. Sometime before the partnership was formed did you commence negotiations to have a partnership created? A. Beg pardon, sir.

Q. At some time before the partnership was actually formed did you commence negotiations for a partnership to be created? A. Yes, negotiations went forward.

Q. Describe what those negotiations were, and with

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whom? A. As I said before, it was very difficult to get sugar, but there were certain regulations that you could make applications and so forth, and for hardships and otherwise some companies were getting sugar allotments from the State, from the Government; and I hadn't been successful, I had made a great many applications and at considerable expense, and nothing was forthcoming.

Early in 1945, I believe, through an advertisement in the newspaper or word-of-mouth or something, we learned of a bottling plant being for sale in the Bronx, and they wanted to sell it. Well, if we could have purchased that bottling plant and junked the machinery, we probably could have been able to have the quota of their sugar transferred to

us, and that was a fairly common practice during the war years. But I asked Mr. Stone, who was in my employ, to follow through on that, and the people that came down, they had a lot of machinery but——

Mr. Stryker: I object to any conversations not in the presence of a defendant.

Mr. Wessel: This is only offered for the purpose of showing how it came into the partnership and not for the truth of any matters with respect to the defendant Stone.

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Mr. Stryker: I object to it.

Mr. Wessel: This is all preliminary to the negotiations commenced with the defendant regarding the partnership. The preliminaries are not very important, and if counsel wishes it excluded——

The Court: Are you going to withdraw it?

Mr. Wessel: I will withdraw the question in so far as it relates to discussions with persons other than Mr. Livorsi, Louis Roth, and Mr. Stone.

Q. Do I make myself clear, Mr. Lubben? A. Yes, sir. Well, I don't know how to say it, but Mr. Stone came to me and told me——

Mr. Stryker: There again I object.

A. (Continuing)—as a result of the conversation——

Mr. Stryker: Just a moment. I object to any conversations except where the defendants were present.

The Court: If you had a conversation, tell us with whom, but do not say what it was.

The Witness: As a result of the conversation with Mr. Stone, Mr. Roth came to my office and Mr. Roth told me he had heard a great deal about me and my business and that he was associated with the Doughnut Corporation of America, and that they had interests in a jelly plant and a dress plant, and a number of other factories, a flour plant, and they (93)
were considering going into the candy business, and they had heard about me and were interested in my business.

I told Mr. Roth that I did not have any sugar quota and it was necessary that I buy my sugar in the black market, although I was using a tremendous amount of dextrose which did not require ration certificates, but I had to pay over the ceiling for it, and that was still black market.

Mr. Roth told me the jelly company which was associated with them and part of their company had just received ration certificates of 14 million pounds of sugar and that he was sure that with the connections they had they could create a hardship for me and get me a sugar quota. He asked me if he could bring an accountant into my place and go over the books, and I had no objection, and I believe he brought a man named Mr. Hausman in, and they went over my books and checked my records and decided they would like to buy a fifty per cent interest in the business. I believe the time they decided they wanted to buy it I was introduced to a Mr. Giglio, who came to my office, and then later I went to the Doughnut Corporation of America office, I

believe it was on the seventeenth or the eighteenth floor of the Equitable Life Building, and I went

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through those offices and I was introduced by Mr. Roth to a number of officials. I can remember those offices, because they were up on the Seventh Avenue side where these executives were; and he put his hand around me and said, I want you to meet Dave Lubben, and he——

Mr. Stryker: I did not get that.

Mr. Wessel: I object to this.

Mr. Stryker: Unless it is a conversation with somebody else——

Mr. Wessel: I object to statements addressed by counsel to the witness. They should be directed to the Court.

Mr. Stryker: I address them to the Court. I object to it unless the statement is made in the presence of one of the defendants by Roth.

The Court: Did you have a conversation with any of the defendants then?

The Witness: No, sir; not then.

The Court: You had a conversation, and what happened then?

The Witness: As a result of the conversation I was introduced to a number of people in the Doughnut Corporation of America, and I was becoming part of the organization——

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Mr. Stryker: I object to that in view of your Honor's ruling.

The Court: Yes, strike it out.

Mr. Stryker: I ask your Honor to instruct the jury to disregard it.

The Court: Yes.

Q. Were these conversations in the presence of Mr. Roth? A. Yes, they were.

Mr. Wessel: I except to your Honor's ruling, on the ground they were in the presence of one of the conspirators.

The Court: All right, I will take it subject to connection then.

Q. Would you please continue? A. Also on the same floor there is an office of a Mr. Max Goldhill, and Mr. Max Goldhill is an attorney. The discussion was in there as to the forming of the partnership, papers and so forth. When the time came to sign the papers I was only selling a fifty percent interest in my business, and Mr. Roth told me that on the other side Mr. Giglio had Mr. Livorsi and his wife and Mr. Loperfido, who was his cousin, and Mr. Livorsi's wife, and he said it would be much better if I divided up my fifty per cent with other people.

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So I arranged to take in Mr. Hankermeyer, who is my cousin, and Mr. Stone, who had worked for me. I believe Mr. Hankermeyer gave me some money, and Mr. Stone, but I believe the check Mr. Stone gave me in payment of his part came back, and I don't know whether it was made good, but I always considered my fifty per cent was my fifty per cent, and that was how the partnership was formed.

Mr. Stryker: I move to strike out the statement of what he considered, as a conclusion, and not evidence.

Mr. Wessel: May I inquire along that line for a moment, if your Honor please?

The Court: All right.

Q. With regard to your fifty per cent, Mr. Lubben, are you suggesting the persons who shared that were dummies? A. Am I what, sir?

Mr. Stryker: I object to the question as leading, and as seeking a different way to get the operation of the witness's mind.

The Court: I will let it stand for whatever it is worth.

Q. Will you answer the question?

The Court: That is, I will overrule the objection.

Mr. Stryker: Exception.

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A. Sir? Yes, sir, they were—I owned my own fifty per cent, sir, regardless of what the paper said, on the partnership agreement, and when the papers were signed in Mr. Max Goldhill's office Mr. Livorsi was present, Mr. Giglio was present, Mr. Loperfido was present, I believe Mr. Lawn was present, but with me was Mr. Hankermeyer and Mr. Stone; and Mr. Roth was present, and so was Mr. Goldhill, and some other people, but the wives of Mr. Livorsi—Mr. Livorsi's wife and Mr. Giglio's wife were not present. The papers were signed later by those people.

Q. When for the first time did you meet Mr. Livorsi? A. I believe the first time that I met Mr. Livorsi was down

at 19 Rector Street after we had moved down there. It may have been that he came to 1841, but I can't remember exactly. But I do remember at 19 Rector Street. I mean that is to the best of my recollection.

Mr. Wessel: I ask that this document be given the next exhibit number for identification.

(Marked Government's Exhibit 21 for identification.)

The Witness: Oh, I beg your pardon, sir. I met Mr. Livorsi for the first time at the office of Max (98)
Goldhill, when we signed the papers.

Q. Had you prior to that time had any discussions with Mr. Giglio or Mr. Roth with regard to Mr. Livorsi being a partner of yours? A. No. Mr. Roth I believe I had discussion with, and he said Mr. Giglio wanted his fifty per cent divided up between these people.

Q. I show you, sir, Government's Exhibit 21 for identification (handing), and ask you if you can tell me what that is, and whether you can identify your signature? A. Yes, sir. This is my signature, and it is a photostatic copy of the notice of formation of a limited partnership of Eatsum Food Products.

Mr. Wessel: I offer it in evidence.

Mr. Stryker: I have no objection.

(Government's Exhibit 21 for identification received in evidence.)

Mr. Wessel: Ladies and gentlemen of the jury, Governmnet's Exhibit 21 is a duly certified copy of

a certificate of partnership formation on file in the County Clerk's Office in the Supreme Court, New York County. It reflects that there were two general partners in the Eatsum Food Products Company, Ltd., David G. Lubben and William Giglio. The following persons were listed as limited partners: Ronald Stone, Roy Hankermeyer, Marghe-

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rita Giglio, Dorina Livorsi, Frank Loperfido. The partnership agreement is dated June 12, 1945.

(Hands exhibit to jury.)

May I proceed, your Honor, while the jury is examining the document?

The Court: Yes.

Q. This conversation you have referred to, Mr. Lubben, in which you said something about Mr. Roth and other persons would be in on Mr. Giglio's side of the transaction —can you give any more detail with regard to that transaction, aside from the date and who were present? Anything else, any other details that you recall? A. Well, it took place, sir, shortly before the signing of that paper. I can't recall who else was present there at the time, sir.

Q. Can you recall where it took place? A. Yes, it took place at my office at 1841 Broadway.

Q. Is that Columbus Circle in New York? A. Yes, sir.

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Q. Can you recall any more detail to the conversation than you have already stated? A. Well, Mr. Roth told me, I mean, as a result of a conversation—I don't know how to say it—well, the——

Q. Anything Mr. Roth told you is all right, Mr. Lubben. A. Okay, sir. Mr. Roth told me that Mr. Giglio wanted to have his investment spread over these people for tax reasons, and that I would be very smart if I did the same, and put it in the name of certain people. I believe Mr. Roth called them nominees.

And so I arranged to have Mr. Stone, who was in my employ at that time, and Mr. Hankermeyer be on my side of the partnership.

Q. Do you recall how much money, if any, Mr. Hankermeyer actually put up? A. I believe it was $10,000, sir.

Q. Now, I take it thereafter the company, Eatsum Food Products Co., Ltd., commenced; is that correct, sir? A. Yes, sir.

Q. Can you describe in brief detail, Mr. Lubben, how your books were kept in the Eatsum Food Company proprietorship which you operated before the partnership? A. Will you repeat the question, sir.

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Mr. Wessel: I will rephrase the question.

Q. Is it correct, sir, that the company, before it became a partnership with Mr. Giglio and others, had certain black market transactions? A. Yes, sir, it did.

Q. Will you describe how and whether those black market transactions were handled on the books of the company? A. Well, in the case——

Mr. Stryker: Only for clarification now: Are you referring to the proprietorship or the partnership?

Mr. Wessel: I am referring to the proprietorship before the partnership commenced.

Mr. Stryker: All right.

A. In the case of where a manufacturer or a supplier would want to be paid in cash and by check—in other words, he would give us an invoice for one price, but he would want something extra in cash—we would draw a check for the invoice price, and then we would also draw a check for the total of the cash that we had to give him. Then we would cash the cash check at the bank on the corner, and then give that to the supplier, and then we would make notations on our invoices that the price of the overage, say, would be

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10 cents a pound, and we would draw a line, and that would bring it out, for an example, to 20 cents a pound where maybe the invoice would say it was only 10 cents a pound. But on our books we reflected it as the total and the true cost, regardless of how it was paid.

In the case of purchases of a hundred per cent cash, where we had no invoices, why, we would make a disbursement slip, which was printed, and state what it was for, so forth, and information, why the money was drawn, and go and draw a check, and then cash it, and then give it to the person that got the money. And that was our practice, sir.

Q. Was there any change in that practice after the partnership of Mr. Giglio and others commenced to operate? A. Well, sir, there is always—the papers of the partnership weren't signed, I believe, till sometime in June, but in reality the partnership had started to function sometime prior to that because profits of that period were picked

up by the partnership, although we hadn't signed the papers, nor had I been paid.

Q. What period are you referring to when you say "that period"? A. Well, probably April or May of 1945.

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Mr. Wessel: Just a minute, sir.

I ask that these documents be marked with the next exhibit for identification number, please.

(Marked Government's Exhibits 22 and 23 for identification.)

By Mr. Wessel:

Q. Before I show you these documents, Mr. Lubben, can you point out, in the presence of the Court and jury, Mr. Giglio, Mr. Livorsi and Mr. Lawn? A. Yes, sir. Mr. Giglio is with the dark hair on the left; Mr. Lawn is the gentleman in the brown suit, and Mr. Livorsi is sitting directly in back of him.

Mr. Wessel: May the record show that the witness has identified the three defendants.

Q. I show you, Mr. Lubben, Government's Exhibits 22 and 23 for identification and ask you, first, if you can tell me what those documents are? A. They are copies of a financial statement by my certified public accountant, Bernard Bercu & Company.

Q. Are they copies or originals, sir? A. These are the originals, sir.

Q. Well, now, first, examining those, sir, do those re-

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fresh your recollection as to when the partnership actually

started to operate, without regard to the date of signing the partnership certificate? A. June 1st, sir, is when the partnership officially started.

Q. Now, you made reference a while ago to a splitting up of profits for some period during which the partnership operated before the official commencement of operations.

Do you recall what that period was now after refreshing your recollection, if you can, from those documents? A. Well, I would say that the negotiations started, I believe, sometime in April of 1945. In May, Mr. Roth went over our books, or he had gone over them before, and he saw how we handled our black market transactions, and Mr. Roth told me that that was the wrong way to handle them.

Q. I don't think you understood my question, sir. I want to know whether, with reference to those exhibits before you, which are the Bercu financial statements, those refresh your recollection in any way as to the period during which the partnership actually operated before the official

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commencement of operations, and I specifically want to refer you to—— A. It says it started June 1st.

Q. —I want to refer you, sir, to certain portions of these balance sheets which reflect a share of profit for a certain period.

Now, I ask you, does that refresh your recollection in any way as to when the partnership actually commenced operations without regard to the date on the partnership certificate? A. Sir, that is what I was saying, that the paper says June 1st, but it actually started before, the month of May, during that time, according to the certified public accountant's statement. The partnership, during the month

of May, I mean, during the month of May preceding it, made a profit of more than $26,000.

Mr. Stryker: Don't you think—just a moment, please. No objection to the witness refreshing his recollection. If you are going to have any of the contents I think there should be an offer in evidence.

Mr. Wessel: I think counsel is quite right.

By Mr. Wessel:

Q. Mr. Lubben, I ask you whether you received those (106) two exhibits in the regular and ordinary course of business of the Eatsum Food Products Co., Ltd.? A. Yes, sir, I did.

Q. Were they prepared by the certified public accountant hired by that company? A. Yes, sir, they were.

Q. And was it a part of the business of the Eatsum Food Products Co. Ltd. to have such certified financial statements? A. You mean Eatsum Food partnership?

Q. Partnership. A. Yes, it was a part, yes, to have those statements.

Mr. Wessel: I offer them in evidence.

Mr. Stryker: Would you be good enough to tell me——

Mr. Wessel: I withdraw my offer, if your Honor please.

Mr. Stryker: All right.

By Mr. Wessel:

Q. Now, sir, you referred to the method of keeping records of Eatsum as a proprietorship. Would you state

whether there was a change after the partnership commenced to operate? A. Yes, sir, I would.

Q. Would you describe that change and how it came

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about? A. Well, Mr. Roth was the accountant for Mr. Giglio, and he stated that it was not the proper way to keep records of black market transactions; that neither he nor Mr. Giglio wanted to have the records kept in this manner here, the manner I had been doing, and that we should have a cash box whereby we should sell a certain amount of merchandise for cash, and that the sales of this merchandise for cash would be put in this box, and then when we had to make black market transactions, that we should pay for the black market transactions from this box, and that was the proper way to do it, because in the other way you may involve other people that you had given this cash to.

Such a box was started, sir.

Q. And that box related to Eatsum's candy business? A. In the beginning, sir, yes, sir, we had a box, and some cash sales were made in this candy, for this candy box, but our type of customers were such that it was impossible to sell anywhere near enough candy for cash to justify the amount of cash that we were paying out for sugar and so forth.

Q. You referred to a conversation with Mr. Roth.

Do you recall any conversations on the subject of setting

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up a cash box at which Mr. Giglio or Mr. Lawn or Mr. Livorsi were present? A. Sir, I had a conversation with Mr. Giglio, and he told me that Mr. Roth was the one that took care of his financial papers, and that I should follow Mr. Roth's suggestions and his recommendations because

Mr. Roth had a great deal of experience, and that was the way he wanted the records kept.

I recall—that is all, sir.

As far as for Mr. Lawn, sir, Mr. Lawn was not present at that conversation, nor was Mr. Livorsi.

Q. Do you recall any other conversations at which Mr. Giglio or Mr. Lawn or Mr. Livorsi were present, in which any reference was made to this kind of cash box transaction? A. Only the corn box, sir.

Q. I am referring now to the cash box you referred to in your testimony so far? A. Not to the candy box, sir.

Q. Would it refresh your recollection in any way if I suggested a conversation in which reference was made to a previous company of Mr. Giglio's? A. Oh, yes, sir.

Q. Would you now state what you recall, sir? A.

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Well—but I think the reference to the previous company, sir, was in the method—was where they were drawing checks with false invoices.

Mr. Stryker: I move to strike it out. He is merely expressing what he thinks, an opinion.

Mr. Wessel: I join in the motion.

Mr. Stryker: Hearsay.

Mr. Wessel: I join in the motion.

Mr. Stryker: And I hope you join in asking his Honor to instruct the jury to disregard it.

The Court: All right, I so instruct the jury.

Mr. Wessel: I ask that this little black book be marked with the next exhibit number for identification.

The Court: I think we will take a five-minute recess now. I am sorry I forgot about it at 3 o'clock. Don't discuss the case.

(Short recess.)

(Jury present.)

(Marked Government's Exhibit 24 for identification.)

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By Mr. Wessel:

Q. Mr. Lubben, just before the recess we were discussing the candy cash box. Did you keep any records in connection with that cash box? A. Yes, sir. I started to keep them, and I think that other people later on kept them; a number of people kept them.

Q. I show you, sir, Government's Exhibit 24 for identification, and ask you if you can tell me what that is? A. Well, this is a book on the candy cash box, sir. It shows the money received and the money paid out, and to whom it was paid and what it was paid for.

Q. And was that record kept by you, sir? A. Well, sir, most of this writing is mine, but there is some of it here, sir, that is not my writing.

Q. Can you identify whose it is? A. Well, sir, it would be only a guess, but it appears to be the writing of, a few places, Frank Loperfido.

Q. But you can't be sure of that? A. I cannot be sure, no, sir.

Q. Who is Frank Loperfido, sir? A. He was one of the Limited partners, sir.

Q. Do you know whether or not he had any relation-

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ship to William Giglio? A. I was told he was a cousin, sir.

Q. Who told you that? A. Mr. Giglio, Mr. Roth and Mr. Loperfido.

Q. I show you, sir, the next-to-the-last lined page of this little black book and ask you if you can identify the handwriting on that page? A. Yes, sir. That is my handwriting, sir.

Q. And were those entries made by you at or about the time of the event which is set forth on that page? A. Yes, sir, they were.

Q. Did you keep that record, and particularly that page, as a part of the regular and ordinary course of Eatsum Food Products Co., Ltd. partnership's business? A. Well, you wouldn't call it the proper record, sir. It was a record that had to do with the situation at the moment, of this particular transaction.

Q. If I understand you, that was not part of the regular books of the company? A. No, sir. This wasn't what you would call a proper legal transaction.

Mr. Stryker: I move to strike that out. I don't think we need his legal opinion.

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Mr. Wessel: I think it is very relevant your Honor——

Mr. Stryker: I move to strike it out.

Mr. Wessel: —to the question of whether or not this book will ultimately be admissible in evidence as a document kept in the regular course of business.

The Witness: Yes, sir, it was kept in the regular course——

Mr. Stryker: I move to strike that out. You mumbled it. I didn't hear it.

(Answer read.)

The Court: You want to be stricken out the word "legal," expressing a legal view?

Mr. Stryker: He expressed a legal opinion about this. I don't know the exact words. Whatever it was, I move to strike it out.

The Court: Strike out that little phrase.

Mr. Stryker: And the last comment which came very fast, I didn't quite hear. I think he was ready to say something. I am not sure what he said.

The Court: Is that the one you just read back? Read it again.

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(Last answer reread.)

Mr. Stryker: All right, I don't object to that.

The Court: All right.

The Witness: (Continuing) —of business.

Mr. Wessel: You do or you do not object?

The Court: He does not.

Mr. Stryker: I do not.

By Mr. Wessel:

Q. I want to refer to certain specific items, sir, and ask you if they are in your handwriting.

Mr. Stryker: Mr. Wessel, could I ask you if you would make it a little louder. You are standing, talking up by the witness. I am sorry, it is hard to hear back here.

Q. Next to the date June 18 appears a comment——

Mr. Stryker: One moment. I will interrupt right there. Let's have the book in evidence or not have its contents; one or the other.

The Court: I think Mr. Wessel is trying to establish facts which he thinks will lay a foundation for the book.

Mr. Wessel: I am not reading the book in evidence and have not done so or will not.

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Mr. Stryker: I thought you were referring to something from it.

The Court: He is just referring to certain pages and lines, not asking the content; asking how those particular pages and lines got the way they are.

Mr. Stryker: All right, I won't object to that.

By Mr. Wessel:

Q. On the second page, the second lined page of the book, next to the date June 18, which is the second item from the bottom of the page, appears the notation, and I ask you whether that is in your handwriting? A. Yes, sir, that is in my handwriting.

Q. Now, on the third page, next to the date June 11, appears another item, it is item No. 2, and I ask you if that is in your handwriting? A. Yes, sir, that is in my handwriting; this one here, the second one.

Q. The second item, yes, sir. A. Yes, sir.

Q. Next to the date June 13, June 14 and June 15—and I am referring to the first item next to June 15—are

three items. I ask you whether the ink and not the pencil marks next to those three dates are in your handwriting? A. June 13 is in my handwriting. June 14 is in my hand-

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writing. And June 15 is in my handwriting, sir.

Q. On page 5, under the heading "Paid Out," next to June 21, is a penciled notation. I ask you if that is in your handwriting? A. No, sir, that is not in my handwriting.

Q. And next to June 26 appear two items. I ask you whether the second of those is in your handwriting? A. No, sir, it is not in my handwriting.

Q. Can you recognize the handwriting for this last item I have referred to, next to June 26? A. Sir, it appears to be the writing of Frank Loperfido.

Q. You can't be sure of that, though, sir? A. Well, no, sir, I can't.

Q. Now, subsequent to this, sir, did there come a time when a second cash box was employed by the Eatsum Food Products Co., Ltd. partnership? A. Yes, sir, there did.

Q. Would you describe the circumstances as to how that second cash box came into operation. A. Well, sir, we will refer to that as the corn box.

Mr. Wessel: Counsel has requested me to see

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if I can get the date when that commenced.

By Mr. Wessel:

Q. Before you answer the question, sir, can you tell me when, approximately, or as clearly and as best you can recall it, this second cash box came into operation? A. To

the best of my recollection, sir, it came into existence in August, July or August of 1945.

Q. Would you continue with your answer, sir, please. A. Yes, sir. In addition to sugar and dextrose, which is corn sugar, corn syrup was also in very short supply. While it was not a government rationed item, as was sugar, it was rationed by the manufacturer. By that I mean you were not allowed to purchase it, or they would not sell it to you unless you had a history of purchases prior to a certain date.

Eatsum Food Products Co. had no such record, and as a result enjoyed no quota with any corn syrup manufacturer.

A Major Ryan came to me—Major Ryan was known to me from when I worked at Kroger—and he told me that it was possible to get corn syrup——

Mr. Stryker: One moment. Just a minute.

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By Mr. Wessel:

Q. Mr. Lubben, if you could only answer the question in so far as possible by saying "As a result of a conversation with Major Ryan," without going into the conversation—— A. All right, sir.

Q. —unless one of the defendants, Mr. Giglio, Mr. Livorsi, Mr. Lawn or Mr. Roth was present during the conversation.

Mr. Stryker: I move to strike out everything he said about Major Ryan, and I ask your Honor to caution the witness not to transgress your ruling again, that is, to present conversations not in the presence of the defendants.

The Court: All right. We got up to a point where Major Ryan had a conversation with you. Then you tell us after that.

A. As a result of that conversation, sir, I went to Mr. Giglio, in his office, and I introduced him to Mr. Ryan, and I told Mr. Giglio what the subject of the conversation was. Well, I told Mr. Giglio——

Q. If I may, just to explain the Court's ruling to the witness, you can testify, Mr. Lubben, if you told Mr. Giglio what Major Ryan told you, provided you testify only to what you said to Mr. Giglio with regard to that conversa-

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tion, sir. A. Sir, I told him of the proposition that was presented to me by Major Ryan—Major Ryan was there with Mr. Giglio—and how we could go into the West, and the corn syrup people were not getting any corn because the farmer or the elevator had plenty of it but they wouldn't release it until someone paid them a premium or a black market premium for it, and that if we would pay these people this premium they would release the corn to the corn refinery, and they would have it, they would then grind it and we would get corn syrup.

Mr. Gigilo liked the proposition very much and stated——

Mr. Stryker: I move to strike that out.

The Court: All right.

By Mr. Wessel:

Q. What did Mr. Giglio say?

Mr. Wessel: I join in your motion.

A. Mr. Giglio said it sounded very good and he would check it with Howard Lawn and see what Howard thought about it, and then I told Mr. Giglio, or Major Ryan told us both, that, naturally, we would have to find a corn refinery to grind it, and Major Ryan, in the presence of Mr. Giglio and myself, said he thought he could get Penick & Ford

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to grind the corn, and I went to Penick & Ford with Mr. Ryan, and I spoke to a Mr. David O'Connor and a Mr.——

Q. Don't refer to the conversation with Mr. O'Connor unless it was in the presence of one of the defendants. A. I spoke to some of the officials over there, and as a result of the conversation they agreed to——

Mr. Stryker: Wait a minute. Who is "they"? Clear that up.

Mr. Wessel: No.

Mr. Stryker: Well, I will object to it. I don't know who "they" is. He is talking about someone other than the defendants; that is all.

Mr. Wessel: I think counsel will have a chance to cross examine on all these areas.

Mr. Stryker: I don't want this man to put in hearsay if I can help it.

Mr. Wessel: It is perfectly clear who the "they" are. It is Penick & Ford, I am quite sure.

Mr. Stryker: It is not clear to me.

Mr. Wessel: I think it is improper to be interrupting the witness because it makes it very difficult for him to tell the story in a clear fashion.

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Mr. Stryker: Without a clarification of who "they" were, I object to it as hearsay by third parties.

The Court: May we have the last few words of the witness' answer read back?

(Record read.)

The Court: What counsel is afraid of, if you say "they agreed" to something, that is the same as telling us what the conversation was, you see, and the defendants were not present.

Mr. Wessel: If I may state, if some kind of an agreement or contract was formed, and that is what the witness is testifying to, that is not hearsay at all, of course.

Mr. Stryker: Unless my clients had something to do with it. If they did, let him say so.

Mr. Wessel: It is a fact, your Honor, without regard to whether his clients had anything to do with it or not. An agreement is a fact.

Mr. Stryker: It is a fact that is not relevant.

The Court: After you had the conversation at Penick & Ford, did something else happen?

The Witness: As a result of the conversation,

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sir, I went back to Mr. Giglio, and I told Mr. Giglio that Penick & Ford agreed to grind the corn for us, and for every bushel of corn that we supplied them, they would furnish, I believe, 16 pounds of corn syrup from that bushel of corn, which they would sell to us at the regular ceiling price, and I told that to Mr. Giglio, and, if my memory serves me cor-

rectly, Mr. Lawn was present there at the time we discussed this; and I told them that this merchandise could then be sold as pancake syrup by adding a small amount of molasses to it, and it could be sold as pancake syrup at a much higher ceiling price. There was a ceiling price at the time that was pretty high.

So Mr. Giglio agreed that we would go ahead with it, on this deal.

A check was drawn. Major Ryan went to the West, and a check was drawn for—I don't recall the initial amount of money, but it was drawn to cash, and that money was used to start the corn syrup deal rolling, and they paid premiums to these farmers.

Mr. Wessel: I think this might be a good time to break, if your Honor please. It is two minutes to four.

The Court: All right, we will stop two minutes (122) early today. Be back at 10:15 tomorrow morning.

Don't discuss the case. Goodnight.

(Adjourned to January 14, 1955, at 10:15 a.m.)

(122a)

New York, N.Y., January 14, 1955.
10:15 o'clock a.m.

Trial resumed.

DAVID GEORGE LUBBEN, resumed.

Mr. Stryker: May I bother your Honor for a moment, with Mr. Wessel?

The Court: Yes. Come on up.

(Discussion at the bench not recorded.)

The Court: All right, Mr. Wessel, you can go ahead.

Direct Examination by Mr. Wessel (Continued):

Q. Mr. Lubben, if I may, I would like to refer to a few portions of your testimony yesterday. At page 93 of the transcript, reference was made to a conversation with Mr. Roth, in which the Doughnut Corporation of America was involved.

Did you later find out whether or not that company had any interest in Eatsum Food Products Co., Ltd.? A. Well, (123)
sir, whether the Doughnut Corporation of America had any interest with Mr. Giglio, I don't know, but I know that—I don't believe they did, sir.

Mr. Stryker: I move to strike it out.

Mr. Wessel: Let me rephrase it. I join in the motion.

The Court: All right.

By Mr. Wessel:

Q. Let me rephrase my question, Mr. Lubben.

Did Doughnut Corporation of America ever have any interest in Eatsum Food Products Co., so far as you as a partner knew? A. No, sir, I did not—they did not.

Q. Sir, at page 90 of the transcript you made reference to sugar rationing. Do you know at what time that rationing control on sugar went off? A. I believe, sir, sometime in 1947.

Q. Can you place it any more precisely in 1947? A. No, sir, I cannot.

Q. At page 94 of the transcript, sir, you made reference to your first meeting with Giglio, and you stated as follows, and this is a part of your answer:

> "I believe the time they decided they wanted to
>
> (124)
>
> buy it I was introduced to a Mr. Giglio who came to my office and then later I went to the Doughnut Corporation of America office."

and the answer goes on.

I ask you, sir, if you can give me any more precisely who else was present at the time you were introduced for the first time to Mr. Giglio? A. Mr. Roth, sir.

Q. Anyone else? A. Well, there may have been some people in my office, sir. I believe Mr. Hankermeyer, but I don't recall, and probably Mr. Stone, because Mr. Stone was the man that brought Mr. Roth to my office in the first place.

> Mr. Stryker: Pardon me, just a moment. I move to strike it out. We are not dealing here with probabilities. We are dealing with the witness' recollection.
>
> The Court: I will let it stand.
>
> Mr. Stryker: Will you strike the answer out?
>
> The Court: No, I will let it stand, Mr. Stryker, for what it is worth.

By Mr. Wessel:

Q. Where is Mr. Hankermeyer now, Mr. Lubben? A. He is dead, sir.

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Q. Can you state, as clearly as you can now recall it, what was said and by whom on that occasion, when you first met Mr. Giglio? A. Well, prior to that, sir, Mr. Roth had been to my office and had examined my books, and I was introduced to Mr. Giglio by Mr. Roth, who told me he was the head of the organization.

Q. What organization is that, sir? A. Well, just the organization—and that Mr. Roth had made very favorable comments upon the earnings of my company, and that they were sure, he was sure, Mr. Giglio was sure, that with the connections that they had, that they would be able to get me a sugar quota, so I wouldn't have to buy sugar in the black market any more, and they had—well, they could be of great help to me in many ways in buying and so forth, and that I could just confine my activities to merchandising, and it would be a good combination and a good partnership.

So I agreed to sell a 50 per cent interest to him based on the book value, on the books, what the value of the company was on the books.

Q. Have you now exhausted your recollection of what transpired at this first meeting with Mr. Giglio and Mr.

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Roth present? A. He told me Mr. Roth——

Mr. Stryker: Just a moment. If your Honor please, I am going to object unless the date is fixed.

The Court: I will overrule the objection.

A. He told me that Mr. Roth was—I should—Mr. Roth was the man; that he made very favorable comments upon my business and he was satisfied it would be a good partnership, sir, and that is about all that I can remember.

Q. If I suggested to you, sir, any possible jelly business, or jelly sales, on the part of Eatsum, would that refresh your recollection in any way? A. Yes, sir. Mr. Giglio told me that they had a jelly factory that had just received a fourteen million pound quota, a quota of sugar of fourteen million pounds, and that at the present time he was having this jelly, there was a legal angle in the wholesale end of it whereby if we acted as the wholesalers of the jelly, that the Eatsum Food Products would receive a bonus of two cents, I mean, a commission of two cents a pound. In other words, sir, they would sell it to us at one figure, and then we could ask two cents a pound more, but they would handle all of the selling. I mean all we would have

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to do would be the billing.

So that the company would make two cents a pound profit.

Q. Do you recall the name of that company, the name of the company that was to sell the jelly to you? A. Yes, sir. The name of the company that sold us the jelly was the Tavern Fruit Juice Company, sir.

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Q. In page 98 of the transcript you made reference to your office at 1841 Broadway, and then an office at 19 Rector Street. Can you state when Eatsum moved to 19 Rector Street? A. To the best of my recollection, sir, it was I would say in July 1945. The latter part of June or early

July of 1945, almost—maybe it was in June, sir. Shortly after the papers were signed in Mr. Goldhill's office.

Q. Did you have any conversations with any of the defendants with regard to moving to 19 Rector Street? A. Yes, sir.

Q. State those conversations, and fix the time. A. Mr. Giglio asked me to—he came to see me one day and told me he was arranging some offices down at 19 Rector Street, where all of his operations would be under one roof, and he asked us if we would move there. I told him I didn't want to move, because our rent was only $135, I believe, at 1841 Broadway, which was where most of the candy people would congregate, the people who bought candy. Well, he said, I would like to have these offices and all my operations under one roof, where I can look after them better, and you will just have to move.

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So we moved, and I believe, sir, that our rent increased to—I believe, sir, to the best of my recollection, $900 a month; and we were not in the office more than one or two days, sir, when we were given a bill, Eatsum Food Products was given a bill, of $10,000 for, as Mr. Giglio stated, our share of the remodeling of these offices.

These offices, sir, were—there is no describing them, sir. They were like a Hollywood set. Although we brought all of our office equipment that we had at 1841 Broadway. It was brought down, that is including my old desk, and we paid $10,000.

Shortly thereafter—we did not pay the—I do not remember we paid the $10,000, we did not pay the rent, to Mr. Giglio, or to the landlord, it was paid to DuBois, which I was told, Mr. Giglio told me, was an associated company

of his DuBois Associates. Later on, sir, to the best of my recollection, I believe we paid another three or four thousand dollars additional money. When I say we, I mean Eatsum Food Products Corporation drew a check which was for additional alterations or something that they had to do with the office.

Q. Would you state, sir, what persons had separate offices at 19 Rector Street? A. Yes, sir. I had a separate

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office, sir. Mr. Giglio had a separate office, Mr. Lawn had a separate office, Mr. Roth had a separate office, although sometimes, sir, his accountant—later on his accountant moved in with him.

Then there was a separate office for—a big office for the girls who did the billing and so forth, of Eatsum Food Products, and there was an office for the secretary, of mine, a room for the telephone switchboard, then another office which I believe had two desks in it, one or two desks.

Q. You said these offices were like a Hollywood set. Would you describe them in more detail to the jury. A. Well, sir, it was—the walls—I mean the—it was not just a plain four walls, they had a lot of glass worked into the interior, the corners were rounded, and it was very luxurious: there were couches and so forth, green rugs on the floor. It was beautiful, sir.

Then in Mr. Giglio's office, his desk was very special. It was sort of curved: he had a bar. I remember in back of the bar there was a sliding panel. Mr. Giglio showed it to me, and later on when the coin box was in existence he told me that the money could be left there at night time and not

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left in the desk.

Q. This sliding panel worked by a buzzer, or how did it work? A. By hand.

Q. Will you describe its dimensions? A. There was a small space in back of it, sir, where you could stack money. I mean you could put anything in back. It was, I would say, only four or five inches deep, but——

Mr. Stryker: The witness dropped his voice.

The Witness: It was only four or five inches deep, if I remember correctly, but it was sort of a hideaway place. But you would never know it was there unless—there was no way of knowing it was there unless somebody told you, because it looked like the rest of the panels in the room.

Q. Was the opening large or smaller than the cash box you made reference to? A. I do not know. I never had any occasion to use it or put any cash in there; but I do remember Mr. Giglio using it.

Q. Am I correct it was not much larger, in any event? Would that be true? A. No, it was not. It was only four or five inches from the panel this way, then the back wall.

Q. How close to Mr. Giglio's office was Mr. Lawn's office? A. Mr. Lawn's office was right next to Mr. Giglio's

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office.

Q. And where was your office with respect to Mr. Giglio's office? A. Mine was on the other side of the hall but next to Mr. Giglio's as well.

Q. Did I hear you correctly that Mr. Livorsi had a separate office? A. No, sir.

Q. Did he ever appear at 19 Rector Street? A. He just came in and out, sir, but he always went in Mr. Giglio's

office. A couple of times he would come in and speak to me, sir, but very rarely. He would always be with Mr. Giglio when he was there.

Q. Do you know what business of other companies was handled at this 19 Rector Street office by Mr. Giglio? A. Sir, I know Mr. Giglio or his associates owned the jelly company. I was told this by Mr. Giglio, and Mr. Roth, and I was never in the jelly factory. They had two jelly factories, one Tavern and one Lorraine Products over in New Jersey. I was never asked to go there, but we did the billing. What other business, sir, they did, I really do not know, sir, but I looked after the candy end of it.

Q. How frequently in the normal course of operations if at all did Mr. Giglio consult with you in regard to the business of the Eatsum Food Products Company, Candy Divi-

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sion, or candy sale? A. Well, when Mr. Giglio sometimes would be away, or I would be away, Mr. Giglio would always stop in my office when he came, and I would say that when we were there we consulted—well, sometimes only two or three times a week, sometimes two or three times a day, depending on the circumstances and so forth, and the same with Mr. Giglio.

Q. Eatsum Food Products Company, the partnership, had a firm of certified public accountants you mentioned yesterday, Bernard Bercu & Company. Did that company perform an audit every month? A. You say partnership?

Q. Eatsum Food Products Company had a firm of accountants; is that correct? A. Yes, but the partnership—the firm of accountants was not wanted by the partnership. I had Mr. Bernard Bercu, who was my accountant when it was a sole ownership. When I became a partner I was

asked by Mr. Giglio that it was not necessary to have two firms of accountants, as Louis Roth was the certified public accountant, and Louis was—he knew all about books and had a lot ideas and so forth, and that we should let Louis Roth handle our books. And I would not agree to it, sir,

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and we kept Mr. Bercu, and Mr. Bercu stayed I believe until September 1945, when it became too unbearable for him and he left. But, however, all during this time we did have another accounting, and that was with Louis Roth, who went over everything Mr. Bercu did or didn't do, or he just checked the books very thoroughly, and I believe most of the time he would have one of his accountants from his uptown office downtown.

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Q. Did Mr. Lawn have any official capacity with Eatsum Food Products Co., Ltd.? A. Sir, he wasn't any partner, sir, if that is what you mean.

Q. Did he play any part in the management of the company? A. Well, when I was introduced to Mr. Lawn, he had his office down there. Mr. Giglio told me that he was a former United States District Attorney, and that he had a terrific entry with some of the highest government offices and that he was a part of the organization, and that he felt that Mr. Lawn was there to prevent any trouble.

By that, he said that if—Mr. Giglio—it was much better to consult someone before you did something than after, because they would keep you—that there wouldn't be any repercussions, and Mr. Lawn would be in Mr. Giglio's office quite frequently, but not all the time, sir, when I would go into discussions with Mr. Giglio.

Q. Now, yesterday you referred to certain other partners in the Eatsum Food Products Company, and I ask you first whether Dorina Livorsi ever appeared at 19 Rector Street, so far as you can recall? A. Well, sir, I wouldn't know if she appeared or not, sir. I don't know the lady.

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Q. Do you know whether or not she ever played any part in the management of Eatsum Food Products Co., Ltd. partnership? A. No, sir, she wasn't active in it, sir.

Q. Now, with regard to Margherita Giglio, I ask the same questions, sir. A. No, she played no part in the management, sir.

Q. Have you ever met her? A. I believe I met Mrs. Giglio once, sir.

Q. Did you ever discuss any of the business of Eatsum Food Products Co. with her? A. No, sir.

Q. Now, with regard to Frank Loperfido, can you tell me what part, if any, he played in the management of Eatsum Food Products Co., Ltd. partnership? A. Well, Frank Loperfido was the limited partner, and he had an office—one of those offices, I believe—there were two desks in it, if I recall correctly—and he was—well, I would say the most important job that Frank Loperfido had was when we had the corn box; Mr. Loperfido used to keep track of some records, and so forth.

Q. Was he consulted from time to time in connection with the managerial decisions of the Eatsum Food Products

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Co., Ltd.? A. No, sir.

Q. Yesterday, sir, at page 108 of the transcript, you referred to, and I quote, "our type of customers," and I ask you if you can describe who the customers of Eatsum

Food Products Co., Ltd. partnership were, in a general way? A. The candy customers, sir.

Q. Candy customers? A. Well, F. W. Woolworth, I believe, sir, we sold them tremendous amounts of candy, and S. S. Kresge; all of the 5 and 10 cent stores were our main customers, sir, and the department stores that handled candy, plus, of course, the candy jobbers, I mean the people that sold boxes of candy to the small stores but would buy in larger amounts. They are called candy jobbers.

Q. Incidentally, sir, did Eatsum Food Products Co., Ltd. partnership maintain a regular set of double entry books in the regular form? A. What do you mean by "double entry" books, sir?

Q. Well, sir, you have been associated with a number of companies throughout your business experience, am I correct? A. Yes, sir.

Q. And is it correct that most companies have a general journal, various ledgers for accounts receivable and ac-

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counts payable and so forth; is that correct? A. Yes, sir.

Q. Did Eatsum Food Products Co. have that kind of books, the partnership? A. Whatever the accountant said was necessary for the business, sir, that is what we had, but we did not have two sets of books, sir.

Q. Well, now, with regard to the set of books that the company did have, when did you last see them? A. Of the partnership, sir?

Q. Yes, sir. A. I believe it was, sir, on March 8, 1946, the last day, or maybe the 7th, the last day that I was—no, sir, I take that back. I saw them after March, sir, when I was called down to Mr. Giglio's office once, and Miss Feldman was there, and I believe I saw the books then.

Q. After you left Eatsum, did you ever take the books; did you ever have the books in your possession? A. No, sir, I did not, never.

Q. Now, with regard to the corn syrup transaction that we concluded with yesterday, at page 119 you said that Mr. Giglio had said the proposition sounded very good, and he would check it with Howard Lawn and see what Howard thought about it.

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I ask you whether you ever learned from Mr. Giglio or Mr. Lawn or Mr. Roth whether, in fact, Mr. Giglio had checked the matter with Mr. Lawn? A. To the best of my recollection, sir; I later on discussed it, to the best of my knowledge, sir, with Mr. Howard Lawn in the presence of Mr. Giglio.

Q. When was that conversation, sir? A. In August, sir, I believe, of 1945.

Q. Would this be the conversation referred to at page 122 of the transcript, and I should read your answer:

> "As a result of the conversation, sir, I went back to Mr. Giglio and I told Mr. Giglio certain things,"

and you mentioned 16 pounds of corn syrup,

> "And if my memory serves me correctly, Mr. Lawn was present there at the time we discussed this"?

Is that the conversation you are referring to, sir? A. Yes, sir.

Q. Would you state what Mr. Lawn said, if anything, with regard to this corn syrup transaction at that time? A. I can't recall, sir, what Mr. Lawn said at that time, but I

know, sir, we were given the okay to go ahead with the (140)
corn syrup deal.

I can remember, at a later conversation with Mr. Lawn, about the corn syrup, sir.

Q. When was that, sir? A. Well, sir, maybe a month after we were in the corn syrup deal, or three weeks after the corn syrup deal, Mr. Giglio called me in his office and told me that from now on I should not concern myself with buying the corn or having anybody go out to pay the premium to the farmer; that Howard Lawn had much better connections and that he would take care of it.

Howard Lawn told me that he had terrific connections, sir, with a syrup company that was in St. Louis and that he was connected in some way with Bob Hannegan, and that he would have someone that would buy the corn, and they could get it better and cheaper and faster and everything else, and as a result of that conversation, sir, a Mr. Red Bowman appeared on the scene, and I was introduced to him, and he, Red Bowman, told me that he was——

Mr. Stryker: Pardon. Is this in the presence of any of the defendants?

The Witness: Yes, sir.

Mr. Stryker: If not, I object to it. (141)

Mr. Wessel: The witness has said it was.

By Mr. Wessel:

Q. In whose presence was it? A. Well, it was in the presence of Mr. Giglio. I don't recall whether Mr. Lawn was present that day or not, that I was introduced to him,

and I was told that Mr. Bowman was a very personal friend of the Governor of Minnesota. Mr. Bowman told me that personally later on again.

Q. You said, "I was told he was a close friend of the Governor." Who told you that? A. Mr. Giglio; and later on this man, Mr. Bowman, told me, when he came into my office, he was somebody big in, or he knew a lot of big people in Minnesota; Minnesota was a corn growing state, and that we would have no difficulty getting corn.

Q. Page 122 of the transcript you referred to an agreement by Penick & Ford to furnish 16 pounds of corn syrup to Eatsum for each bushel of corn furnished to Penick & Ford. Can you tell me how many pounds of corn syrup can be made from a bushel of corn? A. To the best of my recollection, sir, 34 pounds of corn syrup can be made from a

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bushel of corn.

Q. So Eatsum was to receive something less than half of the corn syrup manufactured from the corn? A. Yes, sir. They weren't to receive it, sir. They were given the opportunity to purchase it at the regular ceiling price.

Q. Now, finally, in your conversation referred to at page 122 of the transcript, you stated that you had said that this corn syrup could be sold as pancake syrup by the addition of a small amount of molasses.

Was that done? A. Yes, sir.

Q. That is, molasses was added to the corn syrup? A. Yes, sir, molasses was added to the corn syrup, and, well, molasses was added and it could be given another name, a trade name, and it could be sold, sir, with an invoice. Such a name we did take. I believe we called it Cordex.

Q. The amount of molasses, sir, was a barrel of molasses and, I believe, a very small amount—I mean, a barrel of corn syrup and a very small amount of molasses, so it really wasn't corn syrup, but it was corn syrup.

Q. Was this combined product sold as pancake syrup by Eatsum Food Products Co.? A. No. It was called

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Cordex, sir, and it was sold to bottlers and ultimately it was used by bottlers and bakers and confectioners, and so forth.

Q. Now, did Eatsum Food Products Co., Ltd. partnership commence selling, purchasing and selling this corn syrup? A. Did Eatsum Food Products partnership commence selling this corn syrup?

Q. Yes. A. Yes, sir, they did.

Q. Was another cash box set up to handle that transaction? A. Yes, sir, it was.

Q. Can you tell me how that cash box came to be set up, please? A. Well, sir, I believe I stated yesterday that in order to start the cash box we had to have some cash and that a check was drawn, and that money was sent out to the West with Major Ryan, to start the corn rolling to the refinery. This was the premium money.

Now, this premium money was given to farmers or elevators, whoever was holding the corn and who wouldn't release it.

Now, when they got the premium money, they were told to ship it to the Penick & Ford Company and the Penick & Ford Company would pay the elevator and the farmer

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the regular ceiling price, and then the Penick & Ford Company notified us that—or we would notify them that through our efforts car No. so and so was now rolling to these people,

so they would know who expedited it, and if that could be the word.

Then when the car was received, Penick & Ford would write us a letter, and they would state that car No. so and so arrived with so many hundred or so many thousand bushels of corn, and it would be processed in due form, and then they would ship us the corn syrup, and this corn syrup was shipped to us, sir, sometimes in barrels, but barrels were very difficult to get, so I would say 95 per cent of the time it was shipped to us in tank cars, and these tank cars, sir, were sent to a company in Brooklyn, as we had no facilities to unload tank cars.

During the wintertime you have to hook up a steam hose to make the corn syrup so it will flow, and these people had the facilities, and they unloaded the corn syrup from the cars and put it in barrels, and added the necessary molasses, so in the true sense of the word it couldn't be called corn syrup any more but a product, corn syrup product, and then it was sold.

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Q. Was there a period of time between the date premiums were paid for the purchase of corn and the date that corn syrup was actually received? A. Yes, sir. In the beginning there was a short space of time, maybe three weeks or so, until the corn started to flow.

I believe, sir, to the best of my recollection, that we furnished Penick & Ford with more than 400,000 bushels of corn, and somehow, sir, that four hundred, four hundred twenty-five, that figure seems to remain in my memory.

Q. Well, now, during that period of time, after the premiums had been paid, and before corn syrup had been

received by Eatsum for sale, there was an investment made for this cash business; is that correct? A. Yes, sir.

Q. Do you recall how that investment was handled on the books of the Eatsum Food Products Co. partnership? A. Well, sir, to the best of my recollection, sir, it was—a check was drawn, and the cash, the cash was taken out, but there was another way, sir, that Lou Roth wouldn't want the money charged up directly to who got the money, and there was some account there they called "special," and so the money could, supposed to be or ultimately could be re-

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placed when the cash came in.

I think, sir, that this was done on a number of occasions; the money for the original check, I believe, was put back, but this was a little bit different, sir, than we had been doing before, quite a bit different.

Now, you asked me about the selling of the corn, sir?

Q. I am going to in a moment, Mr. Lubben. A. Oh, pardon.

Q. Well, would you describe the method by which Eatsum sold the corn syrup which it received? A. Well, sir, as I have stated a number of times, the corn syrup could have been sold legally on an invoice at the same price that we were selling it for cash in an invoice price, but Mr. Giglio told me, sir, in my presence, to me, in the presence of Mr. Roth, that he was not in this business just for the sake of becoming a large taxpayer or the biggest taxpayer, he was in this business to make money, and that he was not going to—this opportunity was going to make a fortune and he was not going to pay it all out in taxes, and Mr. Giglio insisted that the merchandise be sold for an invoice

for so many cents a pound and for a cash amount over,

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and I was not in agreement with it, sir, because it complicated a lot of matters, sir. Truthfully, it just wasn't necessary. I mean there was an opportunity to make a lot of money legitimately and still have money left after you paid your taxes.

Mr. Stryker: One moment. Pardon me.

Mr. Wessel: I think counsel should not interrupt the witness.

Mr. Stryker: I am going to object. It doesn't appear to be part of the conversation. It is merely his comment, his opinion, his feeling. It is not, if I understood correctly, a part of any conversation. On that ground I object.

Mr. Wessel: This is a part of the business of Eatsum Food Products Co. in which this man was a partner and in which he was operating and what he did and what happened in that business is very relevant to this proceeding.

Mr. Stryker: I am still raising the objection that the answer appears to be a statement of this man's opinion.

The Court: All right, now, the question is: what did you say to the defendant and what did he say

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to you?

The Witness: Sir, I am sorry I gave the defense counsel the impression that this is my opinion. This is a fact and this was the conversation.

The Court: In other words, this is what you told the defendant?

The Witness: Yes, sir, emphatically.

The Court: All right.

By Mr. Wessel:

Q. Can you continue, sir, please. A. Well, Mr. Giglio said, "That is the way it has to be, and you listen to Mr. Louis Roth, you listen to Louis and Louis is going to set up the mechanics how it has to operate."

So we started the merchandise, the merchandise started to come in, and then I was told that I could not sell the corn syrup to a Mr. Michael Cohen. Michael Cohen I had bought sugar from, that is black market sugar, from time to time, dextrose, and Michael Cohen wanted to buy this corn syrup for resale and I was told that I could not sell it to him, that Mr. Giglio did not like him.

So I was told to sell the corn syrup to Mr. Ewald, sir, and Mr. Ewald, sir, was the man that we had to pay that

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two cents, and just to get off the corn syrup for a minute, if I may—the two cents that we received from the jelly that was supposed to be profit really wasn't all profit, sir, because——

Mr. Stryker: I move to strike it out.

Mr. Wessel. If your Honor please, I think counsel should not interrupt. This is properly——

Mr. Stryker: I am going to object to an opinion or statement that is not a conversation. He said it was not proper. That is a legal conclusion. I object to it and move to strike it out.

Mr. Wessel: Let me state for the record, if your Honor please, this man was a partner in the Eatsum Food Products Co., Ltd. partnership, with Mr. Giglio. As a partner he handled a good part of the business. How he handled that business, even if the defendants were not present, is a very important fact in this proceeding and I do not think it should be withheld from the jury.

Mr. Stryker: I quite agree with that. That is not the point of my objection.

The Court: Well, now, you asked the witness for a conversation; is that correct?

Mr. Wessel: I did ask the witness to describe

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the corn syrup transaction, if your Honor please, in so far as sales were concerned, and he was describing a particular person to whom sales were made and telling who he was in connection with Eatsum's general business.

The Court: All right.

Mr. Stryker: Then he dropped in the comment that it was not proper. If he says that is part of the conversation, of course, I have no objection.

The Court: I don't recall the word "proper"——

Mr. Stryker: Wasn't that the word?

The Court: —being used. I think he started to tell us who Mr. Ewald was and then he got into a parenthetical discussion of the jelly situation.

Mr. Stryker: I am quite sure I am right.

If there is any question about it I wish you would ask the reporter to read it.

The Court: All right, read the last few sentences.

Mr. Wessel: In order to expedite this, may I ask another question?

The Court: Yes.

Q. Will you please state, Mr. Lubben, who Mr. Gus (151)
Ewald was? A. Well, Mr. Giglio introduced me to Mr. Ewald and Mr. Ewald was a sugar broker and he was the one that supplied the Tavern Fruit Juice Company, or he acted as the broker in selling the sugar to the Tavern Fruit Juice Company, and Mr. Ewald also acted as the broker in the sale of the jelly to the National Biscuit Company and other companies, and Eatsum Food Products partnership paid, if I recall correctly a cent a pound or very close to it, a commission to Mr. Ewald for the sale of all the jelly that was purchased, that the Tavern Fruit Juice Company just billed to the Eatsum Company; the Eatsum Company added on two cents a pound and rebilled it to the National Biscuit, or close to two cents a pound—it may not be exact; it might be a fraction in there—and out of that two cents a pound, why, Mr. Ewald was paid his commission.

Now, the corn——

Mr. Stryker: Now I go back to the motion that I made. I will be glad if your Honor will ask the court reporter to read the comment that I objected to, if your Honor does not recall it that way. I could be wrong. We could settle it by the reporter.

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The Court: All right. Can you find the answer before the last?

(Answer read.)

The Court: "Profit" was the word, not "proper." All right, we will go ahead now. Next question.

Mr. Stryker: All right.

A. Shall I continue describing the sale of the corn syrup, sir?

Q. Yes, I was trying to remember where we were. Yes, would you, please. A. Mr. Giglio told me not to sell the corn syrup. Mr. Roth told me not to sell the corn syrup to Mr. Cohen; that the sale of the corn syrup should be made through Gus Ewald, so some cars were sold to Gus Ewald on the basis of an invoice and cash, and after several of these cars were sold, Mike Cohen came back to me and said, "Why can't I buy them direct"——

Mr. Stryker: Just a moment. If it is in the presence of the defendants I have no objection. Otherwise, I have.

Mr. Wessel: If your Honor please, I think this should be clarified now. This man was one of the

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partners of Eatsum Food Products Co. This is the way the business was handled. It is the business. He was a partner of the defendants.

In order for the business to be brought out, it isn't even possible that each little conversation and each transaction took place within the hearing of the defendants.

Mr. Stryker: Then I am going to object to any conversations not in their presence, with Mike Cohen or anybody else.

A. Well, sir, as a result——

The Court: Wait a minute, now.

The Witness: Pardon me.

Mr. Stryker: And it will save time and interruption, which I don't like to make, if counsel has that in mind, if he will ask the witness whether something was said in the presence of the defendant, which one. I, of course, have no legal objection to that.

The Court: I am not going to limit counsel to conversations in the presence of a defendant.

I am going to tell the jury that where we have a conversation not in the presence of the defendants, as where, for instance, the witness here talks to a customer, that the truth of what the customer says is

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not a question that is before you and not something that we are interested in. I mean the only thing that we are interested in is that a conversation did occur, not whether what was said is true or false.

Do I make the distinction clear?

All right, go ahead. You had a conversation with Mr. Cohen.

A. So Mr. Cohen came back and said, told me, that he, not being able to buy from Eatsum Food Products was ridiculous, because he was buying the corn syrup from Gus Ewald, and that Gus Ewald was making a couple of cents a pound profit on him, and he wanted to know why he couldn't buy it direct, and I went in to see Mr Giglio and I told him that it didn't make any sense selling it to Gus Ewald and then Gus Ewald turns around and

resells to Mike Cohen, and why didn't we sell it to Mike Cohen direct. And Mr. Giglio allowed me to do it.

However, I found later, in a conversation with Michael Cohen, that Michael Cohen was charged a half a cent or a penny a pound by Ronald Stone for the privilege of doing business with us.

Q. Don't refer to that.

Mr. Wessel: I move to strike that last state- (155)
ment.

The Court: All right, strike it out. I think by and large, Mr. Wessel, we will limit our conversations to conversations in the presence of the defendant, and if there is some reason to show the fact of a conversation, and you have to go into it, all right.

Now, I will tell the jury here that what Mike Cohen told the witness is not evidence before you at all. We don't know whether Mike Cohen paid more or did not pay more to Mr. Ewald. All we know is that Mike Cohen told that to the witness, and the witness says he told that to Mr. Giglio.

All right.

A. Sir, shall I continue with the corn syrup?

Q. Yes, please, sir. Do you understand the Court's ruling, Mr. Lubben? A. Yes, sir, to the best of my ability. I understand it, sir.

The Court: All right, we'll do the best we can. We'll all check it as we go along.

A. In the beginning, sir, this corn box was in my desk. This is just a little green box, like you buy in a stationery

store, and Michael Cohen came in to me—again I believe it
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was Gus Ewald—and Michael Cohen came in to me, and he had given me and we had given him an invoice for so many pounds of corn syrup, and at the regular ceiling price for corn syrup, I mean, six and a half cents a pound or something like that, I believe was the figure, and then we would take—he would give me the cash and the cash went into a green box, and a record was kept. I mean we would have to keep track of the amount of cash that came in, and this record was checked, oh, very frequently by Mr. Roth, and as the amount of corn started to flow, these cars started to come from the Eatsum Food Products, I mean from the refiner, it became a much larger part, a bigger part of the business and it became too much work, very frankly, for me, and Mr. Loperfido was given the charge of the cash box. This was at my suggestion, because Mr. Loperfido was on the payroll for $250 a week, I believe, if I recall correctly, and up until that time he wasn't doing anything, and other than the fact that sometimes he would expedite a shipment of sugar, I mean, he would go out and find someone who wanted to sell some black market sugar for us, which we would buy, so the cash box was turned over to Mr. Loperfido, and he would keep it, although, sir, I
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would say, I would go into the office every day, I mean, I would see money all over the desk, and in the cash box, and Mr. Loperfido was trying to keep some records there.

Later on records were kept showing every car number and so forth and so on of the amount of corn and the amount of cash that was received and the amount of overage that was taken in.

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These records, to the best of my recollection—there were other records, sort of a running record, were kept in the box, the money went in and the money went out, and so forth, but there was a record showing every single car number we ever received and kept, and those records to the best of my knowledge were kept at my insistence, but I do not think that Louis Roth ever knew we kept such records, sir; in fact I am sure he did not.

Q. Do you know where those records are? A. Yes, sir. They are in the hands of the Government.

Mr. Wessel: Would you mark these for identification, sir.

(Marked Government's Exhibits 25 and 26 for identification.)

Q. When were they given to the Government, Mr. Lubben, do you recall? A. To the best of my knowledge, sir, sometime in the latter part of '48 or early in 1949, when the Government came to my door. I don't think I gave them the first time, I think it was two or three times they came.

Q. I show you, sir, Government's Exhibits 25 and 26 for identification (handing), and ask you if you can tell

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me what those are? A. Sir, these are the records I was telling you about.

Q. You are referring to Exhibit 25, am I correct? A. 25, and this is 26. The 26, sir, is the original one, and part of 25 appears to be a copy; but although the cash figures here are not on No. 25—I do not see them. Let us see. Yes, sir.

Q. When you say the cash figures, are you referring to the last column in handwriting? A. Yes, that is not written on here.

Q. You are referring to it not being written on 25? A. Yes.

Q. But it is on 26? A. Yes.

Q. Do you recognize the handwriting in the last column on Exhibit 26? A. Yes, to the best of my knowledge, sir, this handwriting is the handwriting of Frank Loperfido. To the best of my knowledge, sir.

Mr. Stryker: Are they marked for identification?

Mr. Wessel: Yes.

Q. Had you finished your answer with regard to the corn syrup sales? A. Well, sir, that was how the corn syrup was sold; yes, sir.

Q. This little cash box that you referred to, Mr. Lubben, (160) would you describe it in as much detail as you can, please? A. You are talking about the green cash box?

Q. The corn syrup cash box. A. Just the ordinary little green box, maybe 12 or 14 inches long, four or five inches high, and maybe five or six inches deep, and on the inside there was a top drawer, where you had little places for coins and so forth, and underneath it for papers or bills. I don't think the corn syrup—I think we threw away the one with the coins on the top.

Q. You threw away the coin trays? A. I do not recall ever seeing that. It would only get in the way.

Q. Get in the way of what? A. The bills in the bottom.

Q. What color was it? A. Green, sir.

Q. Did it have a lock on it? A. Yes, it did.

Q. Describe it? A. Just a tiny little key lock like—well, a ten-cent door lock. I mean it wasn't a lock—it was just an ordinary little key lock.

Q. Did it have a handle on it? A. It had a handle on it and you could take it and walk away with it—a little green box. I am sure everybody is familiar with them; they are selling them for years.

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Q. Do you recall where it was kept during the period of the corn syrup transactions? A. Well, sir, as I stated in the beginning, it was kept in my desk; then later on it was kept in Mr. Loperfido's desk. Then I was told by Mr. Loperfido that it was kept, the money was kept in that place in back of the panel.

Mr. Wessel: I will move to strike that.

The Court: Strike it out.

Q. Without regard to what Mr. Loperfido told you, do you know where it was kept after Mr. Loperfido lost custody of it? A. Only what I was told, sir.

Q. Were you ever told anything in regard to its location by Mr. Giglio, Mr. Lawn, Mr. Livorsi, or Mr. Roth? A. Mr. Giglio told me that.

Q. What did he tell you? A. That it was out in a safe in his home for safe keeping; that it was too much money to be kept in the office.

Q. When did he tell you that? A. I believe some time in October or maybe November.

Q. Of what year? A. 1945.

Q. Do you know when Mr. Loperfido left the partnership? A. Well, Mr. Loperfido—it is hard to tell when he really left it, because he used to come in many days after

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he left it, or said he was going to quit. He used to go back and forth every day in the office. So I wouldn't know officially when he left. But I think he left sometime to the best of my recollection, s.r. about November or December.

Q. Before he left, Mr. Giglio told you he had the cash box in his home in a safe? A. As a result of a conversation I had with Giglio I asked him if that conversation was true, and he said yes.

Q. What was the conversation that you asked Mr. Giglio about, that he said was true? A. I said, Mr. Loperfido said he doesn't have the cashbox any more, and he said you have the cashbox. He said, Yes, I have it out in my home. I believe he lived in Long Island at the time. It was being kept out there for safe keeping.

Q. Incidentally, do you know when Mr. Stone left the partnership? A. I believe, sir, it was around—well, I don't know whether—I believe he left the partnership—do you mean the partnership when I was in it?

Q. Do you know when he left Eatsum Food Products Co. Ltd., the partnership, whenever that may have been, whether you were in it or not? A. He left the partnership, I mean, sometime, I believe it was in September 1945.

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Q. I am referring to Mr. Stone now. A. Well, maybe it was in January, sir, or February. I don't know when it was, but I know he told me he was going to leave the partnership.

Q. Without regard to a conversation, who is Mario Betancourt? A. He is a man, sir, that sold—like a broker, he sold merchandise. I met him once, sir.

Q. Do you recall the name of his company? A. Yes, sir; it was the Commodity Trading Company.

Q. Was any of this corn syrup ever sold to the Commodity Trading Company? A. To the best of my recollection, I don't recall ever selling corn syrup to Mario Betancourt. I never met Mario Betancourt until many years later. But we sold our corn syrup to Mike Cohen, and who he sold it to I don't remember. It may be possible Mike asked us to bill some corn syrup to Commodity Trading Company, I don't know. That is, for the check. But we always got the cash from Mike Cohen.

Mr. Wessel: If your Honor please, I have an exhibit that runs into many pages, and I think this would be a good time to mark it for identification. It may take the clerk some time to do it. Would this be a good time for the recess?

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The Court: Yes, we will take a five-minute recess now. (To jury) Don't discuss the case.

(Short recess.)

By Mr. Wessel:

Q. Do you know, Mr. Lubben, whether or not Mr. Roth was the accountant for Michael Cohen during 1945? A. Only by what Mr. Cohen and Mr. Roth told me, that he was.

Q. Do you know whether or not Mr. Roth was the accountant for Mario Betancourt during 1945? A. Only

that Mr. Roth and Mr. Cohen told me that he was the accountant for Mario Betancourt.

Q. You had a conversation, I take it, then with Mr. Roth in connection with Mr. Cohen and Mr. Betancourt; is that correct? A. I beg your pardon, sir?

Q. Did you have a conversation with Mr. Roth about Mr. Cohen and Mr. Betancourt? A. Yes, sir; I did.

Q. When was that conversation? A. Some time, I would say maybe September or October of 1945. I remember it was in about the middle of the corn box period.

Q. Was anyone else present besides yourself and Mr. Roth? A. When we had this conversation about Mr. Beatncourt and Mr. Cohen?

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Q. Yes. A. No, sir, there was not.

Q. Where did the conversation take place? A. In my office, sir.

Q. At 19 Rector Street? A. At 19 Rector Street, sir.

Q. Would you tell us what was said by yourself and by Mr. Roth in connection with Mr. Betancourt and Mr. Cohen? A. Mr. Roth told me that he was the accountant for Michael Cohen, and I had asked Mr. Roth, I said, Well, there is going to be trouble because when Michael Cohen files his income tax report he is going to have to say to whom he gave this cash to; and Mr. Roth told me, Don't let it worry you. Why, I asked him, and he says, Because I am the accountant for Michael Cohen; and I said, Yes, but Michael Cohen has given thousands and thousands of dollars. He said, Don't let it worry you because I am his accountant and all I am going to do is make out the paper, make out the income tax sheet showing that Michael Cohen just paid out these checks to Eatsum Food Products, and

in the cash we will let that accumulate down at the end, and so Michael Cohen has so many thousands of dollars, and when it comes time to pay the tax he is broke, he hasn't got any money, and the report will go in and it will all be taken care of.

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He mentioned that Mr. Ronayne was the man who would take care of the income tax report, and he says, He will take care of it and it will get pushed around for a while, and Mike tells me he hasn't got any money, and by the time they get around to checking up on Mike he will be dead, because he has got a very bad heart, and we can push it around for a few years, and he will be dead.

I said, What about Betancourt; I know Mike Cohen is buying the syrup from us and selling it to Betancourt, because Mike told me. He said, Don't worry, I am the accountant for Betancourt and he is a crazy Cuban, he will sign anything I give him, just give him a piece of paper and he will sign it, and when he finds out what he signed he will run to Cuba and that will be the end of that. The next day I told it to Mike Cohen.

Q. You mentioned Mr. Ronayne in your answer, Mr. Lubben. Who was Mr. Ronayne? A. Mr. Ronayne is an attorney, and he has an office on Broadway, and he is the —he used to be somebody with the Internal Revenue and then he went into private practice.

Q. Did you ever have any conversations with Mr. Giglio, Mr. Lawn, Mr. Roth or Mr. Livorsi about Mr.

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Ronayne? A. Well, sir, we can eliminate Mr. Livorsi, because he very seldom ever asked or said anything about the business. He just asked how is business, that's all.

Q. Would it be fair to state that Mr. Livorsi had very little active part in the Eatsum Food Products, the limited partnership? A. As far as the candy end, I would say he had none, and I was introduced to—first I was told about Mr. Ronayne by Mr. Roth, and then later on I was introduced to Mr. Ronayne by Mr. Giglio, and he told me that he was formerly associated with the Government and he was going to take care of all their tax matters, and he didn't have to worry any about tax matters, Jim Ronayne would take care of everything.

Q. Mr. Giglio told you that? A. Yes. Mr. Roth told it to me, sir, many, many, many times.

Q. Did Mr. Giglio or Mr. Roth tell you with what particular branch of the Government Mr. Ronayne had been associated? A. The Treasury Department, sir. The tax department.

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Q. Do you know what part of the Treasury Department or the Tax Department? A. I didn't know then. I learned later.

Q. How did you learn it? Without regard to what you learned, how did you learn it? A. Where he ultimately worked?

Q. Yes. From whom did you learn where Mr. Ronayne worked, before he left the Government? A. Before he left the Government? You mean after he left.

Q. Let me rephrase my question, which isn't clear. Mr. Giglio told you that Mr. Ronayne had worked with the Government before he left the Government; is that correct? A. Yes, sir.

Q. Any you said that sometime much later you learned what Mr. Ronayne's earlier job had been with the Government; is that correct? A. Yes, sir.

Q. How did you learn that fact? A. Well, I can't remember who told it to me.

Q. Well, then, disregard it, sir. A. But Mr. Ronayne later told it to me personally.

Q. That is all right.

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(Marked Government's Exhibits 27-1 to 50 for identification.)

By Mr. Wessel:

Q. I show you, sir, a group of papers marked Government's Exhibits 27-1 through 50 for identification, and ask you, first, if you can tell me what they are? A. Yes, sir.

Q. What are they? A. These are the duplicate copies of an invoice of Eatsum Food Products to the customer, to various customers. I don't know whether they are all the same one or not.

Q. I wish you would glance through them, sir, and tell me whether or not those duplicate invoices are invoices for corn syrup sales by Eatsum Food Products Company to various customers in 1945. A. They are copies of invoices, sir, from the Eatsum Food Products to a company known as the Commodity Trading Company.

Q. That was Mario Betancourt's company? A. Yes, sir. But I didn't meet Mr. Betancourt any time during the partnership or the single proprietorship when General Confections was in business.

That merchandise, sir, was sold to Michael Cohen, and we billed it to Betancourt, but the money was given

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to us by Michael Cohen.

Q. Well, now, for example, Mr. Lubben, on Exhibit 27-5, the penciled notation "Cohen" appears in the upper right-hand corner.

Mr. Stryker: Just a moment. I object, if you are reading from a paper that is not in evidence.

Mr. Wessel: I haven't finished my question.

Mr. Stryker: I don't care if you have or not. You are reading from a paper, as I see you. If you are, it ought to be in evidence.

Mr. Wessel: I am laying a foundation for the admissibility of these and other documents.

The Court: Don't read the notation. Identify it as best you can.

By Mr. Wessel:

Q. The handwritten name or lettering which appears in the upper right-hand corner of Exhibit 27-5, can you tell me in whose handwriting that is? A. No, sir. It appears to be the writing of—I can't tell you exactly. This I can tell you (indicating).

Q. Now, the handwritten comment which appears in the box, in the first left box of the document——

Mr. Wessel: It it very difficult to describe it, if your Honor please. I cannot offer these documents at this time. The handwritten comments are almost —well, they certainly are unimportant at best, but it is very difficult to describe the various things on the document without actually reciting them.

The Court: Let's see the comments.

Mr. Wessel: There are a number of them. I want this one here.

The Court: Well, all right, you can read that one. I don't think that will mean very much out of context.

By Mr. Wessel:

Q. The handwritten comment, "Paid in full," which appears on Exhibit 27-5, do you know whose handwriting that is? A. To the best of my recollection, sir, that is the handwriting of Frank Loperfido.

Q. Over in the extreme right-hand column, first of all, appears a typewritten figure. Do you know what that typewritten figure is? A. The typewritten figure is the part of the transaction that was not collected in cash, that appeared on the books of the company. This part up here (indicating).

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Q. That is the typewritten part? A. Yes.

Q. Now, underneath that appear a number of handwritten figures. Can you tell me what those are, if you know? A. No, I don't know what they are, sir, but I know whose handwriting it is.

Q. Whose handwriting is it, sir? A. To the best of my recollection, sir, the handwriting is the handwriting of Frank Loperfido.

Q. Can you, sir, state the amount of corn syrup sales——

Mr. Wessel: I will withdraw that question.

Q. During what period of time did this corn syrup transaction, as you have described it, run? A. For a period

of about three or four months, sir, starting with, to the best of my recollection, sir, in August of 1945, and three or four months thereafter.

Q. Now, do you know what dollar amount of corn syrup sales were made by Eatsum Food Products Co. during that time with regard to this transaction? A. Well, to the best of my recollection, sir—you are talking about the invoice price and the cash price lumped together?

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Q. Yes, sir, together. A. I would say, sir, that it would be between nine hundred thousand and a million dollars.

Q. Now, what part of that nine hundred thousand to a million dollars was handled on invoice and entered on the books of the company? A. I would say, sir, that about half or slightly more than half.

Q. Now, the balance, sir, would amount to about how much, as best you can recall? A. As best as I can recall, sir, the corn box had a traffic through it; I mean, that is, they had money that went into it, in the neighborhood of four hundred thousand dollars.

Q. Now, did you, sir, as a partner in Eatsum Food Products Co., know the amount of profit realized by Eatsum Food Products Co., Ltd. partnership on the money in the corn syrup cash box, that is, the money not on the books? A. You mean when the transaction was over?

Q. When it was completed, sir, yes. A. Yes, sir. The last figures that I saw, there were some papers, sir, that were kept showing the amount of money, the ins and outs, and so forth, and there was between a hundred and a hundred

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forty-four thousand dollars that was in that cash box when the cash—when the corn syrup deal ended.

Q. Would you repeat the figure, please, sir. I didn't quite catch the first figure. A. Between a hundred—it is either a hundred forty or a hundred forty-four thousand dollars; we can say a hundred forty thousand dollars. It didn't come out exactly on the head, I remember that. Half of that money, sir, was mine. I mean, was to be mine. I was a 50 per cent partner.

Q. Was that profit, whether it be a hundred forty or a hundred forty-four thousand, ever put on the books of the Eatsum Food Products Co. while you were there? A. No, sir, it was not.

Q. You said you did not get your half of that corn box, sir. Did you ever have a discussion with Mr. Giglio with regard to that subject? A. Yes, sir, I did.

Q. When was that discussion? A. Shortly after March the—it was either March the 7th or 8th or right around there, of 1946.

Q. Who else was present at that time? A. At that time, sir, Mr. Roth was present, Mr. Giglio was present,

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and Mr. Livorsi was present, and two or three other people were present, sir, and I asked Mr. Giglio for the money, my half of the money that was in the corn box.

Q. Where did that conversation take place? A. In Mr. Giglio's office, sir, at 19 Rector Street.

Q. Would you state the conversation as best you can now recall it, please? A. I went in and I said, "I would like to get my half of the money that is in the corn box."

This was the corn box that Mr. Giglio had home.

Mr. Giglio said, "What money?"

I said, "The money that was in the corn box, the hundred forty thousand dollars."

"You haven't got any money coming to you," he said.

I said, "What do you mean, I haven't got any money coming to me? It's half mine."

He says, "Yes, but we had some OPA trouble."

And I said, "Not a hundred forty thousand dollars worth, you didn't have."

He says, "Listen, you are lucky we even let you get out

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what you got. Get the hell out of here. You are not getting any money and you are lucky we don't charge you back for some more money."

"What do you mean by that?"

"Well," he says, "you have got too good a deal," he says, something, words to that effect, and "get the hell out of here."

So I looked around the room, sir, and I left.

Q. You looked around the room. Whom did you look at? A. Well, a fellow named Big John Ormento.

Q. Anybody else? A. Mr. Livorsi, two or three other people, sir, that I don't remember, don't know their names, and I left, sir.

Q. When you say you "left," you mean you left the partnership? A. We had already made the deal on the partnership, sir. I was just going to get the money. There was never any mention about the cash in the cash box, why I understood I was going to get my half.

Q. What was the deal with regard to partnership dissolution that you just talked about? A. Sir, I went to Mr. Giglio and I asked him about dissolving the partnership, that I would like to get out, and I wanted to get out of the partnership, and I asked him to split the place down the

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middle on the same basis I had when I went in with him, and he said, "We are not going to let you go, Dave. You are making a lot of money for the company. Besides, you have got a five-year partnership contract with us, and you have to stay."

I told him I didn't want to stay. So I went to a man who had been discounting our account receivables, and I asked from him some advice——

Mr. Stryker: Just a moment. I object.

By Mr. Wessel:

Q. Don't refer to the conversation, but, if you will, explain what you did as a result of the conversation. A. All right, I am sorry, sir.

And as a result of the conversation, sir, the Eatsum Food Products, I withdrew from the partnership of Eatsum Food Products. I was given the machinery in the Bronx plant that I had when I started.

Q. That is, you brought that machinery into the company? A. Yes, sir.

Q. Were there any improvements to it during the interim? A. There were some additional pieces of machinery that were purchased later on during the partnership,

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but they were charged to me.

Q. Do you know what the value of that machinery was when you got it at the end of the partnership, as best you can recall it now? A. We had an appraisal made sometime later on, sir, and I don't remember, sir. So I was given the inventory, that is, the machinery and the lease on the plant in the Bronx, plus an agreement that Mr. Giglio, the

Eatsum Food Products, was going to pay my personal income tax that was set forth on the books of the company during the nine months. I was in partnership, plus they were going to give me a couple of hundred dollars a week salary for a few months, and I was to give—Mr. Giglio was to get the inventory, the accounts receivable, I should say the equity in accounts receivable, the money in the bank, and all of the equipment, the office equipment, and so forth, at 19 Rector Street, I mean, which we had already, as I stated before, paid for half of it, or more than half of it, I guess, and they were to remain in control of the partnership.

They would continue Eatsum Food Products, and it was on that basis, sir, that I dissolved the partnership.

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The inventory, sir, amounted to, I believe, three hundred and some twenty, fifteen, twenty, twenty-five thousand dollars. That was what the inventory was.

Now, half of that inventory was mine, because I was a 50 per cent partner, but I didn't get it, but later on I—the agreement was that I had to buy the inventory, so I bought the invenory, dollar for dollar.

And when I say dollar for dollar, I mean, sir, that if the invoice price called for one thing and the overage price on some things called for the other; it was the full, complete black market price, and everything else was in it and that is the way I bought the inventory. And I borrowed a hundred thousand dollars. I believe the first payment I gave them was a hundred thousand dollars, and later on I believe I borrowed another thousand, and how I borrowed it, sir, is I pledged the inventory with a factor, and as the inventory was reduced, the factor took his money back,

and then when the final papers were signed—mind you, I left March the 8th or March 9th, but the papers were not signed until June, because that was an arrangement, that was something that Mr. Roth and Mr. Giglio and Mr.

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Lawn, sir, wanted to—they didn't want to dissolve the corporation. You see, they were supposed to pay my income tax because the money was in the company to pay my income tax when we dissolved. We were far from broke. And the money was in it.

But when when it came time to pay the money, at the dissolution of the partnership, they didn't want to pay it right then and there in March, but they said, "We have a fiscal year here to go to the end of May 31st, and then we will pay it then."

So I was already in possession of the business, I mean, that is, I had started a new company, and I couldn't argue that point, sir.

But the papers were drawn in the presence of some attorneys, and the attorney told me then, when I signed the papers——

Mr. Stryker: Just a minute. Is this a conversation——

The Witness: I'm sorry.

Mr. Wessel: If your Honor please, if counsel has an objection it should be addressed to the Court, not to me or the witness.

Mr. Stryker: He starts off "the attorney then

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told me something." If he said it in the presence of the defendants I have no objection, of course.

The Court: I think he said "I'm sorry," and he dropped the conversation.

The Witness: I'm sorry.

The Court: So we won't go into that conversation.

Continue.

A. Well, I bought the inventory, sir, and ultimately—the vast part of the inventory I paid on notes to Mr. Giglio at twenty-five hundred dollars a week, and I believe I paid all of the notes, with the exception of the last two or three, which I didn't pay.

Q. Do you know what the total value of the assets of the Eatsum Food Products Co., Ltd. partnership was at March 9, 1946, as best you recall it, sir? A. Well, the last, what you call legitimate certified public accountant's statement I saw was sometime in December. I think Mr. Bercu completed the last one. Anything after that, sir, was with Mr. Roth.

Q. Let me see if I understand correctly the terms of the dissolution, sir. You were to receive the machinery and the

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lease on the plant? A. Sir, this is how to figure it up, sir: It might not be the best bookkeeping way, but the inventory, to the best of my knowledge, now, sir, it was, and I think I paid them $340,000 or $350,000 for the inventory and machinery. I might be off a little bit there. It's been some time, but I know there is papers to that effect.

Now, let's just say it is $325,000. I know there was $140,000 or $144,000, so we will take the $325,000 and we will add the $140,000, and that comes to $465,000; right, sir?

Q. I think that is right. A. I mean I add with a pencil. $465,000, sir.

And then we had money in the bank. At one time I thought it was a greater figure, sir, but later I think it was a little better. I think the money in the bank was in the neighborhood—now, this is only a guess sir, because I didn't see the books——

Q. If it is a guess, then don't say it, Mr. Lubben. A. All right, sir.

Well, to the best of my knowledge, sir, the company was worth about $800,000, and this is the one that was built up from, in nine months, from $67,000 total worth until it

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was worth about $800,000 at the time of the dissolution agreement.

Q. These notes, sir, that you said you made out in part payment of your purchase of the inventory, to whom were the notes made out? A. To Mr. William Giglio.

Q. Not to the Eatsum Food Products Co., Ltd. partnership? A. No, sir. We asked about that, sir.

Q. I beg your pardon? A. I asked about that, sir.

Q. Who did you ask? A. Mr. Giglio and Mr. Lawn, when they were in the attorney's office who drew the papers for me.

Q. What was said and by whom? A. Mr. Howard Lawn told me that they were going to do something with the corporation, the partnership, and to make the checks to Mr. Giglio, to make the notes to Mr. Giglio.

Q. Do you recall when that conversation was? A. Well, the papers, sir, were signed sometime in June, I mean the official papers, and I believe that is, sir, when we gave the note; I would say sometime in May.

However, I could be wrong, because the papers wouldn't
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be signed for the dissolution of the partnership when it really happened, but it had to go to the end of May.

Q. Was there any discussion in connection with this dissolution with regard to your accountant's workpapers? A. Yes, sir.

Q. With whom was that discussion, please, sir? A. Mr. Giglio.

Q. Was anyone else present? A. I think Mr. Roth. Mr. Roth was always there.

Q. When was the discussion? A. Well, sir, shortly before we—the dissolution was made, I mean, in March, shortly before March.

Q. Where did the discussion take place? A. Mr. Giglio's office.

Q. Would you state what was said and by whom, please? A. Well, Mr. Giglio told me that Mr. Bercu had certain work papers that belonged to the partnership, and these work papers, Mr. Giglio said, were—the partnership had paid for the accounting service and gotten a statement, and he wanted these work papers, and one of the conditions for the release of the breaking up of the partnership would be that Mr. Bercu would give them back these work papers,
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as he didn't want at some later date to have so many of these papers to bother with.

Q. Was anything else ever said on that subject with Mr. Giglio? A. Yes, sir.

Q. When? A. Well, we went to Mr. Bercu's office.

Q. Who is "we," sir? A. I called Mr. Bercu and I told Mr. Bercu what Mr. Giglio had said. Mr. Bercu was no longer the accountant for the partnership.

Q. Don't refer to a conversation with Mr. Bercu unless in the presence of other defendants. A. I am sorry. I don't don't understand this legal phraseology, but, sir, I am doing the best I can.

And, sir, as a result of a conversation with Mr. Bercu, Mr. Giglio and I went to Mr. Bercu's office where Mr. Giglio did demand that Mr. Bercu turn over to him any work papers that belonged to the Eatsum Food Products partnership.

Mr. Bercu says that these papers, that he didn't know where they were. He had lots of papers, but the papers were—accountant work papers are his own work papers, and Mr. Giglio said he wanted the papers.

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Mr. Giglio asked me to step into an outer office of Mr. Bercu's office, and I heard some very loud voices, when I was out there, outside, and after above five minutes Mr. Giglio came out and says, "I will get the papers," and we went downstairs, and Mr. Giglio went his way and I went my way. But no papers, sir, were given to Mr. Giglio when I was with him.

Q. I asked you before, sir, whether you knew the names of any other of Mr. Giglio's companies which were at 19 Rector Street.

I ask you whether, if I mention the name American Brands Corporation, it will refresh your recollection in any way as to other companies at 19 Rector Street? A. Yes, sir, it does.

Q. What other companies were there, if you recall them now? A. You mean after I left or before?

Q. Before you left. A. Well, when I was there, sir, the only ones that I knew about that were officially in use were the Tavern Fruit Juice, which made jelly, and the Lorraine Foods, and there were other companies talked

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about.

Q. Did you ever have any discussions with Mr. Giglio or Mr. Lawn with regard to the formation of other companies? A. Yes, sir. One time—I would say, sir, this probably happened in September of 1945, when I was called into Mr. Giglio's office. He asked me to step in. Mr. Roth was there, and Mr.—to the best of my recollection, sir, Mr. Howard Lawn was there.

Mr. Giglio told me that the profits from the candy business and primarily the corn syrup business were becoming terrific, and that he wasn't interested in paying a lot of income tax and something had to be done, and done quick. And Mr. Giglio told me that it had been decided to form a number of companies, and the companies were to be, if I remember correctly, there was American Brands, and American Agar, and American this and American that and American Trucking and American Wine Company, and a lot of companies, and these companies were to be dummies to this extent: We were going to form the corporation, and these companies would set up, they would give Eatsum Food Products an invoice for something that was being used in the raw materials, which could be easily swallowed

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up—I mean those were the words; they could be gone through the company.

They would give us the invoice, and then Eatsum Food Products would pay this invoice with a check in a legitimate—in a regular, routine manner, just as a check, and this money would then go out of the company into this other company.

This company—and we would do this with five or six different companies. I say the names were always American this and American that, and these companies would operate for five or six months, or the utmost nine months, because there was some rule or regulation there that—but anyway they were going to be dissolved, he said, before it came time to pay the income tax, so that nobody would know about that company, and then they wouldn't have to pay any income tax.

In other words, they were going to load Eatsum Food Products with phoney invoices. And he says, "Louis will go into more detail with you," and then Louis went into some of the finer points, that is, bookkeeping angles, and so on and so forth, and I didn't want that. I mean, it was certainly too complicated, and I wanted no part of it, and

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I told them then and there.

I am not trying to paint myself as any angel or anything else, sir, but I didn't want that. I was in the black market, much to my sorrow, but there was never any intent on my part to defraud the Government on income tax.

I paid big taxes, and I wanted no part of this, and I told it to my accountant, Mr. Bercu. Mr. Bercu says, "They are getting ready to freeze you out."

Mr. Stryker: Just a moment. I object——

The Witness: I am sorry.

Mr. Stryker: —unless it is in the presence of the defendants.

The Witness: I am sorry, sir.

The Court: Strike it out.

The Witness: I get mixed up.

Mr. Wessel: That is from the phrase, "I told it to my accountant."

The Witness: I am sorry, sir.

By Mr. Wessel:

Q. Continue. A. And I wanted no part of it.

From then on that became every day; you would hear it from Louis Roth (indicating): "This is the way, this

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is the way, this is the way to do it." How we can do this and how you don't have to pay any income tax.

And then to show me—no, that was all, sir.

Well, that was the story, sir. That was how it was going to be.

Now, you asked me, did I ever see these names?

Q. Yes, sir. A. All right, sir. Once after March, in 1946, I was called down to Mr. Giglio's office, and one of the reasons I was called there, they had a stack of checks: I don't know, it was April or something like that, a stack of checks for me to sign, and to the best of my recollection they were $500 apiece.

I had been drawing $500 salary, and Mr. Giglio says, "Endorse these checks."

I said, "Are you going to give me the money?"

And he says, "No. But we'll pay the income tax on it for you. We just want to get some of this money out of Eatsum Food Products."

And I said, "I will do it; if you give me the money I will endorse it. If you don't give me the money I won't

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endorse it," and I left them, but when I went in that office —and I can remember there was a panel on the right-hand side, glass panels, and on these doors, on these glass doors were now "American Brands" and "American Trucking Company," and American this and American that and American this.

So whether my thoughts mean anything or not, I said, "Well, the plan is in effect."

Q. Sir, do you recall at any time having a conversation with Mr. Giglio in connection with testimony before the Treasury Department? A. Yes, sir.

Q. When was that conversation? A. In 1949, to the best of my recollection.

Q. Was anybody else present? A. Well, I have always been told to keep my mouth shut, but there was a conversation——

Mr. Stryker: I didn't get that. You dropped your voice.

Q. Was anyone else present, Mr. Lubben? A. Yes, sir.

Q. Who else? A. Mr. Roth and Mr. Giglio, Mr. Lawn and Mr. Ronayne.

Q. Mr. Ronayne? A. Yes, sir.

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Q. Where was this conversation? A. In Mr. Ronayne's office.

Q. Where is that office? A. Some place downtown on Broadway, in a big office building.

Q. Is that James A. Ronayne? A. Yes, sir.

Q. Would you state what it was that was said and by whom, please? A. Sir, the Government, I mean, when I left the partnership, I owed the Government some money because they never paid my income tax. I mean, when they were supposed to give me the money, I never got it, so the tax has to be paid.

I am getting letters from the Government, and it is getting to be a bother. I mean, I don't know where to get the money.

So I called Mr. Giglio, and I told him that the Government was becoming very rough, and they wanted their money, and I would have to pay them, so he told me to meet him at Mr. Ronayne's office, and when I went to Mr. Ronayne's office, they were present, and I saw, and they showed me—and I am telling them I owe about $25,000, because I wanted Ronayne to know how much money I did owe the Government, because the books of the partnership were left down there. I mean, when I parted with the

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partnership, the books were still there, and when it came time, I thought I was going to get paid and I didn't, then in June when I signed, they said they would give me the check—some paper here says that—and they tell me I am going to get the money when the income taxes are due; they felt that they should have the use of that money, because there was no sense in paying it out right away to Uncle Sam, they will use that money, but they will pay it when it is due, and Mr. Stein, the lawyer that I had engaged to make the papers, said, "You are making a big mistake, because," he said, "the Government"——

Q. Don't refer to the conversation. A. All right, I am sorry, sir.

Anyway, they didn't give me the money. When it came time to make the income tax papers out, I have no books, I have no records, so I called Mr. Giglio on the phone a number of times. I called Mr. Roth on the telephone a number of times. And the answer I would get, "what books? What are you talking about? We haven't got any books."

So I told this to my accountant. We sent letters to him, registered letters, and told him we would have to file, and

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finally at the last resort I said, "Well, I am sorry, I am going to write, I am going to put in my income tax, and I am going to put in a copy of the dissolution agreement," and I did, and I put it in.

Now, I guess, I don't know, but I suppose in the routine manner of the Government somebody finally got to this, my tax came up; "Where is the money?" so I started getting dunned for the money, and so I told Mr. Giglio I had to have this twenty-five—oh, when I went over my checkbooks, the amount of money that I had, the figure, the best I could figure out was around $22,000 or $25,000. I don't say that is correct, sir, but I had no way of ascertaining if there is any more or any less, and I so stated in my paper to the Government, when I filed it.

So Mr. Ronayne says, "Well, what are you asking for $25,000 for, when you should get a hundred?"

"What do you mean, a hundred?"

He says, "Well, look at here," and he showed me an income tax return which was a partnership return, I was told, and there it said that I had received close to a hundred thousand dollars. I never saw that return.

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Then there was a name that says, Ronald Stone received sixty-some-odd thousand dollars. Ronald Stone had left before I did. I know he didn't get it.

And then there was another one over there, another name, Mr. Hankermeyer, he got $50,000 or $60,000. Hankermeyer was my uncle, and he was still living, and I know he didn't get it.

And then there was——

Mr. Stryker: I move to strike it out.

Mr. Wessel: If your Honor please——

The Witness: I talked to Mr. Hankermeyer.

Mr. Wessel: I object to the interruption.

Mr. Stryker: I'll make the interruption regardless of your objection. I move to strike it out. Quite improper.

Mr. Wessel: It is perfectly proper, if your Honor please.

The Court: I will overrule the objection.

Mr. Wessel: I think, if your Honor please, counsel should wait with his objection until the end of the witness' answer, because it does interrupt the continuity.

Mr. Stryker: That is not correct.

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Mr. Wessel: It can be stricken unless it is most prejudicial.

Mr. Stryker: I am going to object at the time I think prejudicial statements are made. I don't have to wait until he makes them.

The Court: All right.

A. Well, I know I didn't get the money and I told him I didn't get the money, and then Mr. Ronayne turned to Giglio and Roth and he said, "You so and soes," he said, "I thought this paper was correct," and then they started mumbling, having an argument among themselves, and I says, "Well, I am telling you something. I was told to stay away from 253 (that is where the Government was at) and I was told to keep my mouth shut, but I am telling you right now, you call me in five minutes and I am going to be over there because I'm going to tell the whole stinking, rotten mess," and I said, "That is not any threat. You just call me up over there. I'm telling you where I'm going," and I did.

Mr. Ronayne came out in the hall and he says, "Now, Dave, please take it easy, take it easy. Don't do anything rash." Don't do this and don't do that.

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I says, "The—the devil with it. I'm going," and he says, "Well, do me a favor. Whatever you do, don't tell them that you gave me $7,500 to fix up some sugar for you."

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Q. Don't refer to that. A. Pardon me. That is all.

Mr. Wessel: I move to strike the last.

The Witness: That is the story.

Mr. Stryker: He mumbled and I didn't get it. I would like it read.

(The reporter read from the witness's answer as follows:

"Don't tell him that you gave me $7,500 to fix up some sugar for you.")

The Court: Do you want it?

Mr. Stryker: I will let it stay.

The Court: Let it stand.

Q. Was there anything else said in the presence of Mr. Giglio and Mr. Roth at that time, Mr. Lubben? A. Well, that was the story, sir. I mean that was about the sum and substance of it.

Q. You made reference to 253. What is that? A. I think 253 is the terror of everybody who don't pay his income tax.

Q. Is that 253 Broadway? A. Yes.

Q. That is where the special Treasury agents have their headquarters in New York? A. Yes, sir.

Q. You also said in this conversation that you had (198)

previously been told to keep your mouth shut. When was that? A. I was told by Mr. Giglio to stay away from 253 and to keep my mouth shut, that everything would work out all right. I was also told by Mr. Roth if I ever opened my mouth I would find myself at the bottom of the Hudson River in a cement box.

Q. When did he tell you that? A. I have been told that so many times, at least five or six times. Mr. Giglio just told me keep my mouth shut. Mr. Roth told me I would find myself in a cement box in the Hudson River, or I would be floating down the river at the bottom of it.

Q. Did Mr. Giglio ever state to you that he had any knowledge of what was going on in 253 Broadway? A. Yes, sir.

Q. When did he state that to you? A. That day.

Q. Would you state what he said in that connection, please. A. He says, I know you have been to 253, I know everything you do, I know every time you go to 253 Broadway. He told it to me. Then I was afraid to go to 253.

Q. Do you recall, sir, testifying in a suit in this court previously with regard to the corn syrup transaction you

have referred to here? A. I do not know whether it was this court or not, but it was in the building.

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Q. I am referring to the case of College Town Candies, Inc. v. Mario Betancourt, doing business as Commodity Trading Co. et al., Civil 37-543. Do you recall testifying in that suit? A. Yes, sir; I think it was 1950, sir. I do not remember.

Q. Do you recall testifying in that suit in regard to this corn syrup you made mention of here? A. Yes, sir; I do.

Q. Do you recall what you said at that time? A. Yes, I do.

Mr. Stryker: I object to this as immaterial, whether he recalls what he said in another case.

Q. Was what you said the truth, Mr. Lubben?

Mr. Stryker: I object to it as incompetent, irrelevant and immaterial, what he said in some other law suit.

The Court: I will overrule the objection until I see the purpose of the inquiry.

Q. Was what you said the truth, Mr. Lubben? A. Not all the truth, no, sir.

Q. Was it based on any prior conversation you had with Mr. Giglio, Mr. Lawn, Mr. Livorsi or Mr. Roth? A. Well, sir, it was based on two things.

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Q. What were those two things? A. Well, sir, number one, I was told many times to keep my mouth shut about anything that ever happened in Eatsum Food Products, and if I didn't it would be just too bad for me. I was—well, for the same reason, sir, I was afraid, for the same reason I

didn't go to the court when I dissolved my partnership to get a split down the middle because how could I go into court, sir, here I am a black marketeer and if I did go in——

Mr. Stryker: That is not a responsive statement to the question.

The Witness: I am sorry.

The Court: I am not sure what your question is.

Mr. Stryker: It is not responsive at all.

Mr. Wessel: I asked two things that led him not to tell the truth before the court.

The Witness: Well, sir, I was afraid for one thing.

The Court: Could I see you just a second, to see what we are going to get into here.

Mr. Wessel: I refer to page 149 of the transcript (handing to the Court).

(Last statement of the witness read by the reporter.)

Q. Was that fear based on anything Mr. Giglio had (201)
said to you, sir, or Mr. Roth or Mr. Livorsi, or Mr. Lawn? A. No, sir. I was told by Mr. Giglio to—some men's actions are louder than words, sir, and I was told to keep my mouth shut, but Mr. Roth told me, sir, as I say, five or six times emphatically, if I didn't keep my mouth shut that it would be shut for me, and he told me that I would find myself in a box in the Hudson River. He didn't use exactly "in the Hudson River" every time, but just watch your step, and if I opened my mouth I would be taken care of. That, sir, was one.

Q. What was the other reason? A. The second, sir—well, sir, here was a civil case and I didn't want to get my

name in the newspaper, and the fact I had been in the black market, and I didn't want to make any trouble and I just told a lie. Shortly thereafter, sir, why, it didn't make any difference at all.

Mr. Wessel: If your Honor pleases, I have a great number of exhibits to show to the witness, and it is going to take quite a bit of time to mark them. I think it might be a little better if we recessed now and came back maybe a few minutes earlier. I have been as a matter of fact delayed waiting for the exhibits to be marked.

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The Court: Have you anything further to proceed with?

Mr. Wessel: I have a great many more here, your Honor.

Mr. Stryker: That suggestion of Mr. Wessel's is perfectly acceptable to us.

The Court: I have told this jury and everyone else we will run on a timetable and be back at two o'clock. If you want to quit earlier, that is all right.

Mr. Wessel: I will proceed.

(Government's Exhibit 27-51 to 27-189 marked for identification.)

Q. Mr. Lubben, I show you another group of what would appear to be invoices, marked Government's Exhibits 27-51 through 27-189 for identification (handing), and ask you if you can tell me if those are also invoices relating to the corn syrup transaction which you have described here?

Mr. Stryker: While we are waiting, I think I might interrupt: I would like to have marked for

identification the minutes of the College Town Candy case which he referred to in his interrogation, and showed to your Honor. I just want it marked for identification.

Mr. Wessel: I see no objection to it, your (203)
Honor, though I do not see that it is necessary.

The Court: All right, he did not read anything from it as far as I know.

(Marked Defendants' E for identification.)

A. They are all invoices and copies of invoices kept in corn syrup—kept in the ordinary course of business of the Eatsum Food Products.

Q. They are the same as the first group of invoices I showed you this morning? A. They are similar, yes, sir.

(Government's Exhibits 27-190 to 27-212 marked for identification.)

Q. I show you, Mr. Lubben, Government's Exhibits 27-190 through 27-212 for identification (handing), and ask you the same question. A. Yes, sir, they are similar invoices.

(Government's Exhibits 27-213 to 27-217, marked for identification.)

Q. I show you the exhibits just referred to by the clerk (handing), and ask you the same question. A. Yes, sir; similar invoices.

Q. Incidentally, with regard to all these invoices that you have referred to in the group Exhibit 27, did you give those to the Government? A. Yes, sir.

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Q. Do you recall when you did so? A. Yes, sir. When they came to my house at Hillsdale, New Jersey.

Q. Do you recall when that was? A. I believe it was maybe the early part of '49 or the latter part of '48. I am more inclined to believe it was '49.

(Government's Exhibits 27-218 to 27-232 marked for identification.)

Q. I show you, Mr. Lubben, the group of exhibits just marked by the clerk (handing) and ask you the same question with regard to them. A. Yes, sir.

Q. And Exhibit 27-232 for identification, the same question? A. Yes, sir.

Mr. Wessel: I ask that the next group of exhibits be given one exhibit number. They are clipped together.

The Court: You have finished with the others so we will recess now for lunch and convene at two o'clock. (To jury) Do not discuss the case.

(Recess until 2:00 p.m.)

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AFTERNOON SESSION

Mr. Wessel: May I at this time, if your Honor please, introduce Mr. Allan Seif, who is a law assistant in the United States Attorney's office and has worked on this case for sometime now.

The Clerk: Your Honor, in Exhibit 27, subdivision 229 was omitted from my marking, so we will make that correction on the marking.

The Court: We skipped one number in marking the exhibits. It did not get lost.

DAVID GEORGE LUBBEN, resumed.

(Marked Government's Exhibits 28-1 through 28-33 for identification.)

Direct Examination Continued by Mr. Wessel:

Q. Mr. Lubben, I show you Government's Exhibits 28-1 through 33, and ask you whether you can tell me what those documents are? A. Yes, sir.

Q. What are they, sir? A. These are notes that were given to Mr. Giglio to apply on the cost of the inventory, the purchase of the inventory. They are for $2,500 each. I believe there are 30 or 35 of them here.

Q. Do you know how they came into the possession (206) of the Government? A. Yes, sir. I believe these were in the papers I gave the Government.

Q. Where did you get them from, sir? A. Well, sir, they presented the note to the bank and they got the $2,500, then the bank takes the $2,500 out of your account, and then they put this in place of it, so it is like a cancelled check. They are all marked like that.

Q. In other words, each one of those was paid by you? A. Yes, sir, they are all paid.

Q. Do you recognize the signatures on the reverse side of the documents? A. Yes, sir.

Q. You do recognize the signatures? A. Yes, sir, I recognize the signature.

Q. Can you tell me whose signature it is on each one of these documents?

Mr. Stryker: I object unless the documents are in evidence. He says he recognized it and that is enough until you put them in.

The Court: I think that is right.

Mr. Wessel: I don't know how I can put them in until I know whose signature it is, if your Honor please.

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Mr. Stryker: I don't follow that.

Mr. Wessel: This might be the signature of John Jones. I think it is essential to the foundation of a document to establish the signature of whoever appears on the back of the document.

Mr. Stryker: If he offers the documents and I can look at them, then we will have something to either object to or I won't. But now to bring out part of the contents of the documents without putting them in evidence, your Honor's ruling is absolutely correct.

The Court: Well, my own feeling is that you have an adequate foundation now, but I would like to have Mr. Stryker given a chance to object before you make a formal offer.

Mr. Stryker: Is an offer made.

Mr. Wessel: Not at this time, if your Honor please.

By Mr. Wessel:

Q. I show you, Mr. Lubben, Government's Exhibit 6 in evidence, and ask you if that is the original of the document which you were shown in Mr. Ronayne's office and to which you testified this morning? A. Yes, sir, this is an original typewritten sheet, sir. It is the original.

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Q. Were you shown a copy of this document in Mr. Ronayne's office? A. Yes, sir.

Q. Is that the document you were referring to this morning in your testimony? A. Yes, sir. The reason I

can remember that particular piece of paper is because I remember those names on the back page.

Q. Now, sir, this morning I asked you about the various companies which were at 19 Rector Street, and I ask you whether one of the companies was not the Burlan Corporation? A. Yes, sir.

Q. Will you tell me what the Burlan Corporation was? A. The Burlan Corporation, sir, was a corporation that was formed, but it was never used, and it was inactive, and later on, during the partnership, some watches were sold to the Army Post Exchanges, and the fact that we were a food company, that particular invoice, it wasn't the proper invoice to sell watches on, so we had the Burlan Corporation, which was there, and so I discussed it with Mr. Giglio and we decided, and Mr. Roth, and it was decided to use the Burlan Corporation for the sale of watches. The Burlan Corporation, sir, was—it was wholly owned by the partnership. As far as I was concerned, sir, 50 per cent of

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the Burlan Corporation was mine.

Q. Had the Burlan Corporation been in existence before the partnership commenced in 1945? A. Yes, sir. By "existence," I mean it was formed but there was never any business with it.

Q. Do you know what the assets or the net worth of the Burlan Corporation was when you left Eatsum: the partnership? A. I can't give you the exact figure, sir, but I feel it was around $15,000 or $20,000, to the best of my recollection. It was for the sale of watches at Post Exchanges and it was a profitable business.

Q. Did you receive any part of the assets of the Burlan Corporation when you left the Eatsum partnership? A. Not a dime, sir.

Q. This morning, sir, we referred to the total amount of money which went through the corn syrup cash box, and I neglected to ask you whether any part of the $400,000-odd that went through the cash box was put on the books of Eatsum Food Products Co. as sales? A. The cash?

Q. Yes, sir. A. No, sir, it wasn't recorded as a sale, but some of it ended up on the books, sir.

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Q. Some of the $140,000 profit? A. Not the $140,000, sir. No, that never went on the books.

Q. Some of the $400,000 cash was entered on the books? A. No, sir, it wasn't entered on the books, but some of that money, there were some times, sir, that some of that money of the corn box was used to pay some overages in candy, and the candy was ultimately sold at an invoice, so I would think that, then, the candy would show an extra profit so the money would be back on the books, but there were some records kept of that, sir.

Q. Were there any IOUs in this corn syrup cash box? A. Well, sir, there was from time to time. It would be necessary for me to go in, like we needed some money for sugar, and you see, our bank was at 1841 Broadway, and somebody wanted $5,000 or $4,000 for sugar, that we would go in and take it out of the corn box, and then I would put an IOU in there that the candy box, I mean, I owed the candy box, the corn box so many thousand dollars until an adjusting entry could be made on the books.

I believe that was picked up, sir, I don't recall much,

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but I believe it was picked up under an account called "Special, David Lubben Special," and we would take the money from the corn box at some time and buy some other things.

Q. Well, is it in any event, sir, your recollection that there was $140,000-odd net profit? A. I know, sir, that after everything was all over there was—well, now, sir, there was more than $140,000 net profit, because there was still some corn syrup that had not been delivered, but I know there was $140,000 or $144,000 in that cash box when the cash box went over to Mr. Giglio's house.

I saw some papers; Mr. Loperfido told me the money was there, and I knew the money was there.

Q. You just referred to some corn syrup which was still to come when the partnership concluded; is that correct, sir; or when you left it? A. Yes, sir.

Q. What was that, Mr. Lubben? A. Well, sir, there was one company, the Hubinger Company, if I recall correctly, that they owed the partnership—by "owe it," they were supposed to sell the partnership some corn syrup at the regular price, and they had a sort of an agreement,

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I mean, it was a tentative agreement, that they had to sell the partnership 1,280,000 pounds, I believe that is what they still owed the partnership, and when I left, and sold——

The Witness: You know, your Honor, could I be excused just a few minutes?

The Court: Yes.

We will take a five minute recess.

(Jury out.)

(Short recess.)

(Witness conferred with Court.)

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(The jury having left the courtroom, a discussion of Court and counsel ensued.)

The Court: We will take a few minutes' recess. There is some question as to whether the witness can continue, I think.

Mr. Stryker: What is that, Judge?

The Court: The witness tells me he is suffering from this thrombo phlebitis, and there is some question whether he can continue now. Do you want to find out about that? If not, we will go ahead with another witness and bring him back on the stand for the completion of his examination.

We will take a few minutes recess in the meantime.

(Informal recess, during which a discussion of Court and counsel was had in the robing room adjoining the courtroom.)

* * *

(The jury returns to the jurybox.)

The Court: Mr. Foreman, ladies and gentlemen. We are going to have to adjourn the case now until Monday at eleven o'clock. Do not come in at the regular time, I have another matter I will have to take up before you get here on Monday. So it will be Monday at eleven o'clock, and do not discuss the case among yourselves or with anybody else.

(Adjourned to Monday, January 17, 1955, at 11:00 o'clock a. m.)

* * *

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New York, N. Y., January 17, 1955, 11:50 o'clock a. m.

Trial resumed.

(Jury present)

DAVID GEORGE LUBBEN, resumed.

The Court: I apologize again for the delay.

Direct Examination by Mr. Wessel (Continued):

Q. I neglected to ask you, Mr. Lubben, are you here under subpoena? A. Yes, sir.

Q. With regard to the offices at 19 Rector Street, Mr. Lubben, did you ever see any law books there? A. I believe I saw a few, yes, sir.

Q. Would you describe what you saw and where they were and when? A. Well, in Mr. Roth's office, sir, there were some shelves in the back—not exactly shelves; there was a setback in the wall, if I recall correctly, and I believe I did see a few law books on the desk.

Q. Do you have any more records relating to the

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Eatsum partnership, Mr. Lubben? A. No, sir, I don't.

Q. At page 135 of the transcript, Mr. Lubben, you stated, in part:

"... Mr. Bercu stayed I believe until September, 1945 ..."

A. I think, sir, that was December.

Q. I show you, sir, Exhibit 23 for identification and ask you if that refreshes your recollection in any way as to when Mr. Bercu ceased acting as accountant for Eatsum partnership? A. Yes, sir.

Q. What is your refreshed recollection? A. Well, probably, sir, in February, because this is the statement as of January 31, 1946. I know that Mr. Bercu left before I did, sir.

Q. At page 188 of the transcript, Mr. Lubben, you referred to the American Wine Company. Can you give any

more detail with regard to that company? A. Well, the American Wine Company, sir, I don't know if it was the American Wine Company. I know there was a number of American companies, and I know there had been some talk in 1945 about some wine company in California. Whether the name was American or not, I wouldn't know.

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Q. At page 197 of the transcript, Mr. Lubben, you said, in part:

". . . and then Mr. Ronayne turned to Giglio,"

and so forth and so on, "and then they started mumbling," referring to Mr. Giglio and Mr. Roth.

I ask you if you can give any detail as to what it was they mumbled? A. Well, sir, it appeared to be an argument among the three, and Mr. Ronayne, I remember his saying, he said, "I thought you told me these people got the money."

He said, "You told me these people got the money," and I remember saying that, "I know I didn't get the money and I know Hankermeyer didn't get the money," and then there was an argument, sir, between Mr. Roth and Mr. Giglio and Mr. Ronayne.

Q. Was anything said by Mr. Roth or Mr. Giglio with regard to whether or not these partners had in fact gotten the money? A. I can't remember all the things of the argument, but I know Mr. Ronayne was furious, sir. He appeared furious, because he said that—I turned to Louis and he said—used a little profanity to punctuate his re-

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marks, and he said, "You told me that they got this money."

And I said, "Well, I'm telling you right now, sir, I didn't get the money, and I know that Mr. Hankermeyer didn't get the money, and I know as long as I was there

Mr. Stone didn't get the money, and I know that as long as I was there Mr. Loperfido didn't get that money." Maybe he got it later on, I don't know, but I know those three didn't get it.

Q. Did Mr. Roth or Mr. Giglio say anything with regard to that subject that you heard specifically? A. I can't remember the conversation, sir.

Q. At page 166 of the transcript you referred to a conversation with Mr. Roth in which reference was made to Michael Cohen and Mario Betancourt. A. Yes, sir.

Q. And in part you said he, Mr. Roth, said:

> "Don't let it worry you because I am his accountant and all I am going to do is make out the paper, make out the income tax sheet showing that Michael Cohen just paid out these checks to Eatsum Food products, and in the cash we will let that accumulate down at the end."

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and it goes on.

I will ask you, sir, what you meant by the term "accumulate down at the end"? A. Well, sir, the amount of cash that we were taking in from Mike Cohen——

> Mr. Stryker: Just a moment. I object to his statement of what he meant by it. A pure operation of the mind. He has a right, of course, to state what was the conversation.
>
> Mr. Wessel: Well, I will rephrase my question so it accords with Mr. Stryker's objection.
>
> The Court: All right.

By Mr. Wessel:

Q. Will you please, sir, state what it was Mr. Roth said in connection with that subject; that is, the money

accumulating down at the end? A. Well, sir, the checks were to go on Michael Cohen's income tax statement, and the cash that Michael Cohen was giving us I knew some day he would have to say who got the money, and Mr. Roth told me that I shouldn't worry about that, that all of the cash, he would add it up, that Michael Cohen said he had given us, add it all up, and he would make out an income tax statement, Mr. Roth said, and he would add it all up,

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and there put down at the bottom that Michael Cohen never paid out that cash, and then he would make out the statement, and then the income tax form, and he would send it in, Mike would sign it, and he would send it in, and he would put Michael Cohen in bankruptcy, and by the time the case ever came around that Mike would be dead.

Q. At page 153 in the transcript, in an answer you said:

> "Mr. Giglio told me not to sell the corn syrup. Mr. Roth told me not to sell the corn syrup to Mr. Cohen."

I ask you whether that is a correct statement of what Mr. Giglio told you with regard to whether or not you were to sell corn syrup. A. Mr. Giglio told me not to sell the corn syrup to Michael Cohen, and Mr. Roth told me the same thing.

Q. Did Mr. Giglio ever tell you not to sell corn syrup? A. No, sir, he never did.

Q. Page 175 of the transcript you said, and this is part of an answer:

> "... there was between a hundred and a hundred forty-four thousand dollars that was in that cash box . . ."

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I ask you, sir, if that is a correct statement? A. No, sir. I said there was between a hundred forty and a hundred forty-four thousand that was in the cash box.

Q. At page 183 of the transcript you said, in part of an answer:

> ". . . I think I paid them $340,000 or $350,000 for the inventory and machinery."

I ask you whether the machinery was included in the $340,000 or $350,000? A. No, sir, the machinery was not included, but there were one or two pieces of machinery that had been purchased during the life of the partnership, and that machinery was added to the inventory, and it is on some bill of sale, sir, that states that.

Q. Page 179 of the transcript, sir, you said, in part of an answer:

> ". . . they were going to give me a couple of hundred dollars a week salary for a few months . . ."

I ask you whether you ever received any salary after you left Eatsum in March of 1946? A. No, sir. I did not.

Q. Government's Exhibit 27-229 for identification, sir,

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was not shown you inadvertently the other day, and I ask you whether that is a copy of one of the invoices of Eatsum Food Products Co. partnership for the sale of corn syrup? A. Yes, sir, it is.

Q. Do you know who Raymond Giglio is, sir? A. Yes, sir, he is a brother of William Giglio.

Q. Was he ever employed by Burlan Corporation while you were associated with that company? A. No, sir, he was not.

Q. Now, Friday, sir, at the conclusion of the testimony, you were referring to the sale of some corn syrup by you

after you left Eatsum partnership. A. I beg your pardon, sir.

Q. Yes, sir. You referred to the sale of some corn syrup by you, or by your company after you left Eatsum partnership? A. Yes, sir.

Q. Do you recall that testimony that you gave Friday, sir? A. Well, sir, when I left the partnership, the Hubinger Company owed the Eatsum Food partnership, that is, they had an obligation to sell, I believe it was more than a million pounds, 1,200,000 pounds, if I recall correctly, worth of corn syrup at the ceiling price, and they sold, they shipped

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one car, I believe, to the partnership after I had left, and then some trouble developed over it, and then they refused to sell any more.

Mr. Giglio and Mr.—Mr. Giglio and Mr. Roth contacted me on the telephone, and I believe I was down in Mr. Giglio's office, and they wanted that amount of corn syrup, because he says, that was one of the conditions that they had signed the partnership and they wanted that profit, and so they told me if I would go to—Mr. Roth told me he would pay my expenses if I went to Keokuk, Iowa.

I believe I contacted a Mr. Robinson prior to going to Keokuk, who was the sales manager, to the best of my knowledge, some place in Chicago, and later I went to Keokuk and I spoke to Mr. Robinson and Mr. Fisher about resuming the sale of corn syrup to Eatsum Food Products, and they would not, sir, because they said it was being sold in the black market. And I explained to these gentlemen why, that I was no longer in partnership with them, and that this money, the profits of this were to be charged against me. I couldn't pay it, this money, and would they please ship the corn syrup.

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In fact, I pleaded with them, and they, Mr. Fisher finally agreed to ship, I believe, five or six cars more, but he would not ship that corn syrup to the Eatsum Food Products. He wanted no part of them.

Mr. Stryker: I move to strike that out. It is a mere statement of the witness, by some person not connected with this at all, about he wanted no part of it. I move to strike that out.

Mr. Wessel: Well, I have no objection to it being stricken.

The Court: All right, I will strike it.

Mr. Wessel: Will you continue, please, sir.

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Q. Continue, sir, please. A. So he said he would ship it to General Confections, and that I could in turn sell it—do what I had to do with it, sell it to Eatsum Food Products, but he didn't want to make any direct shipment to Eatsum Food Products.

There were four or five cars were shipped to General Confections. This corn syrup—Mr. Roth was on the phone I would say almost constantly; a number of times Mr. Giglio would call me about it, when the corn syrup was coming, but Mr. Roth was the most persistent one, and then the corn syrup did arrive they gave me a penny a pound profit to sell it, commission; and then I would pay Mr. Roth the overage, which I believe was about $8,000 a car.

On several occasions I—I remember one occasion very distinctly, that I paid him, and I believe Mr. Hankermeyer paid him another time, sir; but Mr. Roth got the overage, sir.

Q. Do you recall the amount of overage which Mr. Roth received, by pound? Was there a certain fixed price per

pound? A. Yes, sir. I can't recall the amount of the price that was overage, sir, but the amount seems to stick in my memory of its being around $8,000 for a car, or $7,500 (225) on each car, which was the overage.

(Government's Exhibits 29-1 to 29-6 marked for identification; Government's Exhibit 30 marked for identification, and Government's Exhibit 30-1 marked for identification.)

Q. I show you, Mr. Lubben, a large black book which has been marked Government's Exhibit 30 for identification (handing), and ask you if you can tell me what that book is? A. Yes, sir. It is a record of a cash box of the Eatsum Food Products partnership.

Q. Now referring specifically to the page which has been marked Government's Exhibit 30-1 for identification, what is that, sir?

Mr. Stryker: One moment. If your Honor please, the witness is asked what is that, and shown a document. It calls for the contents. If the witness identifies the document and Mr. Wessel desires to offer it in evidence I should think prima facie he would have a right to, subject to such questions. But I think it is quite adequate for the witness to take a document and identify it as such and such but not read from it in any way.

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Mr. Wessel: I will rephrase my question.

Q. Will you look at Government's Exhibit 30 for identification and see if it refreshes your recollection that that book also relates to activities of General Confections, Inc.? A. Yes, sir; it does.

Q. Referring to page marked Exhibit 30-1 for identification of that book; does that refresh your recollection in any way as to the agreement with regard to the price you had made with Louis Roth with regard to this corn syrup? A. Yes, sir; it does.

Q. What was that agreement? A. Well, on June 1st, sir, I paid him 8¾ cents a pound, to Louis Roth. We had to pay Louis Roth 8¾ cents a pound; yes, sir. That was the agreement.

Mr. Stryker: If your Honor please, I ask that the document be shown to me. It is the invariable rule that when a witness says that a paper refreshes his recollection, even though counsel does not choose to offer it in evidence, opposing counsel has a right to look at it. I think there is no exception to that rule. I ask for that.

The Court: Well, I am not so clear on the rule as to that, Mr. Stryker. I will think about that by the time the cross-examination comes around.

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Mr. Stryker: I would like to have it before that time if I am entitled to it.

The Court: I will not give it to you now.

Mr. Stryker: You will or——

The Court: No. Let me see that page, please.

Mr. Wessel: (Handing to Court) should tell your Honor I have no objection to that page going into evidence. I did not offer it at this time because I did not want to interrupt the witness's direct testimony. But if counsel wants to offer it in evidence, or accepts it under those conditions——

Mr. Stryker: I have a right to examine the paper you have shown the witness, that he says refreshes his recollection.

The Court: There are only four lines there down from the top that are involved, and I do not think the rest of the paper would be important.

Mr. Stryker: That won't be sufficient. I want all of the paper he has identified.

Mr. Wessel: That is certainly not the rule.

The Court: I will deny that.

Mr. Stryker: Whatever paper the witness said he refreshed his recollection from, may I have that?

The Court: The four lines of it.

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Mr. Wessel: I will, if your Honor please, have these four lines photostated, so that part of the page will be produced, and I will offer it in evidence at the conclusion of the witness's direct testimony.

The Court: All right.

By Mr. Wessel:

Q. I show you, Mr. Lubben, Government's Exhibits 29-1 through 29-6 for identification (handing), and ask you if you can identify those for me, please? A. Yes, sir. These are copies of a collateral note that was given to the General Commercial Acceptance Company in payment of—when they would pick up the draft on the car at the syrup bank; then we would have to send a note we owed them the money, and the General Commercial Acceptance would advance part of the money and we would have to put up the rest. And then when the car was paid for—it seems to be part of the deal in fact, sir.

Q. Were these documents kept in the regular course of business by Eatsum Food Products? A. Yes, they were.

Q. Were these part of the regular course of business of the General Confections Company? A. Yes, sir; they were.

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Q. Was it part of General Confections' business to keep such documents in the regular course of its business? A. Yes, sir.

Q. Did you ever, sir, discuss with Mr. Giglio, Mr. Lawn, or Mr. Livorsi, anything with regard to these six carloads of corn syrup? A. Yes. Mr. Giglio.

Q. When was that discussion? A. When I came back, sir, from Keokuk, Iowa.

Q. Was anyone else present at the discussion? A. I don't recall, sir, but Mr. Roth was pretty much all around. I cannot say whether he was there or whether he was not, sir.

Q. What did Mr. Giglio say and what did you say at the time? A. I told him I came back from Keokuk, Iowa, and that the Hubinger Company would not sell any more corn syrup to the Eatsum Food Products, because he said it was being sold in the black market, and I explained to Mr.—I told him, I talked to Mr. Fisher out there, told him what it meant, that I would be accountable for this money, that it had been advanced for premiums, and I had appealed to Mr. Fisher, to the fact that Mr. Fisher knew that the corn syrup—a premium had to be paid on the corn to get it in the first place, therefore I did not see any reason

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why he would not ship it. But Mr. Fisher thought otherwise, and he said he would ship us—I don't know, five or six carloads of corn syrup. I said, Well, that is not all the amount of corn syrup we have coming to us; and he said, Well, we will talk about that later.

Mr. Wessel: I will mark this paper an exhibit for identification.

(Marked Government's Exhibit 31 for identification.)

Q. I show you Government's Exhibit 31 for identification, Mr. Lubben (handing), and ask you first if your signature appears on that document? A. Yes, sir, it does.

Q. Can you tell me what it is? A. It is something about an agreement, sir? I mean an agreement to dissolve partnership.

Q. Do you know where the original of that document is? A. No, sir; I don't know.

Q. Do you have the original? A. No, sir; I do not.

Mr. Wessel: I offer Government's Exhibit 31 for identification in evidence.

Mr. Stryker: Just a question. This is a photo-

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stat of some other paper, is it not, Mr. Lubben?

The Witness: It appears to be a photostat, sir.

Mr. Stryker: Where is the original of the paper?

The Witness: I don't know, sir.

Mr. Wessel: He answered that question, your Honor.

Mr. Stryker: Where did you get this photostat from?

The Witness: It was given to me now, sir.

Mr. Stryker: Is this the first time you ever saw it?

The Witness: I recall seeing the paper—I remember signing the paper.

Mr. Stryker: I ask is that the first time you ever saw it?

The Witness: This paper?

Mr. Stryker: Yes.

The Witness: I don't recall seeing it before, sir. I may have. I have seen a lot of papers.

Mr. Stryker: I have no objection.

The Court: It will be received.

(Government's Exhibit 31 for identification received in evidence.)

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(Government's Exhibits 32 to 38 inclusive marked for identification.)

Mr. Wessel: (Addressing jury) Exhibit 31 is a photostatic copy of an agreement, a letter agreement, dated March 6, 1946, Accepted, William Giglio. Accepted, David Lubben. Witnessed by Louis J. Roth. And it sets forth a proposition that appears to be accepted.

It is addressed to David Lubben and it reads, and I am reading a part:

"I agree to take over your 50 per cent ownership in the business beginning May 31, 1946, and myself conduct the affairs of the partnership in its entirety until May 31, 1946. At that time I agree to accept full ownership of the business, and in return for your interest will assume payment of your Federal income tax liability as reflected by the partnership Federal income tax return filed as of the close of business May 31, 1946."

Then there is a handwritten note with initials appearing next to it. The handwritten note reads:

"As reflected on the books of the company, also all New York State income taxes."

The next paragraph:

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"I will also assign to you the plant and equipment, the partnership now possesses, for your exclusive ownership. In the meantime even though you be no longer active in the conduct of the busi-

ness, consent that you have a salary to continue at $200 a week and permit you to use the plant and equipment for your exclusive purposes, beginning March 9, 1946."

Then there is a handwritten interlineation which I cannot read. It does not appear to be important, but I suggest you see if you can read it; I do not have the original.

"If this expresses our intention please sign the acceptance of this letter on the bottom."

(Hands exhibit to jury).

(234)

Mr. Wessel: If your Honor please, I have a number of exhibits which I will be offering now. I don't quite know how to do it to avoid wasting time.

The Court: Sometimes you can't. Go ahead.

Mr. Wessel: I think, perhaps, the way to do it is to offer them all, and then hand them all to the jury together so that each one can be looking at one document, and then take a brief recess or allow them to examine these papers.

The Court: All right, start and let's see how we get along.

By Mr. Wessel:

Q. I show you, Mr. Lubben, Government's Exhibit 32 and ask if you can identify that for me, sir? A. Yes, sir. This is an agreement of the sale, of the dissolution of the partnership or the sale of certain items to me.

Q. You recognize the signatures at the end of the document? A. Yes, sir.

Mr. Wessel: I offer it in evidence.

(Marked Government's Exhibits 39 through 44 for identification.)

Mr. Styrker: I have no objection.

(Government's Exhibit 32 for identification (235) received in evidence.)

Mr. Wessel: Exhibit 32 is an agreement dated June 4, 1946, between Eatsum Food Products and Giglio, referred to as Seller, and General Confections and Lubben, referred to as Purchaser. It is signed by William Giglio and David Lubben, and attested by Roy Hankermeyer.

Rather than read the whole document, it relates to the sale of certain merchandise by Eatsum and Giglio to General Confections and Lubben.

Paragraph 3 reads:

"The purchase price for the said items appearing upon Schedule A annexed hereto is made up of the values set by the parties to each of the said items as such values appear opposite each item on Schedule A annexed hereto, the total of such values being $339,052.77."

Schedule A lists the merchandise being sold and includes, as item 1, all merchandise inventory on hand March 9, 1946, value $382,073.93, and a number of other accounts, including item 5, prepaid account of McKesson & Robbins, $1.

A rider to paragraph A, which has the initial "D," and the initials "WG" next to it, reads: (236)

"Under the agreement by which Eatsum Food Products Co. was dissolved made on even date here-

with, the benefit of the proceeds of all of the assets herein referred to has been transferred to William J. Giglio and all of the payments to be made hereunder shall be made to William J. Giglio."

Paragraph 4 reads:

"The Seller acknowledges that he has received on account of the said purchase price the sum of $165,775.10. The Purchaser agrees to pay the balance of the purchase price consisting of the sum of $173,277.67 in the manner following:—

"(A) $75,000 in cash or by certified check or official check of a New York bank at the time of the delivery of the bill of sale hereinafter referred to;

"(B) The balance of $98,277.67 by forty notes of the Purchaser payable to the order of the Seller" —and then there is an interlineation in handwriting, "Giglio," and over at the left the initials "D" and "WG"—"the first thirty-nine of which shall be in the sum of $2,500 each and the fortieth of which shall be in the sum of $77.67, one of said notes to

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be payable on August 2, 1946, and one of said notes to be payable on the Friday of each week thereafter until the full sum has been paid. In the event the Purchaser shall default in the payment of any of the said notes," and so forth; I won't read the rest of it.

(Handed to jury.)

Mr. Stryker: I have no objection to these twenty-three, I count, Exhibit 28- to—what is that?

Mr. Wessel: I offer in evidence and counsel does not object to Exhibits 28-1 through 28-33.

Mr. Stryker: All right, no objection.

(Government's Exhibits 28-1 through 28-33 for identification received in evidence.)

By Mr. Wessel:

Q. Mr. Lubben, I show you Exhibits 33 and 34 for identification and ask you if you can identify the signatures on those documents? A. Yes, sir, I do recognize the signatures.

Mr. Wessel: I offer Exhibits 33 and 34 in evidence.

Exhibit 28, ladies and gentlemen, is a group of (238) 33 notes, each for $2,500, coming due weekly, all signed by David Lubben, who agrees to pay the $2,500, and all signed on the reverse side, William Giglio, Eatsum Food Products Co. And then "Special."

(Handed to jury.)

Mr. Stryker: As to No. 33 for identification, I have no objection to that; you can offer it.

(Government's Exhibit 33 for identification received in evidence.)

By Mr. Stryker:

Q. With regard to Exhibit 34 for identification, this is a bill of sale from you to the General Confection Company, isn't it? A. I don't know, sir. You are holding the papers. I can't read it.

Mr. Wessel: I object to examination on a document that is not in evidence. The document speaks for itself. Counsel either has or has not got an objection to it.

Mr. Stryker: I have a right to find out, haven't I, to ask him questions about it?

The Court: Go head.

A. Yes, sir.

Mr. Stryker: I object to it; incompetent, ir-
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relevant, immaterial. Doesn't pertain to any of the defendants here; appears to be a transaction between David G. Lubben and General Confections. Maybe I had better ask a question there.

By Mr. Stryker:

Q. General Confections was a company that you organized after you left the Eatsum partnership, is that not true?

Mr. Wessel: If your Honor please, I think counsel's opportunity for cross examination——

Mr. Stryker: The name is in the paper. I think I should ask about it.

Mr. Wessel: It has already been answered in the testimony.

Mr. Stryker: May I have my question, your Honor?

The Court: All right, go ahead.

By Mr. Stryker:

Q. Is that not a fact? A. Will you repeat the question.

(Question read.)

A. Yes, sir.

Q. That is the company under whose name or under which you carried on the business after you became dis-
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associated from Mr. Giglio; is that correct? A. Yes, sir.

Q. He wasn't a stockholder or any part of that company, was he? A. No.

Mr. Wessel: If your Honor please, I don't think this is proper voir dire examination, if that is what counsel wishes to choose it to be.

Mr. Stryker: If your Honor will look at the paper you will see my question is perfectly proper.

Mr. Wessel: There is no question about the document. It says it is, and it appears to be and clearly is a sale from Mr. Lubben to General Confections of the assets which he had purchased from Eatsum.

Mr. Stryker: Well, then, all right, I object to it as incompetent, irrelevant and immaterial; a transaction between this man and his own company, in no wise related to Mr. Giglio or any of the defendants.

The Court: Let's see it.

I will take it.

Mr. Stryker: Exception.

(Government's Exhibit 34 for identification received in evidence.)

Mr. Wessel: Exhibits 33 and 34 are bills of (241) sale for the merchandise purchased by Mr. Lubben from Eatsum, and then sold by Mr. Lubben to the company he organized, General Confections, Inc. Attached are schedules of the merchandise involved.

(Handed to jury.)

By Mr. Wessel:

Q. I show you Exhibit 37 for identification, Mr. Lubben, and ask you if that group of documents are documents kept in the regular course of business by General Confections, Inc., received and kept in the regular course of business by General Confections, Inc.? A. Yes, sir, these were

received and kept by General Confections in the normal course of business.

Mr. Wessel: I offer Exhibit 37 in evidence.

Mr. Stryker: I have no objection.

(Government's Exhibit 37 for identification received in evidence.)

Mr. Wessel: Exhibit 37 is a group of invoices relating to the purchase by General Confections of this inventory (handed to jury).

Your Honor, it is a quarter to one. Shall I continue?

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The Court: No; I think it would be a good time to stop now, and we will resume at 2 o'clock. We will recess now until 2.

Don't discuss the case.

(Recess taken to 2:00 p. m.)

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AFTERNOON SESSION.

(2.00 p. m.)

DAVID GEORGE LUBBEN, resumed.

Direct Examination Resumed by Mr. Wessel:

Mr. Wessel: Instead of offering a photostat part of a page of Exhibit 30-1 for identification, I am going to offer the whole of it in evidence.

Mr. Stryker: No objection.

(Government's Exhibit 30-1 for identification received in evidence).

Mr. Wessel: (Addressing jury) Government's Exhibit 30-1 is a page from the large black book

Mr. Lubben identified. Under the date June 1, 1946, appears the following notation:

"Received from Mike Cohen as deposit on overage account for some corn syrup we are selling him. We have to pay 8¾ cents a pound to L. Roth." Over in the column is "Received" the figure $12,000 (hands exhibit to jury).

I offer in evidence Government's Exhibits 29-1 to 29-6 for identification.

Mr. Stryker: No objection.

(Government's Exhibit 29-1 to 29-6 for identification received in evidence).

Mr. Wessel: (Addressing jury) Government's (243) Exhibits 29-1 to 29-6 are six drafts of the General Commercial Acceptance Co. to General Confections, Inc., relating to carloads of corn syrup (hands exhibit to the jury).

By Mr. Wessel:

Q. I show you, Mr. Lubben, Government's Exhibit 38 for identification (handing), and ask you if you can identify that document? A. Yes, sir.

Q. Is that a record received and kept in the regular course of business of General Confections, Inc? A. Yes, sir.

Mr. Wessel: I offer it in evidence.

Mr. Stryker: I object to it on the ground that the paper is wholly unidentified as having any relationship whatever——

Mr. Wessel: I will ask him questions about that.

Mr. Stryker: —to the defendants.

David George Lubben—By Government—Direct

Q. Can you tell me, Mr. Lubben, what Exhibit 38 is, please (handing)? A. Yes, sir. It is a list of machinery, packing and raw materials sold to General Confections.

Q. Whom was it sold by? A. This was sold to General Confections, sir, by Eatsum Food Products, the partnership.

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Q. Do you know where the original of which that appears to be a copy, is? A. No, sir; I do not.

Mr. Wessel: I again offer it in evidence.

Mr. Stryker: Go ahead.

(Government's Exhibit 38 for identification received in evidence.)

Mr. Wessel: (Addressing jury) Exhibit 38, as the witness identifies it, is a list of certain machinery, packing and raw materials sold to General Confections by Eastern Food Products.

Mr. Stryker: Does it say that on the paper?

Mr. Wessel: I do not think I am subject to examination.

Mr. Stryker: All I ask is what is on the paper.

Mr. Wessel: Will you read my statement for Mr. Stryker.

(Court reporter read statement of Mr. Wessel referred to.)

Mr. Wessel: The total amount stated for the sale is $27,567.79.

Q. Mr. Lubben, would you describe, please, the inventory which you purchased? A. Yes, sir. It consists of cartons, printed cartons with the name, Eatsum Food Prod-

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ucts, small five-cent cartons, the packing cases, cardboard packing cases printed with Eatsum Food Products name. Peanuts, chocolates, flavors, and other materials that were necessary to manufacture candy. Also there was several thousand dollars charged for some machinery that I had given a man during the partnership a $2,000 for doing some experimental work on some machinery. There was also charged in the neighborhood of four thousand dollars on some fruit cakes that we had ordered and had not been delivered, and there was one dollar on there for a drum, a drum on which the company paid a deposit, and the drum was up at the factory. There was some proration of the rent and—that is all I can remember, sir.

Q. Did General Confections Inc. use the cartons with the name, Eatsum Food Products on it? A. Yes, they did.

Q. Was any change made in the name? A. Some of the outside cartons, sir, they did—no, we used the name, Eatsum Food Products, sir.

Q. I show you, Mr. Lubben, Exhibit 35 for identification (handing), and ask you if you can identify that document and the signatures at the end of it? A. Well, I can identify the signature—this is a copy of a dissolution agree-

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ment of the Eatsum Food Products Company. I can identify the signature of William Giglio and the signature of—my own signature; the signature of my uncle, the signature of Ronald Stone; the signature of Margherita Giglio I cannot identify because she was not there when it was signed. The signature of Frank Loperfido, sir, to me, does not appear to me to be his signature.

Mr. Stryker: Will you read that back. I did not get it.

(The court read part of the answer: "The signature of Frank Loperfido, sir, to me, does not appear to me to be his signature.")

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A. (Continuing) And then the signature of Frank Livorsi and Dorina Livorsi, I cannot identify those. The subscribing witness, sir, is Howard M. Lawn, and I have seen his signature before, sir. It appears to be his signature.

Mr. Wessel: I offer Exhibit 35 in evidence.

Mr. Styrker: Could I see Exhibit 32 in evidence, please?

No objection.

(Government's Exhibit 35 for identification received in evidence.)

Mr. Wessel: Exhibit 35 is a copy of the dissolution agreement, signed copy, of the Eatsum Food Products Co., entered into as of the 31st day of May, 1946, and executed June 5, 1946.

It reads in part:

"The firm ceased to conduct business at and as of March 9, 1946."

Paragraph 2 reads, in part:

"The limited partners hereby acknowledge that they have received repayment of the capital contributed by them to the firm and all sums or benefits to which they were entitled from the firm or the

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general partners and they do hereby severally and jointly release the firm and each of the two general partners and their respective heirs,"

and so forth, "from all claims."

Paragraph 3 reads, in part:

"The assets of the firm remaining after the aforesaid payments which have been completed to the limited partners and the firm's liability shall be respectively distributed and assumed in the manner following."

And subparagraph c reads:

"All of the other assets of the firm, including the goodwill thereof, and the right to conduct business under the name heretofore used by the firm, and all other rights and property of whatsoever kind," etc., "shall forthwith be and hereby they are transferred, assigned and set over by the firm and Lubben to Giglio, and Giglio accepts the same without any warranty or representation from Lubben as to the kind, quantity, quality," and so forth, "thereof."

The subscribing witness is Howard M. Lawn, who also acknowledged, before a notary public, that he was the sub-

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scribing witness.

(Handed to jury.)

Mr. Wessel: I offer in evidence Exhibit 36.

Mr. Stryker: No objection.

(Government's Exhibit 36 for identification received in evidence.)

Mr. Wessel: Exhibit 36 is a certificate of dissolution, which is filed with the county clerk's office in the Supreme Court, New York County.

(Handed to jury.)

By Mr. Wessel:

Q. Mr. Lubben, the documents I have shown you this morning, that is, Exhibits 29 through 35, and 37 and 38, do you know whether the Government obtained those documents? A. Sir, I don't know what numbers those documents are.

Q. Well, referring specifically to the papers of dissolution, and the certificate of dissolution, the dissolution agreement, which you saw this morning, do you know where the Government obtained those documents? A. Yes, sir. I gave them some papers, and they were probably in those papers, and there was another copy of all those papers attached to my income tax return.

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Q. And the papers relating to the sale of the inventory of Eatsum to General Confections, do you know where the Government obtained those documents? A. The invoices?

Q. Yes, sir. A. I gave them to them, sir.

Mr. Wessel: I offer in evidence Exhibits 39 through 44.

Mr. Stryker: No objection.

(Government's Exhibits 39 through 44 for identification received in evidence.)

Mr. Wessel: Exhibits 39 through 44 are certificates of incorporation of American Brands Corporation, American Brands Wholesale Corporation, American Agar Corporation, American Sweets Corporation, American Trucking & Forwarding Corporation, and Lawn International, Inc., all under the certificate and seal of the State of New Jersey.

(Handed to jury.)

Mr. Wessel: I have no further questions of this witness, if your Honor please.

The Court: All right.

Mr. Stryker: Shall I go ahead or shall I wait?

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The Court: You might as well wait for the jury.

Mr. Stryker: While we are waiting, maybe we can ask your Honor a question.

The Court: Surely.

(Discussion at the bench not recorded.)

The Court: Would you rather take the mid-afternoon recess now?

Mr. Stryker: I think that would be a good idea.

The Court: We will take a five-minute recess now.

(Short recess.)

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Cross Examination by Mr. Stryker:

Q. Did you ever bribe an agent of the United States Treasury Department? A. No, sir.

Q. If I left that subject there, would you think that the answer you have given was the whole truth? A. Yes, sir.

Q. Did you pay Louis Roth $7,500 to bribe an agent of the Alcoholics Tax Bureau? A. No, sir; I paid——

Q. Just yes or no, did you or not? A. I paid Louis Roth $7,500——

Q. It is a plain question: yes or no, did you ever pay him $7,500 to call off an agent of the Alcoholics Tax Unit? A. Sir, I am trying to explain it to you.

Q. I want the answer, please.

Mr. Wessel: If the witness cannot answer yes or no, he should not be required to, your Honor.

Q. Can you answer that yes or no? A. I would like to explain.

Q. I know you would, but if you cannot answer it yes or no, I would like to know. A. I gave Louis Roth——

Q. Pardon me, if you can answer it yes or no, I would like that, if not, I will go forward. A. No, I do not think I can answer yes or no.

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Q. Did you testify before the Kefauver Committee in 1950? A. Yes, sir.

Q. You were sworn as a witness down there before the Kefauver Committee, were you not? A. I was, sir.

Q. You took an oath? A. I did, sir.

Q. To tell the truth, the whole truth and nothing but the truth? A. Yes, sir.

Q. And did you testify as follows: "Then Louis would call on the phone, how you getting along, anything I can help you with? Sure, there is an A. T. U. man out here"——

Mr. Wessel: May I have a page reference to that, if your Honor please?

Mr. Stryker: Do you request the page?

Mr. Wessel: Yes, I would like to have the page reference.

Mr. Stryker: I will give it to you. Page 1121.

Q. (Continuing) "Sure, there is an A. T. U. man out here. You would have to give Louis Roth $7,500 to call him off.

"Senator Tobey: Did he make that statement in his direct testimony?

"Mr. Halley: He made the statement under oath. You have heard it.

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"Senator Tobey: Is that your statement? Are you telling that as an anecdote or are you now testifying directly, that you did pay Louis Roth $7,500 to get it off?

"Mr. Lubben: I am telling the truth here."

Did you so testify? A. Yes, sir; I did.

Q. Was that the truth? A. Yes, sir; but if you read——

Q. Was it the truth? A. You are not reading all the testimonial preceding it, sir.

Mr. Stryker: May I ask one thing, that this witness be directed not to make or interject comments. I have read what I have read, and given Mr. Wessel the page, and I do not need the comment of the witness. Admittedly I have not read the whole hundred pages to him.

Mr. Wessel: Unfortunately, I do not have the typewritten transcript, but the printed transcript. I think it is a proper answer to the question, if counsel has not read the entire testimony with regard to that subject.

The Court: I think that where the question is susceptible of yes or no as the answer we will do our best to see you get the kind of answer that you want. (255)

If it incorporates a word open to shades of meaning, such as "truth," I will not hold the witness to a yes or no answer.

Q. I will go along with what you swore to. Did this happen:

"Mr. Lubben: I am telling the truth here."

I think I read that.

"Senator Tobey: Then you did pay Louis Roth that $7,500 for getting this A. T. U. man off?"

Did you say, "That is after I gave them everything and I had my own business for myself."

"Senator Tobey: Who was the A. T. U. man they got off?

"Mr. Lubben: I don't know what the fellow's name was. He is a bald-headed guy; I don't know."

Now did you testify before the Kefauver Committee as I have read? A. Yes, sir; I did.

Q. Was it the truth? A. Yes, sir; it was the truth.

Q. Then it is the fact, is it not, that you did pay Louis Roth $7,500 to get this Alcoholics Tax Unit man out, or off? A. No, sir; that isn't the whole story, sir.

Q. Did you give Louis Roth $7,500 to do something (256)

with the Alcoholics Tax man? A. Yes, sir; I did.

Q. Did you do what I have read you here from your testimony to get him off? A. Yes, sir; but it is still not the whole story, sir.

Q. Didn't you tell the whole story down at Washington before the Kefauver Committee? A. I was told whatever I was asked, sir, as best I could remember.

Q. Did you tell the whole story down in Washington?

Mr. Wessel: I object. This is not proper cross-examination. This witness is not on trial. This is not a prior act which led to anything I know of. It is not cross-examination of the witness, and he is badgering the witness.

Mr. Stryker: I am inquiring as to this man's credibility.

The Court: I overrule the objection.

Q. Did you tell the whole truth down there or not? A. Yes, sir; but there is more to it than that.

Q. In other words, there is something you did not tell? A. I didn't say that, sir.

Q. You mean there is more to it than what you told the Senators down there? A. I don't know, but I believe some-

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where in the——

Q. Answer that question, is there more to it or not? A. Sir, I believe there is more to it than the testimony you are reading.

Q. Do you think I omitted something that bears on this? A. I didn't say that. I testified twice before the Kefauver Committee and I told the truth.

Mr. Stryker: The book I am reading from, Mr. Wessel, appears to be the stenographers' minutes, Holmes & Alderson, the reporters of the Congressional Committee, and it is dated August 22, 1950.

Q. That was the time you were before the Committee, wasn't it?

Mr. Wessel: If counsel suggests that was the only time he was before the Committee, it is not correct.

Mr. Stryker: I did not say that.

Q. That is the time you were before the Committee, on that day? A. Yes, sir.

Q. That was a big public hearing? A. Yes, sir.

Q. Where people's photographs were being taken? A. Yes, sir.

Q. That is the time I am talking about. You only had one public hearing where you appeared; is that right? A. Yes, sir.

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Q. That is what we are talking about. Now you told Louis Roth that you had an A. T. U. man or Alcoholics Tax Unit, there in your office, didn't you? A. Yes, sir; I——

Q. Did you or not? A. I told him several times.

Q. Did you tell him that? A. I have told him, yes, sir, that——

Q. Pardon me, did you tell him that or not? A. Repeat the whole words so I can quote to you.

Q. I am conducting the examination. I ask you whether you told Louis Roth that you had an Alcoholics Tax Unit man in your office. You either did or did not. Let me know, and we will pass on. A. When I say I had him in the office, it doesn't mean he was there when I called Louis Roth.

Q. I only ask whether you told him you had an Alcoholic Tax Unit man in your office, to Louis Roth? A. Yes, sir; I told that to Louis Roth.

Q. This was when you were no longer a partner of Mr. Giglio? A. That is right.

Q. You were in your own business, General Confections? A. Yes, sir.

Q. You were on your own, that is right, isn't it? I

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mean you had a new business, General Confections, up in the Bronx, didn't you? A. Yes, sir.

Q. Did you give Louis Roth $7,500 to call this A. T. U. man off? Yes or no. A. I gave Louis Roth——

Q. I think you can answer that yes or no. Did you give him that to call him off? A. It calls for more than a yes or no answer, sir, and that is the answer I can give.

Q. You cannot answer that yes or no? A. I would like to give you the whole answer.

Q. I know what you would like, but now you are in court.

Mr. Wessel: I move that that remark be stricken, if your Honor please. He can take the stand himself.

Q. Did you give Louis Roth $7,500 to call this Alcoholic Tax Unit man off? A. Well, I gave him $7,500, sir.

Q. Did you not give it to him to call the man off, as you have testified, in Washington? A. If that is the answer you want, sir, that is the answer you will get, but it is not the whole answer.

Q. I want as much of the truth as I can get. Your answer finally is yes, that you did give him that to call the A. T. U. man off; is that right? A. There is more to my

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answer than that. I added more to my answer than that. There is more to it than just yes or no.

Q. Did you or not give Louis Roth $7,500 to call this agent or Treasury man off? A. Well, sir, there is more to it than just a yes or no answer.

Q. Tell me whether that is true or not. A. I cannot give you a better answer than that. If you will let me explain.

Q. Your answer is what, yes or no? A. I gave Louis Roth $7,500.

Q. It had nothing to do with the Alcoholic Tax Unit? A. I did not say it had nothing to do with the Alcoholic Tax Unit.

Q. What is that? A. I did not say that.

Q. You gave Louis Roth $7,500 for some purpose in connection with the Alcoholic Tax Unit man, didn't you? A. Yes, sir.

Q. You were not giving Louis Roth $7,500 to give this Treasury agent a Christmas present, were you? A. No. In reality I believe I was giving the $7,500 to Louis Roth.

Q. That is what you want to say? You mean you do not know whether Louis Roth paid the money to the agent,

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is that what you are trying to tell me? Is that what you mean? A. I do not know whether he paid him or did not.

Q. I mean is that what you are trying to convey, that he did not do it? A. I am not trying to convey anything.

Q. Regardless of what Louis Roth did after you gave him the money did you give him $7,500 to pay to the agent, yes or no. A. I gave Louis Roth $7,500, sir, so Mr. Louis Roth would stop sending people up to bother me.

Q. Did you not testify before the Kefauver Committee you were giving Louis Roth $7,500 to call him off? That was just after you had said, "Sure, there is an A. T. U. man out there," and Senator Tobey said, "Did he," meaning you, "make that statement under oath." No; I am wrong, "Did he." "meaning you. "make that statement in his direct testimony?" And Mr. Halley, the counsel for the Committee, said "He made the statement under oath; you have heard it.

> "Senator Tobey: Is that your statement; are you telling that as an anecdote or are you now testifying directly that you did pay Louis Roth $7,500 to get him off."

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Did you so swear?

A. Yes, sir; but in reality——

Q. Did you so swear? A. I did swear, sir.

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Q. Was that true or not? A. Well, there is a little more to it than that, sir.

Q. I am asking—whether there are pages more—I am asking you whether that statement that you swore to was true or not?

Mr. Wessel: Now, if your Honor please, I object to the question. I object to the line of examination for a number of reasons. First of all, it is beyond the scope of the direct, it is not proper cross examination.

Second of all, there is a long answer here which explains exactly what this means, which the witness is trying to tell, and if counsel would read the long answer I would withdraw my objection.

Mr. Stryker: I will read any part you say bears on it.

Mr. Wessel: I suggest you read the part of the answer beginning with the witness' full testimony——

Mr. Stryker: Where is that?

Mr. Wessel: —on page 43 of the printed transcript.

Mr. Stryker: I haven't got that, so I can't.

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Mr. Wessel: If I may look at the——

Mr. Stryker: Sure, help yourself.

Mr. Wessel: I suggest counsel read the answer commencing toward the top of page 1121 of the typewritten transcript.

Mr. Stryker: All right, I will read the whole thing that you asked me to, although I have never conducted cross examination like that before.

Now you want me to begin with Mr. Hailey at the top, "Had you had similar experiences"——

Mr. Wessel: If you wish, but I am suggesting, "Later on, sir, when I got with myself . . ."

Mr. Stryker: All right, I will start there.

By Mr. Stryker:

Q. Did you swear as follows before the Kefauver Committee, Mr. Lubben:

> "Later on, sir, when I got with myself, got away from it, and I changed the name of my company, when I was away from these people, I still had to buy some black-market sugar. I had bought one small company for $300,000 to get 15 or 20 bags, a legitimate quota, hoping I might be able to build on that one a plea of hardship. Roth would call up. (264)
> Part of this money in this inventory was on notes. These are all facts, sir. They are all notes. Every week he would call up about the money. How are things doing? You were always afraid to tell the man. First he would say we are doing—first we would say"—correct me if I make any mistake—"First we would say we are doing all right. If you did, the next day ATU would send a man out there with an umbrella. You tell me, sir, I don't mean to ask you, forget the question—How can you feel easy when an ATU man is there. Later on they were checking for who was using sugar. The Alcohol Tax Unit originally doesn't care what you do with sugar as long as you don't make alcohol. I never made any alcohol. He would come around there and he would check you. 'Well, you know, I have word here that you bought fifty bags or a hundred bags.'"

Then he goes on:

"Then Louis would call on the phone"—

and I read the other.

Mr. Stryker: Now, is there any other part you would like me to read before I go on with this cross (265)
examination.

Mr. Wessel: I think that is the whole testimony on that particular subject at that time.

Mr. Stryker: All right.

A. There was a typographical error there, sir.

Q. What's that? A. There is one typographical error.

Q. All right, tell me that; let's have that. A. The $300,000. I never bought any small company for $300,000.

Q. Well, that is what it reads. I am not able to—I don't know the facts.

Now, going back to my original question, will you please tell these ladies and gentlemen whether or not you—and I am quoting your words under oath in the Kefauver Committee—"would have to give Louis Roth $7,500 to call him off.

"Senator Tobey:"—I am skipping a line there——

Mr. Stryker: I'll read it if you want me to; I have read it two or three times.

Q. (Continuing) "Is that your statement, are you telling that as an anecdote or are you now testifying directly (266)
that you did pay Louis Roth $7,500 to get it off?"

Now, is what I have just read, from what you testified to, true? A. The whole story, sir, all of what you have read?

Q. All of it. A. Yes, sir, that is true, but the——

Q. All right, if that is true, then the part that I started reading, that is true also, isn't it? A. Yes, sir, but you are not tying it——

Q. I don't care about any answer—— A. Well, I do, sir.

Q. Can you not answer that now, I having done what Mr. Wessel asked me to do; can you not now tell the Court and jury whether or not, in fact, as you testified to in Washington, you did give Louis Roth $7,500 to get this ATU man off?

Mr. Wessel: I object to the form of the question. It is an improper summation of the testimony before the Kefauver Committee.

Mr. Stryker: Well, if you will point out anything improper in my statement, any misquotation, I will welcome it and change it.

Mr. Wessel: I certainly can, if your Honor

(267)

please.

Mr. Stryker: Do it.

Mr. Wessel: And I will be glad to do so. What the witness testified to before the Kefauver Committee is that he paid Mr. Roth $7,500 in order that certain things that he thought Roth was doing be stopped. He did not know who the money was going to; he was referring to paying Mr. Roth.

The short part that Mr. Stryker referred to and which he has asked me to refer to has nothing to do with that whole general subject.

It is a choice of a few words out of a whole answer.

Mr. Stryker: Are you telling his Honor something that is in the record in the Kefauver Committee?

If you are, I would like you to point to it. What you just said, is that in the record?

Mr. Wessel: I just read the answer which is in the record and which is exactly——

Mr. Stryker: I say it is not in the record and I have now read to you, for you, Mr. Wessel, all those parts that you suggested that I read to the witness——

The Court: Somehow or other we have gotten into an argument here as to what is in the record before the Kefauver Committee.

(268)

Now, is there a way of reframing the question so we can pass that?

Mr. Stryker: I will withdraw it.

The Court: All right.

By Mr. Stryker:

Q. Leaving that question for the moment, did you not testify also, or did you not testify before the Kefauver Committee you would have to give Louis Roth $7,500 to call him off? Did you not so swear? A. Yes, sir, but the——

Q. Wait a minute. Just did you not so swear? Did you, yes or no? Now, I want to know if you testified to that? A. But you are not giving me the chance to answer the question.

Q. I am asking you, did you testify to that? A. I testified to that, sir.

Q. All right. A. But that is not all the answer.

Q. Was what I have read to you true or not? A. What did you read to me that was true or not?

Q. Your words, you would have to give Louis Roth $7,500 to call him off; did you so testify? A. Does that (269) say that in the first book, the second book as well?

Q. What's that? A. Which book are you reading out of, sir.

Q. I am reading from the official stenographer's minutes of the Congressional, Senatorial Committee, at page 1122. Now, won't you give me an answer? A. Well, sir, if you will let me, I will give you the answer.

Q. No, no, I know what you will try to do. I want an answer to plain questions. A. Well, sir, I am going——

Q. Is what you swore to there what I just read you now for the second or third time, was that answer true? A. When you read the whole, the whole——

Q. I will do it my way, thank you. I am asking you if what you said there under oath was true or not? A. What I stated, everything under oath, was true to the best of my ability.

Q. I am asking whether the particular words which I have now read in the whole context, whether what I have read to you that you swore to was the truth or was it not? (270) A. You are making an emphasis on words.

Mr. Wessel: I object.

Mr. Stryker: I move to strike out that comment.

The Court: All right, we will strike it out. Go ahead.

Mr. Wessel: I think, if your Honor please—and this is the time to make an objection—I think it is improper to be badgering the witness in this way——

Mr. Stryker: I object to that statement.

Mr. Wessel: Parts of testimony, parts of sentences——

Mr. Stryker: Wait a minute.

Mr. Wessel: —parts of paragraphs is completely improper.

Mr. Stryker: I object to it, resent it, and it is not true. I am trying in the most legitimate way known to the profession to get such of the truth as I can out of this witness.

Mr. Wessel: I don't think that is so.

Mr. Stryker: I don't care what you think. I know the rules quite well.

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Mr. Wessel: Now may I say, if your Honor please, he has read the words "you would have to give Louis Roth $7,500 to call him off."

What does the word "him" mean? The witness is trying to say a great many things, and counsel refuses to let him do so.

By Mr. Stryker:

Q. All right, the word "him"—just before that statement I read in the record:

"Then saying what you said to Louis Roth, after he asked you what he could do for you, you said, "Sure there is an ATU man out here.'"

Now, isn't that pretty plain what he meant by "him"?

A. No, it is not, sir.

Q. Not to you. All right.

Now, will you, please, before I go on to another subject, because I am testing your credibility, not tell me whether

what you swore to, under oath, as I have read it to you now, including all that Mr. Wessel suggested, whether or not that testimony was true? A. That, the entire page, sir?

Q. Was everything I have read to you, which I have now done in accordance with Mr. Wessel's suggestion, was (272) it true or false? A. Everything that you have read, sir, is true.

Q. All right.

Now, will you tell us whether or not it is a fact that you paid Louis Roth $7,500 to get this Alcohol Tax Unit man off? A. Well, sir, the seven thousand——

Q. Won't you just answer that? You can say yes or no, or maybe you don't understand the question. If you don't, I will have it read again. A. It can't be answered yes or no, sir.

Q. You can't answer that? A. No, sir.

Q. Well, now, did you not on more than one occasion pay Louis Roth $7,500 to get an Alcoholic Tax Unit man off, yes or no? Now, yes or no, you know whether you did or not. A. I paid Louis Roth $7,500 several times to get the Alcoholic Tax Unit men that he sent up to my place and to stop bothering me. That is the whole truth, and if I am here until next week, until Christmas, that is the only answer you are going to get from me.

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Q. Your answer is you think—did you see Louis Roth send the man up there? A. No, but Louis Roth got the money.

Q. Did Louis Roth tell you he sent the man up there? A. No, but I know Louis Roth.

Q. Wait a minute. Now, let's see, let's take that up a minute. You said that, under oath here, Louis Roth sent this man up there. Did Louis Roth tell you that? A. No, sir.

Q. Did anyone else tell you that? A. Sir, every——

Q. Yes or no. A. All right. We'll make a play on your words. Nobody told it to me.

Mr. Stryker: I move to strike out that comment and ask you to bring this man to order.

Mr. Wessel: Counsel is calling for those very comments by his examination, if your Honor please. I oppose the motion to strike.

Mr. Stryker: I am not doing anything of the kind.

The Court: Well, I am going to strike it.

Mr. Stryker: Read the last question, please, Mr. Reporter.

(Record read.)

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Mr. Stryker: I move to strike out the answer.

By Mr. Stryker:

Q. Did anyone else tell you that or are you making it up here? A. I am not making it up.

Q. Who told you? You swore that Louis Roth sent this man. Give me the basis of that statement.

Mr. Wessel: Objection. I withdraw the objection.

A. Basis of the statement? Why did I say that? Because I know Louis Roth.

Q. That is all? A. That is all, sir, and——

Q. Then you don't know except as you——

The Court: What is the rest of the answer?

A. And I know Louis Roth right in my heart. I know Louis Roth sent the man.

Q. So you know him well enough to know what he does, even though you don't see it, hear it, or he tells you, you just say you know it; is that it? A. I know Louis Roth, sir.

Q. All right. Now, regardless of whether he sent the man or whether he did not, let's assume for the moment that he did. Regardless of that, the ATU man was there, (275)
wasn't he, a Government official, wasn't he? A. He wasn't there when the telephone conversation——

Q. I didn't ask you that. He was in your office wasn't he? A. Several times.

Q. Several times. And on at least two occasions you paid Louis Roth $7,500 to call this man off; isn't that right? A. Well——

Q. Isn't that right, Mr. Lubben? A. Well, sir, I want to answer——

Q. Isn't that right? The question is so simple. It is either right or it isn't. A. I gave $7,500 to call Louis Roth off. When you called Louis Roth off, he called the man off.

Q. Didn't you give him that for the purpose of calling the man off? A. I gave the $7,500 to get rid of both of them.

Q. Well, part of the purchase price was to get rid of the Government agent, wasn't it, however it was done; that is right, isn't it? A. You can say that, yes, sir.

Q. Yes. So you were paying money to be given to an agent of the United States Government, to call him off from his official duties, isn't that so? A. Well, I don't (276)
know whether Louis Roth ever gave him the money.

Q. I didn't ask you that. Didn't you give it to him for that purpose? Whether he gave it or not I know nothing about. A. I gave Louis Roth $7,500 so Louis Roth would stop bothering me.

Q. Did you give it to him so that he would pay this agent—can't we get an answer to that? A. I don't know whether he paid the agent or——

Q. I didn't ask you that, and I think you know it.

Didn't you give it to him for that purpose, regardless of whether he carried it out or not, yes or no? A. I can't answer yes or no.

Q. You can't? A. No, sir.

Q. Didn't you just tell me a few minutes ago right here that part of the purpose of paying the $7,500 was to get rid of the ATU man, and you just swore to that before these ladies and gentlemen? A. Yes, sir, I——

Q. Did you swear that—— A. I didn't swear anything.

Q. What? A. What are you telling me I am swearing?

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Q. I am asking you if only a few moments ago, in this courtroom, before this jury, you did not say, under oath, that you gave this money to Roth for the purpose of calling the agent off? A. I didn't say for the purpose of calling the agent off. I said I gave it for the purpose of calling Louis Roth and the other man off, because Louis Roth sent the other man.

Q. Louis Roth and the agent, both of them; is that right; that is what you just said, isn't it? A. If you want that answer, I will give you that answer.

Q. I don't want any answer out of you except the truth as near as I can get at it. A. Well, you are trying to——

Q. Didn't you just say that you gave this $7,500—we have it now—to get Louis Roth and the agent off your neck? A. I gave $7,5—if you will only let me answer, I will give you the answer, the truth.

Q. Well, you will have all the chance in the world, but first I would like to have you answer my question.

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Isn't that what you just said, that you gave the $7,500 to get both Roth and the agent off; isn't that what you just said now? A. Yes, sir; but there is more to the answer than that.

Q. Wait a minute, wait a minute.

Didn't you just say that right here? A. Yes, sir; but there is more.

Q. All right, was it true? A. The truth——

Q. Was what you just said, that you admitted you said, true? A. Oh, stop trying to make a play on words, sir. I am trying to——

Mr. Stryker: I have asked you to bring this man to order.

The Witness: I am sorry. I didn't mean to say——

Mr. Stryker: You will find it necessary; other judges have.

Mr. Wessel: I move to strike that comment.

The Court: I am going to tell you now, Mr. Stryker, I will bring him to order, but I have told you at the very beginning, about the second question, when you started to use the word "true" or "truth," and ask for yes or no, I don't think we can get any-

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where because "truth" means the whole truth, is everything true.

What he is protesting is being asked is one segment the truth. He refuses to say yes because it is not the whole truth.

Now, I think you have got to recognize that problem.

Mr. Stryker: Let me approach it this way, your Honor.

By Mr. Stryker:

Q. Is there any other part of your testimony before Kefauver that would change, amplify the parts of the testimony that I read to you myself and at the suggestion of Mr. Wessel? If there is, point it out. A. Well, sir——

Q. Can't you—don't you understand that question? A. I am trying——

Mr. Wessel: Perhaps the witness would like to see his Kefauver testimony.

Mr. Stryker: You are welcome to it. Do you want to hand it to him?

I will hand you mine.

The Witness: It isn't necessary.

Mr. Stryker: Here it is. Help yourself.

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The Witness: It really isn't necessary, sir.

By Mr. Stryker:

Q. What? A. It really isn't necessary.

Q. You don't think it is necessary? A. Not for me.

Q. Because you know your story there, don't you? A. I know what I told. I know the truth.

Q. Then you don't think that I need to follow Mr. Wessel's suggestion in that regard, do you? A. I didn't say that, sir.

Q. Well, all right.

Did you testify falsely, under oath, in the trial of the College Town Candy case, the minutes of which Mr. Wessel showed you yesterday? A. Yes, sir, I did.

Q. All right. Now let me get that: In other words, in that case you sat on the witness stand and lied; is that right? A. I told a lie, yes, sir.

Q. A lie? A. Several of them.

Q. How many? A. I didn't count them, sir.

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Q. Well, now, when Mr. Wessel showed you that book, the testimony, you went over it, didn't you?

Mr. Wessel: I object, your Honor. I don't think I showed the witness the book.

Mr. Stryker: I think you did, but I may be—because I had asked that it be marked for identification.

The Court: My recollection is—Mr. Wessel, did you read from it?

Mr. Wessel: No, I didn't refer to it. I showed it to your Honor.

The Court: He wanted to know whether it should go in evidence.

Mr. Stryker: Your Honor allowed me to have it marked for identification.

The Court: That's right.

Mr. Stryker: Let me have that, the paper, the book of testimony marked for identification, and we will settle that.

Mr. Wessel: I am handing Mr. Stryker Defendants' Exhibit E for identification.

Mr. Stryker: Thank you.

By Mr. Stryker:

Q. Now, yesterday, Mr. Wessel asked you if you had

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testified falsely in the College Town Candy case, didn't he? A. Yes, sir. Not yesterday, sir. Yesterday was Sunday.

Q. Oh, that's right, so you are right, that is true.

Well, with that correction, the last time you were here Mr. Wessel showed you this paper, asked you if you testi-

fied in this case, and you said you had, and that you lied; is that right? A. That's right, sir.

Q. In other words, you lied under oath in that case? A. I did, sir.

Q. All right. And committed perjury? A. I did, sir.

Q. Well, now, when you went over those papers of Mr. Wessel, did you point out the various lies that you told?

Mr. Wessel: I object to the form of the question.

Mr. Stryker: Well, he talked about what you showed him. I think the word is proper.

Mr. Wessel: I don't think there is anything in this record about what papers, if any, the witness went over with Mr. Wessel and I suggest, if counsel

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wishes to make such kinds of references and assumptions in his questions, he find out what the truth is first.

By Mr. Stryker:

Q. Did you not go over those minutes with Mr. Wessel? A. I did not, sir.

Q. Did you talk to him about it? A. When, sir?

Q. I don't know. A. Well, you ask me and I will answer the questions.

Q. Just tell me first whether you did. How do I know when you did. Just tell me, did you?

The Court: Any time.

Q. Any time.

The Court: Any time, did you talk to him about it?

The Witness: I never talked to Mr. Wessel. I asked for the minutes of the College Town Candy Company when I came from Puerto Rico.

By Mr. Stryker:

Q. You asked for those? A. I did, sir.

Q. And then you read them? A. Yes, sir.

Q. And you saw that you had lied under oath again and again and again in that case, did you not, when you (284)

read it? A. Well, sir, I——

Q. Is that so or not? A. I knew I lied without seeing it.

Q. I didn't ask you that. Sure I know you lied.

When you read it over, did you not then refresh your recollection that you had perjured yourself again and again and again in the College Town case?

Mr. Wessel: I object to the form of the question, if your Honor please, and, furthermore, the witness has admitted he lied. I think from now on this line of examination is irrelevant.

Mr. Stryker: You mean to say I can only ask him about it once?

Mr. Wessel: The objection is still made, your Honor.

The Court: Is the question withdrawn? There is a question pending that Mr. Wessel objected to on form. It had a reference to refreshing his recollection or something.

Mr. Wessel: And it was a statement that the witness lied again and again and again.

Mr. Stryker: Let's stop it. Let's forget it. (285)

The Court: Strike it out from the record.

By Mr. Stryker:

Q. You read these mintues, didn't you? A. I did, sir.

Q. Did you make notes of the various lies that you had told under oath in that case? A. No, sir, I didn't make any notes.

Q. Did you, after you read it, talk it over with some agent of the Government? A. I told Mr. Wessel I had lied.

Q. Now, was that the first time you had ever told any agent of the Government that you had been a perjurer in the College Town case? A. To the best of my recollection, yes, sir.

Q. That is the first time? A. To the best of my recollection, the first time I have told anybody.

Q. Never told anybody about it? A. I didn't say anybody. I said the first time I never——

Q. I mean anybody of the Government. I am not interested about the others. Is that right? A. To the best of my recollection, sir.

Q. Now, was there any part of your testimony in the College Town case that was true? A. Yes, sir.

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Q. Then you did testify some places to the truth and other times you lied; is that right? A. That is correct, sir.

Q. Well, now, let's see. That case was tried right here in this building, wasn't it? A. Well, one of these buildings around here, sir.

Q. Well, the Federal court sits here. It was in the Federal court, wasn't it? A. Yes, sir.

Q. Well, it was right here in this building, wasn't it? A. Well, if all the Federal courts are in this building——

Q. Well, they are. A. I didn't know, sir.

Q. So we don't have to argue that. It was right here in this building; is that right? A. If all the Federal courts

are, sir, then it was in this building. I don't know which building it was.

Q. You mean to tell me that you don't know where you gave that perjurious testimony? A. In the Federal court, yes, sir.

Mr. Wessel: I object. I think this examination (287)

is irrelevant.

Mr. Stryker: I haven't begun yet.

Mr. Wessel: Not only irrelevant, but it is badgering the witness and highly improper.

Mr. Stryker: I don't think it is badgering the witness, who admits he is a perjurer, to ask more about it.

The Court: I don't go along with either. As long as we are within limits, without overextended generalizations by either side, I probably agree with both of you.

I think you answered the question but I missed that.

Mr. Wessel: The question is whether it was in this building or not, and the witness just doesn't know, and I don't think it makes any difference.

The Court: Let's get on with the next point.

By Mr. Stryker:

Q. Now, there was a judge sitting in that trial with a jury, wasn't there? A. There was, sir.

Q. It happened to be Judge Noonan of this United States District Court, didn't it; you remember that? A. Yes, sir, I remember that.

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Q. Was there a jury sitting in the box just like this jury is? A. Yes, sir.

Q. And you went up on the witness stand, didn't you? A. Yes, sir.

Q. And they handed you a Bible, didn't they? A. I don't think they gave me any Bible, sir, any more than they gave me a Bible when I came here.

Q. Well, at all events, an oath was administered to you as follows:

> "Do you solemnly swear that you will tell the truth, the whole truth, and nothing but the truth"?

Was that oath given to you? A. Yes, sir.

Q. Now, after that oath to tell the truth, the whole truth and nothing but the truth was given to you, then you lied before that jury, before whom you had taken that oath; that is right, isn't it? A. That's right, sir.

Q. Did you tell them that you were lying? A. Tell who, sir?

Q. You don't—you wouldn't understand that. We are talking about the jury. Don't you think that is pretty clear? Did you tell the jury you were lying? A. No, sir, I didn't

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tell the jury I was lying.

Q. Did you say to the jury, "Well, now, gentlemen, I have taken this oath, but I am going to lie to you as much as I want"?

> Mr. Wessel: I object to the form of the question, if your Honor please.
>
> The Court: Sustained.

By Mr. Stryker:

Q. Did you say that?

> The Court: I will sustain the objection.

Mr. Stryker: Oh, I beg your pardon. I didn't hear you.

Q. Well, did you give any indication, by any word that you uttered to the jury, that having taken the oath you were perjuring yourself? A. No, sir, I didn't give them any indication.

Q. No. In other words, you didn't want them to know that you were lying; isn't that right? A. No, sir, I didn't want them to know.

Q. When you say "No, sir," the answer is you did not want them to know; is that right? A. That is the answer you are getting, sir.

Q. Now, the reason that you did not want them to

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know was the hope that the jury would believe the lies you were telling; isn't that right? A. No, that wasn't the reason I lied, sir.

Q. That wasn't the reason? A. No, sir.

Q. Oh, I know, I remember the other two you gave yesterday. We'll take them up in a minute.

Well, aside from the reasons that you gave yesterday, this was—you wanted the jury to believe you, didn't you? A. Yes, sir.

Q. Just like you want this jury to believe you, don't you? A. I am here under oath and I am telling the truth.

Q. Don't you want this jury to believe you? A. Yes, sir.

Q. And you had the same feeling about the jury before whom you perjured yourself; is that right? Isn't that right? A. Yes, sir.

Q. All right. That was only a civil lawsuit, wasn't it? A. Yes, sir.

Q. In other words, you and the other—your former partners were being sued for a transaction, a civil transaction that occurred allegedly with the Eatsum partnership; right? A. Yes, sir, but I shouldn't have been there in the

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first place.

Mr. Stryker: I move to strike it out, not responsive to anything I have said. Pure comment, pure interjection.

The Court: Strike it out.

By Mr. Stryker:

Q. Now, you know what the issue in that lawsuit was, don't you? A. Yes, sir.

Q. The issue was whether or not the partnership had sold the plaintiff corn syrup as foreign corn syrup or domestic corn syrup; that was the question, wasn't it? A. That was the question, yes, sir.

Q. That was the question in the case, all right.

Now, you wanted to avoid liability for yourself in that lawsuit, didn't you; didn't you? A. I wanted to get the case over, sir.

Q. Didn't you want to avoid having a money judgment brought against you? A. There couldn't possibly have been any money judgment brought against me.

Mr. Stryker: I move to strike that out; not at all responsive.

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The Court: I will let it stand, I think it is.

By Mr. Stryker:

Q. Did you not want the jury not to find a verdict against you? A. They couldn't find a verdict against me, sir. I

never sold the corn syrup. It was sold by the partnership after I left.

Q. I am asking you—but you were being sued as a defendant, weren't you? A. Yes, sir.

Q. You didn't want a judgment against you, did you? A. But when the——

Q. Did you want to have a judgment against you; did you confess judgment or did you resist it? A. Sir, I didn't know anything about the case.

Q. Did you confess judgment or did you resist judgment; which was it? A. I didn't confess to anything.

Q. All right. Then you wanted to establish to that jury's satisfaction that you were not a member of the partnership at the time the transaction took place, isn't that right? That was your point? A. Yes, sir.

Q. All right. And the shipment of syrup, I think, was March 18, 1946; is that right? A. I don't—yes, it must have

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been in 1946, yes, sir, after March, 1946.

Q. After March 9th? A. Yes, sir.

Q. Now, among other things, you wanted to establish that you were not a partner on March 18th; that is a fact, isn't it? A. March 9th, sir, whatever the corn syrup——

Q. I think to do you justice I should think maybe my question was right. You wanted to show at the time of the shipment that you were not a partner; isn't that your point? A. Yes, sir.

Q. Now, regardless of that——

Mr. Stryker: Strike that out.

Q. When did you sign the dissolution agreement? A. May 31st, sir, 1946.

Mr. Stryker: Could I have it, Mr. Wessel?

You put it in evidence. I don't know what number it was—this morning.

By Mr. Stryker:

Q. Well, you acknowledged your signature to this agreement—I am reading from Government's Exhibit 35—you acknowledged it on June 5, 1946, did you not? A. If that is the date on there.

Q. Look at it and see if I am giving it to you correctly.

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A. Yes, June 5th, sir.

Q. 1946? A. Yes, sir.

Q. That is right? A. That's right, sir.

Q. All right. Were you not—oh, and the notary's name was Helen Wolfson; is that right? A. I didn't read the name, sir.

Q. Well, look at it now. A. Yes, sir.

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Q. Now in that College Town case, at page 56 of the minutes, were you asked these questions and did you give these answers:

Mr. Stryker: It is page 56 of mine, Mr. Wessel, the first day.

Q. That was March 6, 1950, when you testified that way, wasn't it? A. I don't recall the date.

Q. If I showed you the stenographer's minutes, the page, will that refresh your recollection as to the date when this began, up at the top (indicating)? A. Yes, sir. March 6, 1950.

Q. There is no doubt about that, is there? A. No.

Q. Were you asked these questions and did you give these answers:

"Q. In other words, you were a general partner. I see the purpose. Let me ask this: when did you cease being a general partner in the firm? A. March 8, 1948, I believe."

I am sure that I should tell you that is a misprint. I am not claiming that at all. I think it was 1946, although it says 1948. But that is not my point at all.

"Q. So that on and after March 8, 1948—— A. 1947, sir. Pardon me. I beg pardon.

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"Q. I am talking now of 1946. Get out of your mind '47, '48, that is not my contention at all. So that on and after March 8, 1946, you were no longer associated with the partnership of Eatsum Food Products Company; is that correct?

"Q. Did you ever on and after that date engage in any activities on behalf of the partnership?"

Mr. Wessel: I don't think counsel has read it right. He has left out an answer.

Mr. Stryker: Tell me.

Mr. Wessel: You read a question and it ended with "Is that correct?" And the answer is "If that is correct."

Mr. Stryker: You are quite right. You are quite correct. The answer I quoted was, "is that correct?" and it should be read "A. If that is correct." You are quite correct; I am glad you called it to my attention.

Q. (Continuing)

"Q. Did you ever on and after that date engage in any activities on behalf of the partnership? A. I did not."

Was that answer true? A. I didn't engage in any activities——

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Q. I just asked you the simple question, was that the fact? A. Read it again, will you, please, sir?

"Q. Did you ever on and after that date engage in any activities on behalf of the partnership? A. I did not."

A. That is the correct answer, sir.

Q. Didn't you tell us this morning that you had engaged in some activities after you were up there in your own company, with the Hubiner Company or Hubinger Company?

Mr. Wessel: I think I will object to the form of the question.

A. That was not the partnership.

Q. Leave it out; forget it for the moment. You go on to say:

"Q. I think it is the fact that the goods are in issue here both cars were delivered subsequent to March 8, 1946, I believe March 16th or 18th or thereabouts. So it is your position you know nothing about this transaction, or do you? A. I only know about one car. We only sold one car and not two."

That is not just what I intended to read. While I am getting that, you were interrogated about the dissolution of

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the partnership, weren't you? Do you remember that? A. Yes, sir.

"Q. Didn't you execute a certificate of dissolution of that partnership on or about that time? If

you hold off that answer I will get a certified copy of the certificate (handing paper to Mr. Chapman).

"Mr. Lubben, I show you a certified copy of a certificate of dissolution of a limited partnership which is dated June 5, 1946, and which is notarized as of June 5, 1946, and I ask you whether that is your signature? A. That is my signature.

(Offered in evidence. No objection.).

That still isn't it.

Mr. Wessel: May I have the page reference to what you are reading, Mr. Stryker?

Mr. Stryker: Yes, page 66.

Q. Leaving out immaterial words—you can put them in if you like—page 67, were you asked:

"Q. But here you appeared before a notary public on June 5? A. I would not say that was true, sir."

Did you give that answer? A. Yes, sir.

Q. Was that true? A. Well, I just——

Q. No, was it true; was it the fact? A. What did I say, sir?

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Q. "I would not say that it was true"—meaning that you appeared before the notary on June 5th. A. Well, I was mistaken, sir.

Q. "By the witness"—by you. "I signed it in March. I don't know when he took it before a notary.

"The Court: You say you signed it in March?

"The Witness: Yes."

Did you give that answer? A. To the best of my recollection at that time, sir, I signed the dissolution agreement in March.

Q. I am only asking you if you gave that answer. A. I gave the answer.

Q. Then that is not one of the falsehoods you told? A. That was no falsehood, sir.

Q. It was true? A. No, sir; that was not a lie.

"Q. Do you know Helen Wolfson, who appears as notary public? A. I do not.

"Q. Do you know whether she works in Mr. Levy's office? A. I do not.

"Q. Do you know whether she works for the firm of Bondy & Schloss? A. I do not.

"Q. Do you deny that you signed this in June? A. I deny I signed it in June, correct, to the best of my recollection.

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"Q. And to the best of your recollection you signed it on March 8th? A. Yes, sir; because that is when we quit partnership, some date in there.

"Q. You were a general partner in Eatsum Food Products. Who were the other general partners? A. William Giglio.

"Q. You were both general partners, all right."

Now then, you were shown here——

Mr. Wessel: I object, if your Honor please. Counsel has read a good deal of testimony and yet has framed no question about that testimony. I think that is improper in this court, to be putting testimony before the jury which is not sworn to here and which should be sworn to.

Q. Did you answer those questions I have read as I have read them? A. To the best of my recollection I did, sir.

Q. All right. A. I stated then to the best of my recollection, too.

Q. You knew that if the jury believed that you had signed it in March before the date of shipment that there would be complete proof that you were not liable on this plaintiff's claim; you knew that, didn't you? A. No, sir; I didn't know that.

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Q. You didn't understand that? A. No, sir.

Q. Now you had no purpose then that you could think of in saying that you did not appear before the notary public on June 5th? A. Sir, as I stated then, and I am under oath now, to the best of my recollection I did not remember that I had signed the final papers in June. In my—to the best of my recollection at that time I had nothing to refresh my memory. The time I thought I had signed it in March all the papers—I knew there was some paper in March and it was shown to me today.

Q. You said you had nothing to refresh your recollection? A. Only when the man gave it to me in June.

Q. Didn't you have the dissolution agreement here in court containing the notary's certificate that you appeared before her June 5th? Didn't that refresh your recollection? A. I could not remember signing it in June to the best of my recollection. It was my best recollection I signed it prior to that.

Q. In other words, you were saying to this jury the certificate by the notary Miss Wolfson, that you had signed it, was not correct? A. No, I did not say that.

Q. You see, she certifies you appeared there. A. I said I did not know Miss Wolfson, did not know where she

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worked and did not know I signed it that particular time. I thought it was in March.

Q. You saw the dissolution agreement which I believe is now Government's Exhibit 35 in this case, which contains the notarial certificate of Helen Wolfson that you appeared before her and acknowledged your signature, did you not?

Mr. Wessel: It appears to be an acknowledgment and not a notarial certificate.

Mr. Stryker: Call it what you will—an acknowledgment.

Mr. Wessel: There is quite a difference.

Q. On that day you acknowledged your certificate before her? A. Yes, sir.

Q. I would like you to list for me—I won't stop now; if you will overnight—the different—giving me the page, if they will let you have the minutes—the different perjuries that you committed when you were sworn and testified in the College Town case. Will you do that?

Mr. Wessel: Unless your Honor directs it, I will not have this witness reading the transcript and studying it overnight for the benefit of counsel. The questions should be framed for the witness in the proper form.

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Q. All right, will you take this transcript, Exhibt E for identification, your testimony, and point out anything you said that was true and also the things were you lied?

Mr. Wessel: I think that is improper.

Mr. Stryker: I would like to know the extent of his lies; and some will bear very much on this case.

Mr. Wessel: I am sure that counsel has studied the transcript and can point out whatever he wishes.

Mr. Stryker: I am not the witness.

The Court: I am not going to take the time in this trial to go over the minutes of some other trial to find out how many words are inaccurate and how many are accurate, or how many admissible and how many are not.

Mr. Stryker: It is not words, your Honor.

The Court: We will not go on with that.

By Mr. Stryker:

Q. You were asked about this College Town testimony when you testified as a Government witness in the Shotwell case in Chicago, weren't you? A. I don't recall, sir.

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Q. Can't we save time. You must remember you were asked that? A. Sir, I don't recall.

Q. I will get the record. When did you come up from Puerto Rico? A. Last Sunday. Last Saturday night, sir.

Q. How soon after that did you ask to see your testimony in the College Town case? A. I don't know; a day or two after, sir. I don't know the specific date.

Q. What caused you to read your College Town testimony? A. Because I told Mr. Wessel I lied.

Q. You told him that as soon as you got in? A. I would not say the minute I got in; no, sir.

Q. You told him that? A. Yes, sir.

Q. And that you lied, and wanted the testimony to read? A. No, I said I told a lie in the College Town.

Q. You told what? A. I said I lied in several places in the College Town Candy case, in the testimony, and I wanted to tell him about it.

Q. You were ready to find out what those places were, weren't you? A. Yes, sir.

Q. What drew the subject of College Town and your testimony there to your attention when you came from Puerto Rico? A. Nothing. That has been here for years.

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Q. Your conscience? A. It has been here for years. Yes, sir; for years.

Q. For years that perjury in that case has been on your conscience? A. To me it has, yes.

Mr. Wessel: I will refer counsel now to the Shotwell case, page 1228.

Q. Let us see. Was that perjury in the College Town case on your conscience when you talked with the prosecutor in Chicago before you testified against the Shotwells? A. I do not recall any testimony about the College Town in Chicago.

Q. You see, my question was, was that testimony, these lies in the College Town case, on your conscience when you talked to the prosecutor in the Chicago case? A. I do not recall whether I told the prosecutor in Chicago or not, sir.

Mr. Stryker: I will ask the reporter to read my question. I will ask you to answer it.

(Question read as follows:

"Q. You see, my question was, was that testimony, these lies in the College Town case, on your conscience when you talked to the prosecutor in the Chicago case?")

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Q. Would you answer that? A. Was it on my conscience? Yes, sir, it certainly was.

Q. Being on your conscience, did you tell him about it? A. I do not recall whether I did or whether I didn't.

Q. Did you tell any agent of the Government out there in Chicago that you had lied in the College Town Candy case and committed perjury there? A. I don't know whether I did or did not. I do not remember.

Q. Didn't you think it fair to the United States Government to tell its agents you had been a liar under oath? A. It certainly would have been the fair thing; yes, sir.

Q. And if you did not do it you were unfair to the Government? A. Yes, sir.

The Court: We will suspend now until ten-thirty tomorrow morning. Do not discuss the case.

(The jury then left the courtroom and discussion of court and counsel was held in the robing room of the court adjoining the courtroom.)

(Adjourned until Tuesday, January 18, 1955, at 10:15 a. m.)

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(January 17, 1955.)

Mr. Stryker: I have got here five or six subpoenas.

Mr. Wolfram: We move that they be marked for identification.

The Court: They will be marked.

(Marked Defendants' Exhibits F-1 to F-4 for identification.)

Mr. Wessel: Subpoenas on whom?

Mr. Stryker: Here, I think, has about come a question for you to pass on, whether you are going to permit us to have all or any of the documents tha

are called for in the subpoenas. Perhaps it has not quite come yet, I don't know. Do you think that is so?

Mr. Wolfram: Well, I don't suppose the last minute is here.

The Court: At least we can start thinking about it. Are these tax returns?

Mr. Wolfram: Yes, sir. May I show you the subpoena served on the United States Attorney. These are served on the different departments, and the blanket subpoena served on the United States Attorney covers them all.

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The Court: As to 3, I said no.

Mr. Wessel: The only thing we were required to have present in court were the tax returns, and I believe the informer's fees. The others, you said, were too broad, and unless a foundation were laid you would not require it.

Mr. Stryker: Statements made to agents at the time.

Mr. Wessel: I do not believe we were required to do that.

Mr. Stryker: I do not happen to have the subpoena.

The Court: My tentative feeling that I just throw out to bring the discussion to a head is that the informer's fees and anything he has gotten in that way, Mr. Stryker should have. The income tax returns I think I would be against giving you on the defense unless that is part of the case—unless the man takes the stand he does not remove the seal as to income tax returns.

Mr. Stryker: I agree with you on that, but it will tie into certain aspects of the case as I have developed them.

Mr. Wessel: If Mr. Stryker wants the tax returns and does not feel the foundation is properly there, when the foundation is properly there he can

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renew his request.

Mr. Stryker: Yes.

Mr. Wessel: As to informer's fees, this is not a discovery application but a subpoena, and if counsel wishes they can be called in the regular course when the Government closes its case. If the application is forgotten, and they are regularly produced documents in court, they can be produced to show motive, hostility, and so forth.

Mr. Stryker: I do not know myself whether they got one cent in informer's fees. I don't know.

The Court: Mr. Wessel's point is that you should ask him first, and then Mr. Wessel will come forward, if he does not give you a fair answer.

Mr. Stryker: That is right.

Mr. Wessel: The same with any other such documents. May I ask if counsel has come in with respect to the witness Stone last Friday stating to me——

Mr. Stryker: I think I will make no stipulation one way or the other.

Mr. Wessel: Then, if your Honor please, I wish to make the following application. I have studied the cases, and I find after a detailed analysis there may be error if the Government calls a witness to

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the stand who pleads the Fifth Amendment, and when there is legitimate and sound basis for it. In

my judgment there is sound basis for this witness pleading the Fifth Amendment; he is under indictment in New Jersey and it may be held against him and may prejudice his rights. I would like to have the witness called and sworn in this court under oath, outside the presence of the jury; so that it cannot prejudice the Government if he is later called as a witness by the Government. I do not want to prejudice the Government's case by having him plead the Fifth Amendment.

Mr. Stryker: Mr. Wessel, as far as I can in justice to my clients, I will help you, but I do not think I can help you there. I do not know whether he is going to plead it or not, and I do not see how I can agree to swear a witness in the courtroom that way when we are in a jury trial.

Mr. Wessel: The witness Stone is in my view an extremely hostile witness for a lot of reasons. He has a record; I will not go into all the record, I won't prejudice anybody. There are facts he can state which are extremely helpful to the Government. There are statements he made to Roth and others which I am sure the defendants think will help them. But I do not want to be in the position of not calling

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Mr. Stone and have him as a defense witness. He said he was going to plead the Fifth Amendment. It might be a bluff, but I would like to call him as a witness before this court, out of the hearing of the jury, and have him state that, that he will not testify because any answers may incriminate him.

Mr. Stryker: I am afraid I would have to object to that.

The Court: Having him called out of the presence of the jury?

Mr. Stryker: Yes. This is a very pleasant discussion with the judge, but this is a jury trial, and whatever you do or don't do is your business, not mine.

The Court: There is a limit to how much you can anticipate what a person is going to do or is not going to do. If you let me look over the cases that you have, and want to give me memoranda that will guide me along the path you indicate——

Mr. Wessel: I think if it were on appeal it would not be error on appeal to do this, but there is a question, and I am extremely reluctant to allow any error to creep in here.

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The Court: Give me the cases that show the question.

Mr. Stryker: Let me say Mr. Wessel is stating very nearly what I believe the law is. I think that is so.

The Court: What is that?

Mr. Stryker: If the prosecutor knows John Jones has told him he is going to plead the Fifth Amendment and he calls him, and gets that answer, that I believe has been held error.

The Court: I would like to see the cases. I would rule offhand that the Government bring him in, but still when a man claims privilege he may be relying on nothing at all, when he assumes he is going to claim it. I think the Government should call him and let him claim it, if he is going to. He may change his mind. I would like to look at the cases before I answer that.

Mr. Wessel: We will get them for you.

Mr. Stryker: I do not think I need bother you any more.

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New York, N. Y., January 18, 1955,
10.26 o'clock a.m.

(Trial resumed.)

(Jury present.)

Mr. Wessel: May I hand up to the Court a memorandum of law dealing with the subject discussed last night in chambers?

The Court: All right.

DAVID GEORGE LUBBEN, resumed.

Cross Examination continued by Mr. Stryker:

Q. Have you talked with Agent Twohig since you were on the stand last night? A. Yes, sir.

Q. Did you go over the testimony that you had given on cross examination? A. I was given no testimony, sir.

Q. Do you think that is an answer to my question?

Mr. Wessel: I object, if your Honor please.

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A. Well, sir, would you mind, pardon me, would you repeat the question, then?

(Question read.)

A. I didn't go over any testimony, sir.

Q. Did he read it to you? A. No, sir, he did not.

Q. Did you have it before you when you talked with him? A. No, sir, I did not.

Q. Was it mentioned? A. No, sir, it was not.

Q. How long were you with him? A. Till the time court convened, sir, until I went to bed, and he looked in to see if I needed any help with my medication, and that was all. So I would say that was about 10 o'clock, sir.

Q. My question was, I think, how long were you with him. A. Well, sir, I just told you how long I was with him.

Q. You haven't. A. Well, sir——

Q. When did you first see him and when did you stop seeing him; that is what it means. How long were you with him? A. Sir, I told you, since 4:30 yesterday afternoon until about 10 o'clock last night.

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Q. All right. Now, is it your testimony that in these five or six hours the cross examination was never mentioned? A. That is correct, sir.

Q. When did you first meet Agent Twohig? A. Sometime, sir, I believe, in 1948.

Q. Well, what time? A. I believe—it's only a guess, sir—I think it was in the fall of the year.

Q. Haven't you any memory of when you met him? A. Well, sir, to my recollection, that is the best I can do, in the fall of the year, maybe September, August, September, around in there.

Q. That was quite a significant event in your life, your meeting Agent Twohig, wasn't it?

Mr. Wessel: I object to this line of examination and this particular question on the grounds it is completely irrelevant to the issues in this case.

If counsel wishes to make an offer of proof out of the hearing of the jury I would be very happy to

hear such an offer of proof upon his assertion that he can tie this in somehow to this case. I don't believe he can.

Mr. Stryker: If your Honor please, I really (310)

must object to that type of what is no more or less than interruption. I cannot cross examine this man and ask him everything I want to ask him in one question.

Every question I ask I will make relevant later on and I do not have to disclose to the prosecutor what I intend to ask or give my hand away.

The Court. I will overrule the objection.

Mr. Stryker: Thank you.

Mr. Wessel: May I say this, if your Honor please: I think counsel is treating this witness as a defendant. He is a witness. He is guided by regular rules of cross examination of a witness and must be guided by the scope of cross examination.

Mr. Stryker: That is merely interruption. If I don't know that I must be very ignorant.

Mr. Wessel: I think it is important at this time to determine what the scope of this cross examination is.

Mr. Stryker: Well, the scope is to cross examine a man who admits he is a perjurer, with regard to the matters in this case. That is the scope.

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By Mr. Stryker:

Q. Now, was it not quite an event in your life——

The Court: I think, Mr. Stryker, it would be erroneous if the jury thought I was permitting you to proceed on that theory. I am permitting you to

proceed, and whether he had admitted he was a perjurer or not I would let you ask the same question.

Mr. Stryker: The point is veracity. Every question, or nearly every question, bears on his veracity.

Mr. Wessel: I don't see how his relationship——

Mr. Stryker: Of course, you don't yet because I haven't gotten there. Please don't interrupt.

The Court: He will go further. Go ahead.

Q. Was that quite an event in your life when you met Agent Twohig? A. Yes, sir, it was an important one.

Q. Well, you have testified, have you not, in another case, that you had an excellent memory? A. I think it is as good as average, sir.

Q. Didn't you say, "Oh, yes, I have a wonderful memory," when you were interrogated in San Juan in the depo-

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sition in the Shotwell case? A. I may have, sir. I don't remember.

Q. All right.

Now, you have given here on direct examination details of conversations that you say you had with Mr. Giglio, giving the time and the place and even who said this and who said that; is that not true?

Mr. Wessel: I object to the form of the question.

By Mr. Stryker:

Q. Is that not true?

The Court: I will overrule it.

Q. Isn't that what you have done? A. Yes, sir.

Q. Now, do you mean to tell this Court and jury that you can't tell us what part of the year it was when you met

Agent Twohig? A. Sir, I told you to the best of my recollection it was in about the fall of the year.

Q. Would it refresh your recollection as to the time when you met Twohig if I reminded you of his testimony in Chicago in which he said it was July or in early July; does that refresh your recollection? A. Well, sir, I just got

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through saying here August or the latter part, in the fall, so I mean if it is in July I am only a month away.

Q. I may not have heard you. I did not hear you say August. Perhaps I didn't hear it. A. Well, sir, I said it.

Q. Did you? All right. A. Yes, sir.

Q. Then it was July or August of 1948. We have got that settled; right? A. I said before I can't specifically state the month. I mean it could be in July and it could be in August.

Q. It was either one? A. Yes, sir.

Q. Where did you meet him first? A. Mr. Twohig came to my house, sir.

Q. Where was that? A. In Hillsdale, in Woodcliff Lake, New Jersey.

Q. You had a house out there? A. Yes, sir.

Q. And 23 or 26 acres of land, didn't you? A. Yes, sir.

Q. And did you go over the case with him then on that first meeting? A. No, sir.

Q. What? A. No, sir.

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Q. It wasn't a social call, was it? A. No, sir, it wasn't.

Q. Well, did he take notes of what you said? A. I don't recall whether he did or whether he did not, sir. I don't think he took any notes, no, sir.

Q. What? A. He didn't take any notes in my presence, sir, that I can remember.

Q. All right. When did you next see him? A. Oh, maybe—this would be only a guess, sir—maybe a month later, maybe two weeks later. I saw him many times.

Q. Was any part of the testimony that you gave on direct examination only a guess? A. No, sir.

Q. What? A. I beg your pardon, sir?

Mr. Stryker: Read the question.

(Question read.)

A. No, sir, it was not.

Q. Didn't Mr. Twohig tell you he was investigating your tax returns? A. Mr. Twohig?

Q. Can't you answer that? Did he tell you that or didn't he? A. Well, sir, in the first two times; the first couple of times, Mr. Twohig did very little talking.

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Q. Now, that still doesn't answer my question. Did he tell you that he was investigating your tax returns? A. Not that time, sir, he didn't tell me.

Q. Not when, in July or August, you mean? A. No, sir. There was another man with Mr. Twohig.

Q. What? A. There was another man with Mr. Twohig who did the talking.

Q. Who was that? A. A Mr. Cordes.

Q. Mr. Cordes. Well, whatever Mr. Cordes said, he said in Twohig's presence; is that right? A. Yes, sir.

Q. Now, did he tell you that he was investigating your tax returns? A. He said he was investigating Eatsum Food Products.

Q. I am asking you, and this is the third time I have asked you, did he tell you, either Cordes or Twohig, that he was investigating your returns? A. Well, sir, if I recall correctly, he was——

Q. Well, just a moment. You mean you don't remember? A. I didn't say it, sir.

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Q. Well, then, won't you answer my question if you do remember? A. I am trying to.

Q. Did he tell you, either Cordes or Twohig, there in July or August, that they were investigating your returns? A. Sir, the way I remember the conversation——

Q. Just tell me, say you don't remember or do remember and we will pass on. Did he say that? A. Sir——

Q. I don't care about the form of words at all. Did he say that? A. Sir, he said he was investigating Eatsum Foods Products and, if I recall, correctly, everybody's tax returns.

Q. Well, then, now we have got it he told you that he was investigating, at least among others, your returns? A. I tried to answer it for you, sir.

Q. Have we got it now that he told you that he was investigating at least, in part, your returns; is that the answer? A. Yes, sir.

Q. All right.

Now, when did you next see Mr. Twohig? A. I think a couple of weeks later, sir.

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Q. Where was that? A. I believe in my house in Hillsdale.

Q. And that would then be what—latter part of August, you think? A. Perhaps, sir.

Q. When did you next see him after that? A. Oh, sir, very many times.

Q. Suppose you tell me—or do you remember the times? Do you, approximately? A. I would say that in 1948, sir, I would say that I had seen Mr. Twohig at least a dozen times, maybe more.

Q. It might have been a good deal more, mightn't it? A. Not many more, sir, no.

Q. Where did you see him after he came to see you at your house in Hillsdale? A. At a building up the street from 253.

Q. That is the place you were telling us about in your direct examination, the terror of the tax evaders; I think you said was what it was? A. No, I didn't say that, sir. I said no such thing. I said the next time I met Mr. Twohig it was in an office, other than my house. When you asked me was it in a building, that was not 253, because I was afraid to go to 253.

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Q. All right. Was it an office of the Internal Revenue Bureau? A. It was some Government office, sir.

Q. When was the first time you saw him in this Government office? A. Probably maybe six weeks or two months after the first visit.

Q. Would it be fair to say that was September or October? A. Well, sir, I could not pin it down to a specific time. I said a couple of months after the first time.

Q. Were you then interrogated by a stenographer—I mean were you then interrogated and a stenographer take it down? A. I don't recall whether they had a stenographer or not, sir. I don't think they did.

Q. Did you write out a statement? A. Not then; no, sir.

Q. Did they write out a statement and ask you to sign it? A. No, sir, they did not.

Q. That is definite and certain, that the first time you saw him no statement was written out by you, or signed, and no stenographer put down what you said? A. I don't know what they might have had in another office or any

place else, or whether they had anybody taking down my conversation.

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Q. When was the next time after that that you saw Agent Twohig? A. Oh, many, many times, sir.

Q. I think you have told me that. If you would be good enough, I would like an answer, when was the next time you saw Agent Twohig?

Mr. Wessel: May it be understood, your Honor, that I have a continuing objection to this line of examination and these questions, on the ground they are irrelevant to the issues in this case.

The Court: All right.

Q. When was the next time you saw Agent Twohig after this occasion in the Government office that you just mentioned? A. Maybe another week or two.

Q. Did they ask you questions then? A. Yes, sir.

Q. About your tax returns? A. Yes, sir; they asked——

Q. Is that answered? They asked you about your tax returns? A. They asked me many times, sir.

Q. Did they ask you about your tax returns? A. As far as I can remember, they asked about everybody's tax return.

Q. Did they ask you about your tax returns? Can't you answer that? A. Yes, sir, they probably asked me about my tax returns.

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Q. There is no doubt about it, is there? A. No, sir.

Q. Did they ask you among other things about your tax returns for General Confections? A. Yes, sir; they asked me——

Q. That is all I am asking at the moment. They did ask you. A. Yes, sir.

Q. Did they have your return, or rather the General Confections return, before you or on the table or with them, when they asked you? A. I don't recall what they had on the table, sir. I——

Q. Didn't you see the tax return? A. When a man of the United States Government is talking to you, you don't know what he has got.

Q. I don't know about that. Did you see your General Confections tax return? A. No, sir; I did not see it.

Q. What did they ask you about? A. Primarily, sir, they were asking me how we started in business, when I started.

Q. I am coming to that, Mr. Lubben. A. Well, you asked me.

Q. Answer my question, what did they ask you about (321) your General Confections tax return?

Mr. Wessel: I object again, your Honor.

The Court: I sustain the objection, and will let him complete the answer.

Mr. Stryker: I respectfully except.

The Court: I would like to have him complete the answer. Read the question.

(Last question read by reporter.)

A. I do not recall what they asked me about General Confections tax returns, sir.

Q. That is an answer. Without tiring the jury with each occasions, you saw him a good many times before the end of the year 1948, did you not? A. I did, sir.

Q. And always in this Government office? A. No, sir.

Q. Where else, then? A. Sir? I believe several times, sir, in the beginning, I went to the other office because Mr. Giglio told me he knew everything had happened.

Mr. Stryker: I move to strike that out.

The Court: Read the answer.

(Answer read by the reporter.)

Mr. Stryker: That is not in any wise responsive.

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It is merely volunteered.

The Court: I will strike it out.

Mr. Wessel: I believe the answer is called for by the antagonistic comments and the attitude counsel is assuming with this witness.

Mr. Stryker: How does your Honor rule on it?

The Court: I strike out the intejection about Mr. Giglio.

Mr. Stryker: And your Honor allows the question?

The Court: Let the question and the balance of the answer stand.

Mr. Stryker: Was my question answered, Mr. Reporter? I forget.

(The reporter read the answer as follows:

"I believe several times, sir, in the beginning I went to the other office, because Mr. Giglio told me he knew everything had happened.")

Mr. Stryker: I ask to strike that out, and request the instruction to the jury to disregard what you have stricken out.

The Court: Yes. Any time I strike anything out, ladies and gentlemen, you will disregard it.

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Q. What is the other office you speak of? A. I don't know, sir. It is another Government office. I believe it is about a block or two uptown from 253.

Q. A different office still from what you have told us about before; is that right? A. Yes, sir.

Q. On any occasions—I think you have said many occasions when you saw Twohig in '48—did you sign a statement or was a statement taken down that you signed or not? A. In '48, sir?

Q. Yes. A. No, sir, I don't recall signing anything in '48.

Q. Now I will come to '49. Did you see him repeatedly throughout '49? A. Whenever I was requested to go over to 253.

Q. I do not know what that was, but did you see him repeatedly? A. I would not say repeatedly. Whenever I was called, I came.

Q. How many times would you say you saw him in '49? A. Maybe seven or eight times.

Q. Only seven or eight times? A. Sir?

Q. Only seven or eight times. A. Well, that is a guess, sir.

Q. That is a guess? A. That is a guess, sir. That is

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the best of my recollection.

Q. When was the first time you saw the agents at 253 Broadway? A. To the best of my recollection, sir, it was in the fall of 1948, maybe some time around November or December, or maybe January, I don't know.

Q. I have forgotten if you told me, how many times you saw him in '49. I don't want to repeat it if you have already told me. A. I said to the best of my recollection, seven or eight times. It could be more, I don't know.

Q. And in '50 how many times did you see him? A. —Probably the—probably the same number of times, sir. Maybe a few more or a few less.

Q. Did there come a time in any of the periods I have mentioned, when you signed a statement? A. Yes, sir.

Q. When was that? A. I believe, sir, in '51, sir, to the best of my recollection. 1951, maybe 1950.

Q. In the latter part of '50 or early part of '51, would that be right? A. Yes, sir. I had given statements before, many statements.

Q. You mean that had been taken down, or you signed? A. Well, sir, they——

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Q. That is what I am asking about, Mr. Lubben, in case my question is not clear. I am asking about signed statements you made. All I want to know is if you did and when you did. A. I believe it was in '50 or '51.

Q. Can we leave it this way: that was the first time you ever signed a statement or made a statement recorded by a stenographer? Would that be right? A. No, sir; that would not be right.

Q. What is right? A. You asked me——

Q. What is the fact? A. Do you want when I signed a statement or did not sign it?

Q. That is right. A. What is right?

The Court: It is not clear what you mean, whether you want the time it was taken by a stenographer or when he signed.

Mr. Stryker: I think that is absolutely correct.

Q. When was the first time you signed a statement for Mr. Twohig?

The Court: Now we are talking about when did you sign.

A. As I stated, sir, I believe it was in '50 or '51. That is the best of my recollection.

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Q. When was the first time to your knowledge that whatever you said was being taken down by a stenographer? A. Well, sir, I think my—this is only a guess, but I think my conversations were taken down many times; but I don't know who was taking them down.

Q. I did not ask you that, Mr. Lubben. You knew they were taken down; you saw a stenographer writing them down in the book? A. There was always somebody in the office, sir, besides Mr. Twohig.

Q. Mr. Lubben, what I am asking you is, you told us that when you first signed the statement, and I would like you to tell me if you can, when was the first time a stenographer was taking down what you said? A. Well, sir, I would say about that time, possibly '50 or possibly '51.

Q. Did any of the agents write out a statement of your talk while you were talking, irrespective of the stenographer? A. They made notes; yes, sir.

Q. They made notes? A. Yes, sir.

Q. When? A. Oh, sir, I believe when I finally came over to 253 Broadway to their office.

Q. Was that the first time they made notes? A. To the best of my recollection it was, sir.

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Q. That would be, then, November or December of '48, wouldn't it? A. Or early January 1949.

Q. Now did you talk with Mr. Twohig about the College Town case before you testified? A. Where, here, sir?

Q. Anywhere in the world, did you talk to him? A. Before I testified where, sir.

Q. The College Town Candy case.

Mr. Wessel: I think the question is not clear, whether he is asking before he testified here or some other place.

Q. Did you before you testified in the College Town Candy case, discuss that case with Mr. Twohig? A. No, sir; I did not.

Q. Did you tell him you were being sued and were going to be a witness in this court in that case? A. No, sir. I don't ever recall telling him that.

Q. Was he present in the courtroom while you testified? A. Yes, sir; he was.

Q. Had you not then told him before you testified that you were going to do so? A. No, sir; I did not.

Q. Then it was a mere coincidence that Mr. Twohig was in the courtroom when you testified?

Mr. Wessel: I object to the form of the question, your Honor.

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The Court: Sustained.

Q. At all events, you had not asked him to come, did not know he was coming? A. I did not ask him to come and I did not know he was coming.

Q. But you saw him there? A. And a couple of other agents, too.

Q. I did not ask you that. A. Yes, sir.

Q. Did you see Mr. Twohig in the courtroom when you testified? You have said so, haven't you, Mr. Lubben? A. No. I do not recall seeing him in the courtroom when I testified. I recall seeing him in the corridor, but I cannot place him in the seats. I cannot see every man there.

Q. Didn't you say you saw him and other agents? A. Most of the agents I spoke to in the hall.

Q. Did any of them come into the courtroom when you were testifying in the College Town case? A. I believe they did.

Q. You believe that Mr. Twohig did also? A. Yes, sir.

Q. That was the case where you committed perjury? A. I told a lie.

Q. You told us yesterday you lied and committed per-

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jury. That is the case, isn't it? A. Yes, sir.

Q. While you were there on the stand lying under oath these agents were in the room; is that right? A. Sir, I cannot——

Q. They were in or out of the room, but they were there? A. Yes, sir.

Q. Have you always been frank and truthful in the statements you have given to the agents? A. Yes, sir. To the best of my ability I told them——

Q. Did you tell them you had lied and perjured yourself in the case they came to here, or were in the corridor, or in the room? A. No, sir; they knew it.

Q. They knew it? A. Yes, sir.

Q. They knew it.

Mr. Wessel: I do not know if counsel's comments are supposed to be in here, but they should be stricken and not repeated.

The Court: Yes.

Q. Did they tell you they knew it? A. They just looked kind of funny, sir.

Q. But a moment ago you said they knew it. Was that statement true? A. Yes, they knew I told a lie.

Q. I asked you if the statement you made only a moment

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ago that they knew you had lied—whether that answer you

gave in this court was true or not? A. I told you they knew I told a lie.

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Q. Have you ever been prosecuted for perjury on those lies? A. No, sir, I have not.

Q. That was in March 1952, wasn't it? A. Yes, sir.

Q. And you have never been arrested or indicted or prosecuted for the perjury that you say the agents knew you gave; is that right? That is right, isn't it? A. Well, they knew the story I told them wasn't the——

Mr. Stryker: I move to strike it out. It isn't responsive at all. I can't cross-examine unless I get responsive answers.

Read my question, will you, Mr. Reporter.

(Question read.)

By Mr. Stryker:

Q. Now, is it right or not? A. Yes, sir, I have never been.

Q. All right, that is all I wanted to know.

Now, did there come a time when you began to turn records and papers over to the agents? A. Yes, sir.

Q. When was that, the first time? A. Oh, I would say sometime, maybe 1949, maybe 1948, too, sir, about the third

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or fourth visit that they came out to the farm. It was in 1948 or 1949, sir.

Q. I didn't hear about the farm. I am sorry, I didn't catch it. A. Well, when they came out several times, sir, I knew I didn't give them any records there, but I believe most of the records I gave them was in that year 1949.

Q. You kept a set of books in the General Confections Company, didn't you? A. We kept a set of books in the normal course of business procedure, yes, sir.

Q. Well, that is just what I meant. A. Well, I answered it, sir.

Q. Did you turn over the books of the General Confections to the agent? A. No, sir, I did not.

Q. You did not? A. No, sir.

Q. They asked you for them, didn't they? A. They asked me, yes, sir.

Q. Well, did you refuse to turn them over? A. No, sir, I did not.

Q. Did you have the books of the General Confections? A. No, sir, I did not.

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Q. Had you destroyed them? A. No, sir, I did not.

Q. How long after the first time did you continue to turn over books and papers to the agents? A. How long after the first time what, sir—the first time they called on me or the first time I gave them books and papers?

Q. No. I will make it clear, if it wasn't before.

How long after the occasion when you first turned the papers over to them, how long after that was it that you next turned papers over to them? Is that clear? A. Yes, sir, it is clear.

Q. All right, now will you give me the answer. A. I don't know; two or three trips they came to my house, and they came with a truck; I gave them a truckload of stuff, automobile loads of it.

Q. But not the books and papers and records and journals and regular books of account of General Confections; is that right? A. I didn't give them the books of General Confections.

Q. I say, not that. A. Not those. I couldn't give them to them.

Q. Now, General Confections was a company that you

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had organized, wasn't it? A. Yes, sir.

Q. That was the company that you organized shortly after you left the partnership, wasn't it? A. Yes, sir.

Q. And you, when you left the partnership, you continued right on in the plant and offices that you had in the Bronx before you joined the partnership; isn't that correct? A. Yes, sir.

Q. That was somewhere in West 170th Street, wasn't it? A. Yes, sir.

Q. What was the address? A. 40 West 170th Street.

Q. 40, thank you.

Now, when did you start the General Confections Corporation? A. I believe, sir, the day after I left the partnership of Mr. Giglio.

Q. And you went right on with the business that you had been conducting at 40 West 170 Street right after March 9th, when you left the Giglio partnership; is that right? A. That is correct, sir.

Q. Now, you did have a very large business up there, didn't you, after you left the partnership? A. A substantial business, sir.

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Q. Well, it was around $5,000,000, wasn't it? A. I don't recall the figure. I don't think it was five then, no, sir.

Q. Give me your best recollection of the amount of business that you did in the first year in General Confections after you left the Giglio partnership? A. I would say $2,000,000 or $3,000,000, sir. That is only a guess on my part. I don't have my——

Q. What—$2,000,000 or $3,000,000? A. To the best of my recollection, sir. I could be wrong.

Mr. Stryker: I ask you to have this document marked for identification.

(Marked Defendants' Exhibit G for identification).

By Mr. Stryker:

Q. I show you Defendants' Exhibit G for identification and ask you if you can tell me what it is? A. This is a franchise tax report.

Q. A what? A. This is a—it says, a New York State business corporation franchise tax report.

Q. All right, go on.

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Will you glance at it and tell us whether it refreshes your recollection as to the amount of business you did in General Confections. You see the figures on the first page. Don't they refresh your recollection? A. I'd like to look at all the pages, sir.

Q. Take your time, Mr. Lubben. Take all the time you want. A. Thank you very much, sir.

Yes, sir.

Q. It does refresh your recollection, doesn't it? That was my question, I think. A. Yes, it refreshes my memory, sir.

Q. It having refreshed your recollection, will you tell us what the business was that you did in General Confections for the year immediately after you left the partnership? A. Well, sir, first of all——

Q. Just—if you don't mind, Mr. Lubben, I have asked a question. You said it refreshed your recollection. A. Yes, sir.

Q. Now, then, my next question is, being refreshed, will you tell us what business you did in General Confections.

Mr. Wessel: I object to the form of the question.

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Business may be gross receipts, gross income, net income. I don't know what he is talking about.

The Court: I will let the question stand, but I won't compel the answer in the form of one figure.

Mr. Stryker: I am not asking one figure. I am asking him to give his recollection.

The Court: You may answer.

Mr. Stryker: Yes, go ahead.

The Court: You need not restrict it to yes or no or one million or two million or five million.

A. Well, sir——

Q. Mr. Lubben—— A. I am trying to answer your question, believe me.

Q. Maybe I am at fault.

The Court: I will let the question stand. Go ahead, Mr. Lubben.

Mr. Stryker: All right.

A. Sir, it says here, on some typewritten sheets——

Q. Mr. Lubben, I am sorry—— A. It says——

Q. Just a moment.

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Mr. Wessel: I think your Honor permitted the witness to answer the question with reference to general statements of this kind, and I think counsel's interruptions are improper.

Mr. Stryker: I am asking whether it refreshes his collection as to the amount of business that he did in General Confections in the year immediately following his leaving the partnership. He said it did refresh it.

Now, can't I have an answer as to what it was?

Mr. Wessel: I don't know what "amount of business" is. I don't think it has any meaning whatsoever, either in fact or in law. It must have

reference to a specific item: Net income, gross income, gross receipts.

By Mr. Stryker:

Q. All right, let's have this: Was not your gross income——

Mr. Wessel: Now, I object, if counsel is going to read a figure.

Mr. Stryker: I won't read it; don't worry.

Q. Was not your gross income in General Confections for the year following your leaving the partnership the (338)
figure set out here under gross income?

Mr. Stryker: You see, I haven't defined it.

By Mr. Stryker:

Q. Tell me, does that refresh your recollection as to what it was? A. Sir, I don't know whether it does or whether it doesn't because these figures are written in pencil, there is a lot of erasures here and I don't know whether it is authentic or not. My signature is not on it, and being that I would have to be an officer to sign it, I don't know whether these are real or not real.

Q. Did you not tell me a few moments ago that the papers did refresh your recollection, or am I mistaken? A. I said the papers refreshed my memory.

Q. What? A. The papers refreshed my memory.

Q. Did you not say—and let's leave the point; if I am mistaken, I want you to correct me—did you not say that that paper that I have just handed you—what is the exhibit——. A. Well, there happens to be 7 or 8 papers here, sir.

Q. Yes, I think there are at least that.

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What number is that now, G for identification—did you not tell me, and let's go on to another point, that Exhibit G for identification refreshed your recollection as to the amount of business that you did in General Confections? A. Sir, as I stated before——

Q. Pardon me, Mr. Lubben—— A. I don't know. I haven't——

Q. I am just asking you one simple thing. Would you mind listening to it.

Didn't you just tell me that a moment ago here? A. That the papers refreshed my memory?

Q. Yes, sir. A. Yes, sir.

Q. All right.

Now, that being so, will you tell us what the gross income of General Confections was for the year following your leaving the partnership?

Mr. Wessel: I object to the form of the question. The witness did not say it refreshed his recollection as to the gross income of the company.

Mr. Stryker: I am asking him now.

Mr. Wessel: Well, then, I move that the words "that being so" should be struck from the question.

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The Court: I will sustain your motion.

Mr. Stryker: What was my question, Mr. Reporter.

(The amended question was read by the reporter as follows:

"Q. Now, will you tell me what the gross income of General Confections was for the year following your leaving the partnership?").

A. Well, I can't tell you, sir, what it was. I don't know.

Q. I am asking you for your recollection. You ran that business, didn't you? A. I said I got my business; it wasn't $5,000,000. I said it would probably be two or three.

Q. You are not answering at all. You did not answer my question. You are just talking. Didn't you run that corporation? A. Surely I did.

Q. And don't you know how much it made within a million dollars?

Mr. Wessel: I object to that.

Mr. Stryker: Strike it out.

By Mr. Stryker:

Q. Don't you know what its gross receipts were within (541)
a million dollars? A. Well, I said two or three million dollars, maybe three million, $2,980,000.

Q. Wasn't it well over $4,000,000? A. Well, sir, look at it, I have no way of knowing whether this is an authentic paper.

Q. Well, you needn't worry about that. A. Thank you, sir.

Mr. Wessel: I move that that comment be stricken from the record.

The Court: Strike it out.

Mr. Stryker: What was my last question before the interruption?

(Question read.)

By Mr. Stryker:

Q. That is? Won't you answer that? A. I think it could be, sir.

Q. Well, now, Mr. Lubben, do you mean to say that you cannot tell this Court and jury—if that is your answer, I will pass to something else—within a million dollars what the gross sales of General Confections were for the period of the fiscal year ending February 28, 1947? If that is what your testimony is, I assure you I will go on to another

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subject. A. You have my answer, sir, and I don't know whether those papers are authentic.

Q. You have said that four or five times. A. Yes.

Q. Would you like to say, perhaps, they are not authentic? A. Well, sir, there is something confusing about that paper there.

Q. Well, now——

Mr. Wessel: Counsel has asked a question. I suggest the witness be permitted to answer.

By *Mr. Stryker*:

Q. Would you like to say under oath that they are not authentic? A. It is confusing.

Q. I didn't ask you that. Would you like to testify under oath that these papers are not authentic? A. No. I won't testify under oath that they are authentic either.

Q. Don't you recognize these as the report that Sproul & Scholz got up for you for your income tax return for that year? A. I don't recall ever seeing that particular piece of paper.

Q. All right. Now—— A. Sir, how would you have my accountants' work papers?

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Mr. Stryker: Now, if your Honor please, won't you tell this witness——

The Witness: I am sorry. Pardon me, sir. I didn't mean to say that. Please accept my apology.

By Mr. Stryker:

Q. Now, did you also have a company called the Reserve Trading Company? A. Yes, sir.

Q. That was a corporation, too? A. Yes, sir.

Q. And you ran that, didn't you? A. Yes, sir.

Q. That was organized shortly after you left the partnership, wasn't it? A. Yes, sir.

Q. Now, you continued the business that you had before you went into the partnership; you continued it right along after you left the partnership under these two corporations, the General Confections and the Reserve Trading; that is correct, isn't it? Isn't that right? A. Yes, sir; we continued the business, yes, sir.

Q. And you dealt with the same customers that you had when you were running the business before you ever met Giglio? A. More or less.

Q. And the same customers that you had while you,

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were with Mr. Giglio? A. More or less, sir.

Q. Now, in addition to the gross receipts that you had in General Confections, did you also have gross receipts in this Reserve Trading Company? A. Yes, sir, but I, I——

Q. Just either you did or you did not; that is all I am asking about. The answer is yes, isn't it? A. We had gross receipts, yes, sir.

Q. Can you remember what, about, those gross receipts were over and above the receipts that you got from General Confections?

Mr. Wessel: I must object to this, if your Honor please. There is no period stated, there is no——

Mr. Stryker: Oh, yes, I think you are right, Mr. Wessel. Well, I will make it very definite.

By Mr. Stryker:

Q. Based on the calendar year 1946 or fiscal year ending February 28, 1947:

Mr. Wessel: I think the record——

Mr. Stryker: That is the period.

Mr. Wessel: The record should disclose that counsel appears to be, and is indicating very obvi-

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ously that he is reading from a document. That isn't proper, and if there is any inference to be given that——

Mr. Stryker: Wait a minute, you objected because I didn't mention the period.

Mr. Wessel: I haven't finished my objection.

If there is any inference in this record——

Mr. Stryker: I then mentioned it.

Mr. Wessel ——that counsel is reading from a document or referring to a document, the jury should be instructed he should not do so and is not properly doing so.

Mr. Stryker: I answered Mr. Wessel's question to the best of my ability and I answered it from a document that I hold in my hand. That is correct, I did.

Now, will you mark this for identification.

Mr. Wessel: It is not in evidence.

Mr. Wessel: I know that.

(Marked Defendants' Exhibit H for identification.)

By Mr. Stryker:

Q. Will you examine Defendants' Exhibit H for identification and tell me what it is, without reading the (346)
contents. A. Yes, sir. This appears to be a copy——

Q. Of what? A. Of a business corporation franchise tax report for the Reserve Trading Corporation, which was a subsidiary of General Confections.

Q. Yes, all right. That, I think, answers my question. Now, taking the paper which I have shown you, I will ask you whether it refreshes your recollection, and I will point to column 4, line 4, without stating what it is, as to th gross receipts of the General Confections in the period that has now been made clear?

Mr. Wessel: I object to the form of the question. I believe counsel was referring to Reserve Trading Company in the last question.

Mr. Stryker: What did I say? That is what I am talking about.

The Court: You said "General Confections."

Mr. Stryker: Did I? I misspoke.

You are quite right. Reserve Trading Company.

A. Sir, I have no way of knowing the authenticity of this paper.

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Q. Yes, I know.

Well, now, regardless of that, you said that, will you tell us whether it refreshes your recollection? A. Yes, it refreshes my recollection——

Q. Now, your recollection being refreshed, will you tell us what the gross receipts of Reserve Trading Company was for the period, for the calendar year 1946 or fiscal year ending February 28, 1947? Will you tell us that, your mem-

ory being refreshed? A. Well, to the best of my recollection, sir, and not from any basis of that paper, I think the Reserve Trading Company did about six or seven hundred thousand dollars worth of business, maybe $750,000.

Q. Well, then—I am not asking you to state what's in the papers—even after you have read this last exhibit for identification you say your best recollection is about what—$750,000? A. To the best of my recollection.

Mr. Wessel: I move to strike the words "even after".

The Court: Strike it out.

Mr. Stryker: How does it stand now, your Honor?

The Court: Is that his best recollection other

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than from the record that you showed him?

A. About three-quarter million dollars worth of business.

Q. Now, do you recall, for the period that I have been talking about, what you reported as your own income? I am just asking if you recall it. Do you?

Mr. Wessel: The period talked about in the last question was a calendar year, 1946, and a fiscal year ending in February, 1947. I think it should be defined in this question.

Mr. Stryker: Well, all right, maybe you are right.

By Mr. Stryker:

Q. Can you tell us what your income——

Mr. Stryker: Strike that out.

Q. By the way, you owned most of the stock in those companies, didn't you? A. A substantial amount, yes, sir.

Q. Well, very much more than a majority? A. Well, no, sir. If you added up together all the stockholders, I believe they owned more than I did.

Q. You owned a very substantial amount? A. Yes, sir.

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Q. Now, can you tell us what your individual earnings were from these two companies, General Confections, Reserve Trading, for the calendar year 1946? Give us the best you can. A. From my personal earnings?

Q. That's right. A. My personal amount of money that I earned?

Q. That's right. A. Well, sir, now if I recall—just let me get this straight. You want to know how much money David Lubben owed the Government from January 1, 1946, to January, or December 31, 1946?

Q. That's right. A. Wouldn't there be a period, sir——

Mr. Stryker: Just a minute.

By Mr. Stryker:

Q. Well, let me put it this way; maybe my question was faulty:

What did you earn, yourself, from those two companies in the calendar year 1946? A. That would be an income tax that would be filed——

Q. Do you think, Mr. Lubben, in all frankness, that that does answer my question? Does it?

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Mr. Stryker: Will you read the question.

If you don't understand it, tell me. If you do, please answer it.

A. That income tax could be——

Q. Well—— A. I am just trying to answer you, Mr. Stryker.

Mr. Stryker: Read the question I asked him about income. Read it to him again slowly.

A. I know what the question is, sir.

Q. Well, I asked you what your income was, didn't I? A. I wouldn't know, sir.

Q. You mean you wouldn't know what my question was or you wouldn't know what the income was? A. I don't recall. I haven't seen my income tax statement.

Q. Can't you approximate, Mr. Lubben? Can't you tell within—I don't expect exact dollars and cents, but let's say within a few thousand dollars what it was? A. In 1946.

Q. That's right. A. I would say maybe fifteen or twenty thousand, sir. I don't know. It's a guess. Whatever the accountant took off from my books, that is how much I had.

Q. Let me ask you if it would be less than that? A. It

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could be, sir. Whatever the certified accountant——

Q. Would you deny that it was only $10,500? A. Well, sir, whatever was set forth on the books of the company, taken by a certified public accountant, that was my tax.

Q. I am sorry, Mr. Lubben, that isn't my question. Would you deny it was $10,500? A. I wouldn't deny it, no, sir.

Q. I show you this paper—now, just so that I am clear myself, maybe you will help me—did you tell us—if you did not, then my memory is wrong—that the gross receipts or the gross income of General Confections was approximately $4,000,000? Am I mistaken or did you not tell us that? A. No, I don't think it went to $4,000,000. It could be, sir. I mean if you lumped Reserve Trading Company with it, sir.

Q. No, I am not lumping. I am taking General Confections alone. A. Well, General Confections, sir——

Q. What? A. General Confections owned Reserve Trading Company, so on the income tax——

Q. They owned the stock? A. It was a wholly owned

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subsidiary of General Confections.

Q. They owned all the stock? A. Yes, sir.

Q. All the stock of Reserve was owned by General Confections? Won't you just answer that. A. Whatever money was made by Reserve Trading Company——

Q. Did General Confections own all the stock of Reserve Trading? A. Yes, sir, to the best of my recollection, they did.

Q. Did Mike Cohen own some of the Reserve Trading stock? A. No, sir.

Q. No one else? A. No, sir.

Q. Have you got the stock books? A. I don't know where they are. I don't have any books at all, sir. The receiver took all those.

Q. Oh, then the answer is you haven't the stock—what do you call it, the stock certificate book—you haven't got that of General Confections or Reserve Trading? A. How could I have it, sir, when the receiver took it.

Q. We still get at it, you haven't got it, you don't know where it is? A. No, I don't know where it is at now.

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Q. What is that? A. I wouldn't know what the receiver did with it.

Q. Did you try to get it from the receiver? A. How could I get it back from the receiver?

Q. I don't know. I am asking if you tried. A. No, sir.

Q. Well, when the agents began to ask you about these companies, didn't they say they would like to see those

books, the stock certificate book and the General Confections books and the Reserve Trading? A. They just wanted all the books.

Q. What? A. They just wanted all the books.

Q. Did you go with them and call on the receiver and ask for the books? A. I told them where the books were at, sir. That was why I couldn't give them the General Confections books. I gave them the other ones.

Q. You told them they were with the receiver? A. I told them the receiver had taken the books.

Q. Are you suggesting that the receiver stole them? A. No. He came over and it was part—he was appointed by law, to come over and get the books.

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Q. I know. When they went over to see the receiver they didn't get the books, did they? A. I don't know that.

Mr. Wessel: I object to the form of the question.

By Mr. Stryker:

Q. Didn't they tell you that? A. No, sir.

Q. Wait a minute. Didn't they tell you, after you said, "Go over and see the receiver and get those books," didn't they say to you, in words or substance, "We have gone, but we can't get them," or, "We can't find them," or something like that? A. No, sir.

Q. When did you go into receivership? A. In March of 1948.

Q. When I say "you," that question isn't quite accurate, I admit. I am referring to your companies. A. You mean General Confections, Inc.

Q. That's right. A. Yes, sir. In March of 1948.

Q. And Reserve Trading also? A. Well, Reserve Trading Company was a wholly owned subsidiary of General Confections, so no doubt it went along with it.

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Q. Did that go into receivership or not? A. I don't know the mechanics of the law, but General Confections owned it.

Q. Did you have any other companies that went into receivership at or about that time? Did any of your other companies go into receivership in March, 1948? A. No, sir.

The Court: We will take a five-minute recess now.

Don't discuss the case. Incidentally, I notice during the trial every now and then one of you will turn to the other. The admonition not to discuss the case includes your time in the courtroom as well as out of the courtroom. In other words, at this point all you do is absorb your own thoughts on the case and you don't discuss them with anybody.

All right.

(Short recess.)

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Q. Mr. Lubben, when did you turn over the books and records of General Confections and Reserve Trading Company to the receiver? A. Shortly after the place was closed, sir, the receiver——

Q. Would it be around March of 1948? Yes, around March of 1948, would it be that? A. Yes. It would be—well, shortly after the place closed in March 1948.

Q. What books and records did you turn over to the receiver? A. Every book that was in the place, sir.

Q. Will you enumerate what they were. A. No, sir; I could not enumerate what the books were. I mean I am not a bookkeeper, but——

Q. You are not? A. They took a whole load of books out.

Q. If you are not a bookkeeper, how come yesterday you told us how other companies kept their books? Did you say that?

Mr. Wessel: I object to the form of the question.

Mr. Stryker: It is perfectly proper.

Mr. Wessel: Counsel can refer to what was said yesterday and see if the transcript is not correct.

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The Court: I will let him answer.

A: I don't recall saying how other companies kept their books, sir.

Q. You do not? A. No, sir.

Q. We will come back to it. Did you turn over the stock book, among other things, the stock ledger, stock certificate book? A. To the best of my recollection; yes, sir.

Q. Of both General Confections and Reserve Trading? A. Well, sir, the man had——

Q. Did you or not? A. To the best of my recollection, yes.

Q. Did you get a receipt from the receiver? A. I don't think I did, sir

Q. Were any of the books and records of General Confections and Reserve Trading missing when you turned over whatever books and papers you say you did turn over? A. All the books were closed since the date the notice went on the plant.

Q. Maybe my question is not clear. When you turned over the books and records of these two companies to the receiver, were there any of them missing at that time? A. I didn't know of any books missing, sir, at that time.

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Q. Did you get a receipt? A. No, sir. I don't recall whether I did or whether I didn't.

Q. You testified in the receivership of your companies, didn't you? A. Yes, sir.

Q. Do you recall whether any of the Government agents were there when you testified? A. I don't recall, sir; I don't think they were, sir.

Q. When did you testify before the receiver? A. Several times, sir. I think——

Q. Would April 1948 be a date that refreshes your memory as to when you testified? A. Well, April and May, sir. I mean several times, but the date don't mean anything to me.

Q. Have you been over the record in the Shotwell case, the printed record or the typewritten record? A. No, sir; I have not.

Q. None of it has been read to you? A. No, sir; it has not.

Q. I ask you whether this testimony given by Mr. Twohig in the Shotwell case will refresh your recollection to enable you to answer the last question I gave you.

Mr. Wessel: If counsel wishes to show the

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transcript to the witness, that is all right, but reading the transcript in evidence is improper.

Mr. Stryker: It is testimony that Mr. Twohig gave; I should think it would be right.

Mr. Wessel: I object to the comment. I do not think counsel was present, but if he wishes to swear to what Mr. Twohig said, he can take the stand. Have you a certified copy?

Mr. Stryker: It is a printed copy. I don't know about the certificate being there.

David George Lubben—By Government—Cross

Q. Mr. Lubben, I call your attention to certain questions and answers given by Mr. Twohig in the Shotwell case, at page 339 of the record.

Mr. Wessel: I object to that.

A. How would I know? I was not there, sir. The witnesses were excluded. How would I know what he said?

Q. I point out to you without reading the questions and answers on that page, beginning here, the third question from the bottom. Will you read those and tell me whether it refreshes your recollection?

The Court: What is the question you are asking him to refresh his recollection on?

Mr. Ttryker: When he met Mr. Twohig.

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Q. There are only three or four questions at the bottom of the page. I am not asking you to read them out loud, but just read them and tell me whether they refresh your recollection. That is all I am interested in at the moment, Mr. Lubben. I have no objection to your reading it all. Have you read the questions now that I have pointed out on that page? A. You have one underlined with red pencil, sir.

Q. There are three there. Read them all to yourself, and take your time. A. If it is, sir, the answer——

Q. Mr. Lubben, maybe you have in mind—— A. All right, sir.

Q. I am sure you have, my question. A. I have read it.

Q. Having read that, does it refresh your recollection as to when you first met Mr. Twohig? A. No, it does not refresh my recollection.

Q. It does not? A. No, sir.

Q. That is an answer. Well, was the receivership still pending when you met Mr. Twohig? A. Sir, I believe the receivership ended in June of 1948, sometime in June, and —so I would not know whether I met Mr. Twohig——

Q. All right. I think you told me if I am not wrong,

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you met him in July. A. Or August or September, I don't remember.

Q. When you left the Giglio partnership you went right ahead doing business in your own plant in the Bronx?

Mr. Wessel: I object to this as repetitious. We have been over this at least twice today.

Mr. Stryker: We have not.

The Court: I will let him answer.

Q. Is that right? A. Yes, sir.

Q. Was there certain machinery in this plant in the Bronx that you kept as a part of the dissolution arrangement? A. Yes, sir.

Q. You had that machinery appraised, didn't you? A. Yes, sir.

Q. Do you remember the name of the company that appraised it? A. American something, sir. American Appraisal Company, or somebody from Milwaukee, if I remember correctly.

Q. What? A. American something.

Q. American Appraisal Company, would that be right? A. From Milwaukee?

Q. I really cannot answer that, I am sorry, at the moment.

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Mr. Stryker: I ask to have this paper marked for identification.

(Marked Defendants' Exhibit I for identification.)

Q. Is Defendants' Exhibit I for identification the appraisal to which you have just referred? Will you please look at it (handing)? A. (Witness examines exhibit.)

Q. Take all the time you want. A. Thank you, sir. Here, Mr. Stryker.

Q. Is that the paper? A. Yes, sir.

Q. What is it? A. It is a copy of an appraisal by the American Appraisal Company.

Q. And the original was delivered to you; is that right? A. I don't remember whether it was or not, sir.

Q. You saw it? A. I saw one. Whether it was an original or copy, I don't recall. I recognize this paper.

Q. You recognize it. Refreshing your recollection from——

Mr. Wessel: I do not believe the witness has testified as to his recollection or that it needs refreshing.

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Mr. Stryker: Perhaps you are right.

Q. Can you tell the Court and jury at what figure the American Appraisal Company appraised the machinery? A. Yes, sir.

Q. What is it? A. As of September 5th or 6th, 1946—this is not March 8th now—September 5th or 6th, 1946, I believe the appraisal was something like $130,000 for the property, equipment, leasehold, improvements, and so forth and so on.

Q. You got that machinery from the partnership? A. Oh, no, sir. No, sir; I got some of it, but I added a great deal to it. That appraisal was September 5th.

Q. Tell us how much you added? A. Well, sir, you have a bill of lading or bill of sale there showing——

Q. I am asking you. A. I added a great deal to it.

Q. Tell me what? A. I added all the chocolate department, I know, and anything that was not on the other bill of sale I added.

Q. Can't you tell us in round figures what you added between March 9th, when you left the partnership and—what did you say the date here was? A. September 5th, sir.

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Mr. Wessel: I do not think the witness referred to what the date there is.

Mr. Stryker: He did.

Mr. Wessel: Now he is referring to a document not in evidence.

Mr. Stryker: The witness referred to such a date, and it was not March 9th.

Mr. Wessel: Not the date in the exhibit. Counsel is trying to bring the exhibit in evidence improperly, and he knows it.

Mr. Stryker: I object. I am not trying to do anything anywhere that is improper.

The Court: We got off in this discussion from his recollection of an appraisal.

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Mr. Stryker: Well, am I not right—to save time—didn't he say, didn't he himself mention the date?

The Court: Why, I think he did.

Mr. Wessel: He certainly did.

Mr Stryker: What's your complaint?

Mr. Wessel: But you were referring to what date is stated in that appraisal which is not in

evidence and which is not properly before this court at this time.

Mr. Stryker: Oh, I see. All right.

By Mr. Stryker:

Q. Well, now, I am asking you, between March 9th and the date of this appraisal what machinery you added to your plant in the Bronx, in value? A. I would say $50,000.

Q. Now, that is not a guess. That is your statement, is it, under oath? A. No, that is the best—that is only a pure guess. I don't have the books.

Q. I don't want a pure guess, Mr. Lubben. I want you to tell me that you either know or you don't know, and if you know, let's hear it. If you don't know, I can't expect you to tell me. A. Well, sir, if you have the rest of the

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books that you can refer to me, I would appreciate it very much.

Q. Well, you brought this matter up, Mr. Lubben. I am sorry.

You mentioned that you had gotten a lot of machinery between March 9th and the date of the appraisal. A. Yes, sir.

Q. You must have had something in mind. Tell us your best recollection of what that was. Well, to the best of my recollection, we got a new chocolate department.

Q. A what? A. A chocolate spray department.

Q. Well, you see, I am sorry, but I don't know much about that. How much did that cost you? A. Well——

Q. About, about. I don't expect you to carry the exact figures. A. Well, by the time you put the installation in——

Q. Wait a minute. What do you say about the chocolate spray department, in round figures; what is your best

recollection? A. We had to have a lot of air-conditioning on it, too, sir.

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Q. I didn't ask you that. A. It is part of the chocolate spray department, sir. I am trying to answer your question.

Q. Wouldn't you answer it if your—— A. Give me a chance, sir.

Q. I am giving you all the chance in the world. You told us about a chocolate spray department and I am asking your best recollection as to the cost of that. If you know, tell me. If you don't, say so. A. The best recollection of the chocolate spray department I can't put down in dollars and cents, but I think——

Q. About, about, Mr. Lubben. A. I think maybe ten, fifteen twenty thousand dollars. There were some more pans we bought, and there was air-conditioning that went next to it. There was a lot of installation work.

Q. Go on. A. Period.

Q. You have testified here in the direct, on many occasions—I can't stop to turn to them—about what was on the books. What figure did you put the machinery down at on General Confections on March 9th, before this appraisal? A. I wouldn't know, sir. All I know is I bought an inventory for——

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Q. If you don't know, that ends that. A. I don't know, sir.

Q. You can't tell us at all what the figure listed on the General Confections' books was as to the value of this machinery on or about March 9th; you can't tell us that at all? A. No, sir. I think there was something about $75,000, sir. Somewhere I think I saw a figure like that.

Q. Now, did you not, in your tax return for the year, your own tax return for the year 1946, state——

Mr. Stryker: What do you want to do, object?

Mr. Wessel: Yes. I wanted to wait until counsel finished the question.

Mr. Stryker: All right.

By Mr. Stryker:

Q. Did you not state that the machinery and equipment of Eatsum Food Products, located at 40 West 170th Street, transferred to David George Lubben, was appraised by the American Appraisal Company and valued at approximately $100,000?

Mr. Wessel: Now, I want to object to that question and I wanted to wait until it was completed

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to show exactly the fault in that kind of question. In the first place, it states facts not in evidence before this Court and not properly in evidence.

Mr. Stryker: Any statement contradicted is proper.

Mr. Wessel: In the second place, if counsel wishes to testify, and that is what he is doing by a question like that, he should be sworn and take the stand like any other witness in this case.

I therefore object to the question.

Mr. Stryker: Mr. Wessel, don't let's have any personal difference. I like you.

So how does your Honor rule on the question?

Mr. Wessel: I think that comment should also be struck, your Honor.

Mr. Stryker: Well, I didn't say I didn't like you.

The Court: Let's have the question read.

Mr. Stryker: Can I have an answer to that?

(Question read.)

A. Who would I state it to, sir?

The Court: Wait a minute, Mr. Lubben, I am still trying to figure out whether this is a proper question.

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Mr. Stryker: Mr. Lubben, you join with Mr. Wessel and want to put me on the stand?

The Court: As a matter of fact, I am frankly lost here in the train of this, Mr. Stryker. We got off on a question of appraisal as of September 8th. Now, his recollection of an appraisal, is that what we are going to now?

Mr. Stryker: Well, that is part of it. It goes deeper than that. It is what was the machinery, if I can get at the facts, that he got for General Confections from the Eatsum partnership when that split up.

The Court: I don't think we have had any question to the witness as to what the value of the machinery was when he got them on March 9th.

Mr. Stryker: I am asking if he did not say so here.

The Court: You are asking what he said some other time—all right, go ahead.

Mr. Wessel: If I may explain my objection——

Mr. Stryker: Your Honor overruled Mr. Wessel's objection.

Mr. Wessel: He should not read into evidence a statement which is not in any way authenticated.

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Mr. Stryker: Your Honor ruled on it. Let me have an answer.

The Court: Read the question again.

(Question reread.)

Mr. Stryker: I am very sorry, I must apologize. Could I have it read? I shouldn't have been talking to anybody but the witness.

The Court: I think when you said "Did you not state," you indicated a prior question; did you not state to somebody.

Mr. Stryker: "Did you not state to the Internal Revenue Department." Very good. Go ahead.

A. I didn't state anything to them, sir.

Q. Did you write it, if that isn't a statement? A. Write it where, sir.

Q. In a return that you filed with the Internal Revenue Department. A. Well, sir, the income tax statements that were mine were prepared by a certified public accountant, period. That is what they did, sir. They took it from my books.

Q. That was Sproul & Scholz, wasn't it? A. Yes, sir.

Q. Well, you swore to it, didn't you? A. I signed it.

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A certified man makes a statement for me, I——

Q. Did you swear to it, too? A. Who would I swear to?

Q. I am asking you. I wasn't there. A. Well, if it was in my statement, sir, it must have been correct, sir. If a certified public accountant puts it in there, I assume it is correct.

Q. Now, you were sworn as a witness before the Kefauver Committee, weren't you, Mr. Lubben? A. Yes, sir.

Q. Did you——

Mr. Stryker: And I will help you, Mr. Wessel, page 1118.

By Mr. Stryker:

Q. Did you on that page——

Mr. Stryker: Strike that out.

Q. Did you there, before that committee, under oath, testify as follows——

Mr. Wessel: I think, if your Honor please, I must object before counsel reads the question. That is not the proper way to bring into evidence what may or may not be a prior inconsistent statement.

Mr. Stryker: I may have to learn the rules of

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evidence over again. You have been to law school more recently than I have. I have done it all my life that way.

Mr. Wessel: I think counsel knows he should inquire of the witness what the fact is. Then if he thinks there may be a prior inconsistent statement, ask of the witness whether or not there is such a prior inconsistent statement, and finally read it.

Mr. Stryker: I don't know that rule—I have done it long before you were born—when you are interrogating a witness about whether he tells the truth. I don't know any tricks.

The Court: At this point, Mr. Stryker, I think the date of Mr. Wessel's birth, the date of his law school graduation, those matters are relatively unimportant. He is making an objection——

Mr. Stryker: That is true.

The Court: ——right or wrong, as to the merits of your question. He should be met on the merits.

Mr. Stryker: I will meet him on the merits. That is quite right. Probably I shouldn't have said it, and I am sorry.

The Court: I think it puts a lawyer at a dis-
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advantage, and it is not fair.

Mr. Stryker: All right. I am really sorry. All right.

The Court: Now, if this goes to what he said in the return, fine. If it goes to some fact other than that, I think Mr. Wessel is correct; he should not be asked did he say this, when you haven't even asked what the fact is.

Now, not having seen the minutes, I just don't know.

Mr. Stryker: Would you like to look at them, Judge?

The Court: I don't think it is necessary, Mr. Stryker. I think, as you say, that you know the rule very well, and I am sure that you wouldn't intentionally trespass on it.

Mr. Stryker: Is this proper? I hope it is:

Q. Did you testify to the truth, the whole truth, and nothing but the truth, in accordance with the oath that you took, before the Kefauver Committee? A. To the best of my ability I did, sir.

Q. Did you not state anything that was not the fact? A. I stated, sir, that I told the truth to the best of my
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ability.

Q. Now, then, is this what you said:

"Senator, are you trying to ask for a missing link? This is the basis on which I got away from these people. I wanted to get away on a basis of 50-50, but that would not do because we had a five-year contract, and 'We are very happy with your

services,' Mr. Giglio told me. The only way I could do it, I gave them all the cash that was in the business, all of the money in the bank. I gave them all of the accounts receivable, and I gave them all of the inventory. I gave them everything. Mind you, I owned 50 per cent of this. Just to get back the few lousy pieces of machinery that I had up in the Bronx the lease that I had when I went in with them, provided I gave them everything, that they would pay my income tax for the nine months in which I was a partner."

You can read the rest, I don't think it is material.

"I went to some very ethical lawyers."

Now, did you——

Mr. Wessel: I think the last sentence certainly (376)

is material.

Mr. Stryker: Well, I don't. All right, you want it, let's have it.

By Mr. Stryker:

Q. "That was the total income of the deal. I went back to my friend Milton Blumberg."

Mr. Wessel: The word is not "income," it is "outcome."

Mr. Stryker: You are right.

Q. "That was the total outcome of the deal. I went back to my friend Milton Blumberg. I said this is the only way in which they will do it. Later on they almost tried to renege on that."

Did you so swear? A. Yes, sir.

Q. Was that true? A. To the best of my recollection it was certainly true.

Q. Was the statement that all you got was a few lousy pieces of machinery true? A. The machinery I had when we started.

Q. Pardon me, Mr. Lubben, if you will. Was that statement that I have just read, about getting, only getting a few lousy pieces of machinery, true or not? Was that a fair, truthful statement about the machinery you got? A.

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Well, sir, based on the rest of the assets I figured it was very fair.

Q. You what? A. Figured on what I left, I figured it was a very fair statement.

Q. That you only got a few lousy pieces of machinery? A. Whatever machinery I had when I started I ended up with.

Q. Well, I am just asking you—I am just testing your conception—— A. I gave you the answer, sir.

Q. —of the truth. Do you think that the statement, "I only got a few lousy pieces of machinery," was a truthful, fair statement? A. Perhaps my wording could have been a little bit more polite, sir, but the feeling was still there. In my own mind it was.

Q. I think it could, too.

Mr. Stryker: Oh, strike it out.

Q. Won't you answer my question as to whether you think now—and then we will pass on to something else—that that was a fair, truthful statement about the machinery that you got. Just tell me that and let me go on to something else. A. On the overall deal, what I got out of the

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deal, was a few—probably "lousy" is not correct—a few lousy pieces of machinery; based on the other side, it was a correct statement, sir.

Q. Did you state, also, before the Kefauver Committee, that there was, to your knowledge, $200,000 in the bank account, no part of which you got? A. Well, sir, I did state that, but I made a mistake.

Q. Wait a minute. Please, let's take it one step at a time. A. Yes.

Q. Am I correct? Is that what you said? A. To the best of my recollection, it was, sir, and I so stated, I believe.

Q. You mean what you said was the best recollection, or are you saying the best recollection, that is what you stated; which is it? A. No, I believe, sir——

Did you say that? In other words, let's make it short, isn't that what you said? A. Why don't you read it to me, sir? You have it there.

Q. I will in a minute. I can't find it. I know it is there, and you do, too. A. Well, you read it to me, sir, and then

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we will be sure.

Q. Page 1119. Did you say under oath:

> "These figures (referring to other figures) are not exact, but to my knowledge there was close to $200,000 in the bank"?

A. I said it wasn't exact. To the best of my recollection at the time there was close to $200,000 in the bank.

Q. You see, I am sorry, but that doesn't quite answer my question.

Did you say what I have read to you under oath? A. I said what you read to me under oath, yes, sir.

Q. All right. In other words, you said that it was, to your knowledge, the bank account was close to $200,000; is that right? A. To the best of my knowledge, sir, it was.

Q. Now, as a matter of fact, don't you know that there was only about $8,000 in that account, not $200,000? A. No, sir, but I got myself muddled up there a little bit, sir, and——

Q. I am sorry about that, too, but would you mind answering my question. A. I can explain it to you sir.

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Q. Would you read it? Don't you know about—— A. I don't remember, sir, I never paid any attention to a bank account. The bookkeeper took care of that. All I remember is seeing monthly statements.

Q. Didn't you, on your direct examination, say something to Mr. Wessel about the bank account, and say, or start to say, that you learned since what it was, or something like that?

Mr. Stryker: Your Honor will remember that, I am sure.

Mr. Wessel: Page 183 of the transcript.

Mr. Stryker: All right, let's have it.

By Mr. Stryker:

Q. That's it, page 183, as Mr. Wessel kindly helps me, of this record here before this jury, this Court and jury, did you swear:

"At one time I thought"—"then we had money"——

Mr. Stryker: I will start over again, strike it out.

Q. "And then we had money in the bank. At one time I thought it was a greater figure, sir, but later I think it was a little better."

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Did you say that? A. A little less or a little better?

Q. To be fair to you, I think you said a little lesser or smaller. I think that is what you said but I am not holding you to this because I believe you are right.

You said later on you learned it was a little less. That is what you meant, wasn't it? A. Yes.

Q. All right. Well, did you later learn exactly what it was? A. No, sir, I did not.

Q. But you learned that it was a great deal less than the $200,000 that you swore before the Kefauver Committee, to your knowledge? A. I said "to my knowledge," to the best of my recollection, sir.

Q. Down there you said that? A. Read what I said in the beginning of the paragraph. I said, "This is"—I believe I said——

Q. Did you not say, "to my knowledge," the words I have read? A. Yes, but I said something before "to my knowledge."

Q. Didn't you say that, to your knowledge, that it was $200,000? A. I said other things besides "to my knowl-

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edge."

Q. About that $200,000? A. I think so, sir.

Q. All right, to be perfectly fair about it you tell me anything else that you said that changes that. I want to get it. Maybe you can tell me, or Mr. Wessel can. I don't know what you have in mind. Would you like to take it? A. Sir, I am trying to answer your questions.

Q. I know. Well, I haven't got it.

On what information was the statement that you made here before this Court, on what information was based the statement that it was a little less, if I am paraphrasing it correctly, then $200,000? Tell me the basis on which you made that. A. How did I make it, sir?

Q. Well, the basis, what you made it on. A. To the best of my recollection, sir, when I came back from Washington, I discussed what we had stated before up in Washington, and I had a discussion, and the party told me that my figures for the money in the bank were wrong.

Q. Who told you that? A. To the best of my recollection, sir, Miss Feldmann, who was the office manager.

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Q. Was Mr. Twohig down there? A. Yes, sir.

Q. Had you talked with Mr. Twohig before you testified to the Kefauver Committee? A. Before I testified?

Q. That's right. A. Sure. The Kefauver Committee I believe was in 1950, wasn't it, sir?

Q. That's right. It was August 22nd. A. I talked in 1948 and 1949.

Q. Approximately 1948 and 1949? A. Sir, you asked me if I spoke to Mr. Twohig before the Kefauver Committee. I said I had been talking to Mr. Twohig in 1948 and 1949.

Q. My question wasn't as accurate as it should have been. You are quite right. Did you at or before, around that time of your testifying on August 22, 1950, talk with Mr. Twohig about what you were going to say? A. About what I was going to say?

Q. Yes. A. No. There is only one thing Mr. Twohig told me to say.

Q. The truth, of course. A. Are you answering my question or do you want me to answer it, sir?

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Q. Isn't that the answer you are going to give me? A. Mr. Twohig told me when I came over here that day to the court house about this thing, "Just go in and tell the truth and that is all."

Q. Just go in and tell the truth. Well, now, did he go over the statement—did he go over with you the statement that you swore to before the Kefauver Committee? A. What statement? I didn't make any—you mean I signed a paper?

Q. No, no, I don't mean that. The testimony that you gave before the Kefauver Committee. A. No, I only spoke to Mr. Twohig not more than two or three minutes in a hall in one of these buildings around here. Which one it was I don't know.

Q. That was down in Washington, this Kefauver Committee. A. We had a dress rehearsal before we went there.

Q. A dress rehearsal? A. Well, you know what I mean. They had you in private chambers and so forth.

Q. Did you make a statement under oath in the private chambers? A. Yes, sir, I did, if I recall correctly. Yes, sir, I was sworn there, too.

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Q. Did you in that statement say the same things that you said when you got out into the committee room in Washington? A. Very much the same, sir. Maybe I didn't use exactly the same words, but——

Q. Was it the same? A. —but the sum and substance was the same, sir.

Q. When was that, about how long before the Kefauver open hearing? A. Only a guess, sir, I would say a week or ten days.

Q. Was what you said there in the—I think they call it private hearing, don't they? Was that stenographically transcribed, and was it shown to you? A. Well, sir, I don't remember whether it was stenographically transcribed or not. There were quite a few people in there, and I imagine it was stenographically transcribed. It is only a guess on my part.

Q. Didn't they show you the statement that you made in the private hearing before you testified in public? A. Sir, the Kefauver Committee showed you nothing.

Q. Well, then, that is an answer to my question. You didn't see it. A. I didn't see it.

Q. Did Mr. Twohig see it? A. How would I know, (386)

sir, what he saw.

Q. From what he told you, did he tell you he had seen it? A. No, sir, he did not.

Q. Now, then, when he told you after you had made this statement about the bank account, did he tell you on what basis he made the statement that your testimony wasn't correct? A. I didn't say Mr. Twohig made the statement that my bank account was wrong, that the amount of the money—I never told you that.

Q. What did you tell me about Mr. Twohig's statement to you after you testified? A. I never told you he made any statement.

Q. Well, you said you learned afterwards it wasn't $200,000. A. And I told you where I learned it only two minutes ago.

Q. From whom, tell me again? A. To the best of my recollection, from Miss Feldmann when we drove back from Washington.

Q. Miss Feldmann. Well, was Mr. Twohig in the Senate chamber room when you testified to the $200,000? A. Where, sir—in Washington?

Q. That's right. A. Well, sir, I would imagine he was, but I was sitting up in the front facing the senators, and I (387)

don't know, there were propably a hundred, two hundred people in the back.

Q. Did you see him there before and after, in the Senate room? A. I never saw him sitting in the Senate room.

Q. You saw him down there in Washington? A. Yes, sir, I saw him in Washington.

Q. In the Senate house? A. Yes, sir.

Q. Well, when you said down there that "there was $200,000, to my knowledge," did you have knowledge that that statement was correct? A. Well, sir, I was only trying——

Q. I don't care, Mr. Lubben. Don't let's debate that now. I am just asking you if that——

Mr. Stryker: Well, read the question.

(Question read.)

Mr. Stryker: That is my question.

A. I stated down there, I believe; to the best of my ability, and I am stating right here what I told you. I had never seen——

Q. I am not referring to that. A. Sir?

Q. I am referring to that part of your testimony where (388)

you said, "to my knowledge." A. I think there is something more. I have asked you to read it to me, sir, if you only will.

Q. I have given you the book and you can look at it yourself. A. You didn't give me any book, sir.

Q. I thought I handed it to you. A. No, you went back there.

Mr. Wessel: Suppose I refer to what counsel is referring to——

Mr. Stryker: No, I would rather have the witness, thank you.

I will give you the book here and help yourself.

By Mr. Stryker:

Q. Now, I will show you this Kefauver Committee testimony, page 1119, and the part that you have already verified as your testimony:

> "To my knowledge there was close to $200,000 in the bank."

Now, you say you changed that somewhere. If you did, please point it out to me. A. I stated here, I says—sir——

Q. Do you have my question, Mr. Lubben? A. Yes, sir.

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Q. Just point out anywhere you want, anywhere, I don't care, anywhere, any number of pages. A. "The Chairman: Let's get the amount of what you turned over to them in order to get out."

Q. Do you mind if I read it with you? A. Sir, you can read it for me.

Q. No, you read it. A. I prefer you reading it, sir.

Q. All right:

> "Mr. Lubben: These figures are not exact, but to my knowledge there was close to $200,000 in the bank."

A. Sir, when you are reading "but to my knowledge," the emphasis that you are putting on there, do you find anything underlined to put the emphasis on the words "to my knowledge"?

Q. No; I don't. A. Why do you read it that way, sir?

Q. Is that your only criticism of the way I read it? A. I say:

> "Mr. Lubben: These figures are not exact, but to my knowledge there was close to $200,000 in the bank."

There is a little bit of difference, sir.

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Q. Then your only criticism is my peculiar intonation? A. I didn't say it was peculiar.

Q. Well, my intonation, that is the part where I might be wrong, where I stressed the words "to my knowledge"; is that right, Mr. Lubben? A. Yes, sir.

Q. Now I go back to my question and ask you what——

Mr. Stryker: Strike that out.

Q. I ask you upon what fact the knowledge that you said you had was based? Would you give us that? A. Sir, the last certified public accountant's statement that I had seen I believe was for the period ending January 31, 1946.

Q. The last one you saw? A. Yes, sir.

Q. All right. A. And this was taken by an ethical certified public accountant.

Q. Mr. Bercu? A. Mr. Bercu. And I believe, sir, that the net worth of the company at that time was about seven to eight hundred thousand dollars. Now, that is to the best of my recollection, even today.

Q. I don't want to interrupt you.

Is that all the knowledge that you had, upon which you

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base the statement that to your knowledge, when the partnership ended there were $200,000 in the bank? Is that right? A. Well, sir——

Q. Mr. Lubben, please, if you don't mind. If my question isn't clear, it will be my fault. Would you answer, if you understand it? A. I don't know your question.

Mr. Stryker: Read it again.

(Question read.)

A. No, I said, to the best of my recollection—you want to know where I got the knowledge. I had to get it some place.

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Q. You have told us the knowledge that you had, and my question was, did you have any other knowledge, and if so, what was it? A. No, sir; the only knowledge I can ever think of remembering is in that certified public accountant's statement.

Q. That it was a certified public accountant's statement of Bernard Bercu & Company, and I think you said it was January 1946; did I hear you right? A. December or January, sir.

Q. What did you say according to that statement the cash in the bank was? A. I said to the best of my recollection down there, that the figure was about $200,000, and I have told you I was wrong.

Q. I know, I understand that, but did you not say that the basis of your statement to your knowledge of saying down there, to my knowledge there was $200,000 in the bank, was based on the statement of your accountant? Didn't you tell me that? A. To my knowledge and the best of my recollection, what I am thinking at the moment, that is the same thing.

Q. Didn't you tell me a few minutes ago that is a statement you got from your accountant? A. I said to the best of my recollection that is where I got the information, that there was a worth of six or seven hundred——

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Q. No, I am asking about the cash in the bank. A. No, I told you it was the over-all worth of the company.

Q. We are talking about one thing at the moment, what you said about cash in the bank. A. I told you, sir, I was wrong about the cash in the bank.

Q. How wrong were you? A. I don't know. I never did find out, sir.

Q. Now I show you this paper——

Mr. Stryker: Or rather, I will have it marked for identification first, please.

(Marked Defendant's Exhibit J for identification.)

Q. Now I show you Defendants' Exhibit J for identification (handing), and ask you if you will just tell us what it is? A. Yes, sir. What is it? It is a copy of a certified public accountant's statement, Mr. Bernard Bercu, as of January 31, 1946.

Q. The original of that same statement was shown you by Mr. Wessel the other day, wasn't it, and marked for identification? A. Yes, sir; I believe it was.

Mr. Stryker: Would you let me have that for

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a moment, Mr. Wessel, please.

(Mr. Wessel hands exhibit to Mr. Stryker.)

Q. Now I show you Government's Exhibit 23 for identification, so we will have no confusion on that point. Is there any doubt what I have shown you is a copy of their exhibit for identification?

Mr. Wessel: I do not think it is competent to ask the witness to compare the two documents, if your Honor please.

Mr. Stryker: I do not know why not.

The Court: I don't know. I see no great harm in it except the time that it takes.

Mr. Stryker: A question of credibility again. I am coming to it and cannot do it all at once.

The Court: If you think a comparison of the two documents will help, all right.

Mr. Stryker: I offer them in evidence.

A. Yes, sir.

Q. It is the same? A. I am not checking word for word; but it appears very much to be the same.

Mr. Stryker: I will mark the Government exhibit in evidence.

The Witness: I don't know whether you can offer the Government's——

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Q. You are not sure about the law of that? A. I am not sure.

Mr. Stryker: Maybe the Judge will help us decide that. All right, I will mark it in evidence.

(Marked Defendants' Exhibit K in evidence.)

Mr. Wessel: I think it was the Government's exihibit that was received.

The Court: That is right, Government's Exhibit 23 for identification. It is now Defendants' Exhibit K in evidence.

Mr. Stryker: Is that all right, Mr. Wessel?

Mr. Wessel: Yes, it is quite satisfactory.

Mr. Stryker: (To jury) Gentlemen, this is a document signed by Bernard Bereu & Company, certified accountants. It reads, the part I am reading, though there are many pages:

"Eatsum Food Products Company Balance Sheet without closing inventory as of January 31, 1946, total cash $25,072.04."

You can read that (hands to jury).

Mr. Wessel: May I point out, sir, since the jury is examining the document in evidence, that I do not believe that——

Mr. Stryker: I am sorry, I did not hear.

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Mr. Wessel: I would like to point out to the Court while the jury is examining that document, since reference to it is proper at this time, it is of January 31, 1946.

Mr. Stryker: That is exactly the point I pointed out to them. I have done it twice.

Mr. Wessel: But we have it as of March 9, 1946.

Mr. Stryker: We have had that. The witness says this is the basis of his information.

The Court: No, he did not say this was the basis of his information on the bank account. There was no basis. He was wrong. He made a further statement on the net worth, which he says—just let the jury recall what he said and come to their own conclusion.

Mr. Stryker: My recollection could easily be faulty.

The Court: And mine, too. But I will tell them that my recollection and yours will be discarded.

Mr. Stryker: If I may make a suggestion that the stenographer turn back over the lunch hour to it. I thought he said he based his testimony on the last statement he got from reputable accountants, Bercu, in January. I would love to be corrected if I am wrong. I think that is what he said.

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The Court: He based it on recollection of net worth, and recalled the net worth in the Bercu statement.

Mr. Stryker: I am sure your memory is better than mine, but when we come back maybe the stenographer has it. Can we take that up after lunch?

The Court: Yes. We will recess now and return at two o'clock.

(To jury:) Do not discuss the case.

(Recess until 2:00 p. m.)

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AFTERNOON SESSION

(Jury present.)

Mr. Stryker: If your Honor please, with regard to the matter we talked about as we closed, I have talked it over with Mr. Wessel, and the reporter has been good enough to read it to us, and we both agree that the record is confused there, and there would be no point in reading it back, so I will take it up from there and save you maybe 10 minutes.

The Court: Very well, good.

DAVID GEORGE LUBBEN, resumed.

Cross Examination by Mr. Stryker (Continued):

Q. Now, I come back to a question which I have not yet had answered. What was the basis on which you swore before the Kefauver Committee that to your knowledge the bank account was $200,000? Will you just tell me that. A. Well, sir, as I stated there, the figures might not be——

Q. Pardon me a minute, Mr. Lubben, I don't want to interrupt you. Is my question clear to you? A. Yes, sir, and I am trying to answer it.

Q. Can't you just give me what the basis of the statement was and I will go to something else? Is my question clear? A. Yes, sir.

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Q. Will you please answer it. A. I am trying to answer it, sir.

Q. All right. A. To the best of my recollection, I had seen the last financial statement of the Eatsum Food Products in January or some time, whenever it came out, the last one, and I saw a net worth there, but that was for January 31st, and we had about another four or five weeks there, later on, which we were taking in money, and I estimated it in my mind, as I told the Kefauver Committee, to the best of my recollection, I said I may be wrong, it would be $200,000, but I said I was wrong so——

Q. Are you finished? A. Yes, sir.

Mr. Stryker: Will you let me have that exhibit, that accountant's statement? I think it was one of the last things I put in evidence. I guess it was the Government's I put in, didn't I? It was yours.

By Mr. Stryker:

Q. Now, this Exhibit K, Defendants' Exhibit K, which we have identified as the original statement that you got, is that the paper that you have referred to in your last answer? Take it and look at it. A. You said the Defendants'

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Exhibit K?

Q. That's right, right on the cover. Isn't that right? A. It says, "Government's Exhibit" over here.

Q. All right. I still say on the left it is "K." It was a Government's exhibit for identification.

Now, can't you look at it and tell me whether it is "K" or not? Any dispute about that? A. It says "K" over here and over here it says "23."

Mr. Stryker: That is Government's Exhibit K, isn't it, Mr. Dilberian?

The Clerk: Yes.

By Mr. Stryker:

Q. Now we have that straightened out. Is that the paper that you referred to in the answer you just gave me a minute ago? A. Yes, sir.

Q. Among other things, did you not, in reading this paper, see the left-hand column of the first sheet which says "Current Assets:, Cash:, Manufacturers Trust Company, $19,022.04; Corn Exchange Bank, $5,000; On hand, $950; total: $25,072.04."

You saw that, didn't you? A. When—just now?

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Q. When you looked at it before you went down and testified before Kefauver. A. I didn't look at it then, sir.

Q. I didn't ask you that either. I ask you, when you read this exhibit, if you did not also read the figures I have just read to you? A. I don't recall, sir, but I think all I read was the net worth of the company, the total assets of the company.

Q. Although you did not read the paper even to see what the cash in the bank was, you nevertheless, under oath, testified that to your knowledge there was $200,000 in the bank; that is right, isn't it? A. But I stated I don't know these to be exact.

Q. I am not asking you that. I am asking you if you did not, in spite of what you have just admitted is the fact,

namely, that you didn't even look at the cash in this account—— A. Oh, I don't say I didn't look at it. I read it, but what remained in my mind was the worth of the company.

Q. I know, but you were talking about cash in bank. A. Yes, sir.

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Q. Goodness, I have been at this for half an hour. Weren't you—— A. Sir, you won't let me answer the question.

Q. I will let you answer any question if you will answer it. We are talking—and I am tiring everyone out—about your testimony before Kefauver, about the amount of cash there was in the bank, when you split up; isn't that right? A. Yes, sir.

Q. All right. And for the thousandth time you told me that you admitted stating under oath that to your knowledge it was $200,000, isn't that so?

Mr. Wessel: I move to strike the words "and for the thousandth time."

Mr. Stryker: Yes, I know, it wasn't a thousand. It was an exaggeration.

Mr. Wessel: I move to strike that last comment out.

The Court: Strike it.

By Mr. Stryker:

Q. How many times it was—more than I would wish to do it—you admitted that you made that statement under oath, didn't you? A. Yes, sir, but——

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Q. Now, then, I have been at this so long——

The Court: You started to say "but." Does that complete your answer?

The Witness: No, sir, it does not.

The Court: Complete your answer.

A. I said, Yes, sir, but I had made a mistake, and I stated in that testimony that these figures—I mean, there is something—words that were not—"to the best of my recollection," or words to that effect.

Q. Are you through now? A. Yes, sir, but you can't make me say anything else, sir, about that.

Q. I wouldn't try, so don't worry. Didn't we go all over that this morning, and you told me there was something else; then I showed you the paper; I read it to you, and you said that the only thing that was something else was the emphasis I placed on the words; didn't we have that? A. Oh, no, I didn't say that, sir.

Q. All right. Well, now, let's see, you told me this morning, I think—correct me if I am wrong—that after you got your General Confections going, or rather taking over your old place, that you added a chocolate spraying; wasn't that what you said? Do I remember that right?

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A. And some air-conditioning and some other equipment, and pans and so forth, to the best of my recollection, sir.

Q. Air-conditioning; is that right? A. To the best of my recollection, sir.

Q. Well, did you do that once or more than once? A. I don't know, sir, but I could easily tell you what I added by checking the original bill of sale.

Q. Let's check what you remember you added for the moment. What did you add? A. A lot of things. We did a lot of remodeling, and so forth, up there, putting in rewiring, and so forth, there.

Q. Who did that for you? A. Contractors.

Q. Would it be Kerby Saunders? A. Yes, sir, they did some of the work yes, sir.

Q. Did anyone else do any air-conditioning except Kerby Saunders? If so, give me the name and address. A. Well, I don't know, sir. I don't have my records and I haven't seen——

Q. I know you haven't. You have your memory, though. Did anyone else do any air-conditioning, other than Kerby Saunders? A. I think we did. I think we had some——

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Q. I—pardon me. I am trying to answer you, sir.

Q. Go ahead. What's that? A. I am trying to answer you, sir, if you will stop interrupting me, sir.

Q. That is all right, try. A. To the best of my recollection, sir, we were doing air conditioning for sometime. I think we had made plans during the partnership to put in a chocolate spray department. I believe I paid a $2,000 deposit on some experimental work which was later charged to me. I don't know whether the air-conditioning was started then or completed later on or whether it was completed or not, but I do know that a considerable amount of equipment was added to the company after March the 8th.

Q. Now, you said something was charged to you. It wouldn't be $2,250, would it? A. I don't recall. 2,000-something sir.

Q. At any rate, it was charged to you personally, not to the partnership; is that right? A. No, it was not charged to me personally. When I——

Q. I thought you just said that. Did I hear you wrong?

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A. Oh, sir, let me answer the question. The twenty-two or $2,000 that was charged to me was on the invoice with all of the inventory, and I think if you will let me refresh my

memory you will see there is a couple of thousand dollars that was charged to me when I accepted—when I left the partnership for——

Q. Well— A. Please, stop interrupting me, please, sir.

Q. Go ahead, finish. A. I am trying to answer you, sir, and that is the $2,200 was something that was actually started before the partnership terminated and it was charged to me because I would have the benefit of it.

Q. Are you through? A. Yes, sir.

Q. Then it was charged to you? That is all I am asking you. That is right, isn't it? A. Yes, sir.

Q. That is the truth? A. That's right, sir.

Q. And that was for the chocolate spraying equipment, wasn't it? A. It was for experimental work, sir.

Q. Was it for chocolate spraying equipment? A. Sir, I am trying to answer the question. It was for experimental

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work on——

Q. Well—go ahead. Go on. Go on. A. It was for experimental work, sir, on chocolate spraying equipment.

Q. Now, I don't care what it was for. Was it chocolate spraying equipment; that is what I am asking you?

Mr. Wessel: I object to the form of the question.

The Court: Sustained. Go ahead.

Mr. Stryker: How does your Honor rule?

The Court: I sustained the objection. Whether it is experimental work on equipment or whatever it is for, I think we have belabored that point enough.

Mr. Stryker: All right.

By Mr. Stryker:

Q. Do you mean by the statement that it was charged to you that that was part of the original equipment that

you had before you formed the partnership? A. No, sir.

Q. You don't mean that? A. It wasn't in there when the original partnership started, sir.

Q. I see. But when it was bought, it was charged to

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you personally, rather than the partnership, or am I wrong? A. No, sir, on the chocolate spraying equipment I gave, to the best of my recollection, during the partnership, a deposit for $2,000 or $2,500 to a company to do some work on chocolate spraying equipment. Now, I don't believe the equipment was ever delivered at that time.

Q. Is that all? Are you through now? A. And it was delivered later on to General Confections and they paid for it.

Q. General Confections? A. Yes, sir.

Q. They paid that $2,250? A. Yes, sir.

Q. All right. A. No, General Confections didn't pay the $2,250, sir. It was charged on the——

Q. Who paid it? A. Ultimately I did.

Q. All right. A. But it came from the partnership. I paid the partnership for it.

Q. Well, you paid the partnership for that chocolate spraying equipment? A. Well, I don't mean I paid the partnership. The partnership—when I accepted, sir, as I have told you, when the partnership broke up, that is on the bill of sale being charged to me. That item and several others.

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Q. All right. Well, now, we were talking this morning about your testimony, that all you got was a few lousy pieces of machinery. Remember that? A. Yes, sir.

Q. Your testimony today. And you told me, if I remember you correctly, that after the partnership you added

a lot of machinery, that is, General Confections did; is that right? A. Yes, sir, a considerable amount, sir.

Q. Amongst the things that were added was this chocolate spraying equipment and also the air-conditioning, isn't that what you told me? A. To the best of my recollection——

Q. All right. A. Just——

Q. I didn't mean to interrupt you. That is what you said this morning. A. I will just repeat what I said.

Q. Isn't what I have said a correct paraphrase? If not, you tell me. A. If you are going to answer the questions, sir, I can't answer them.

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Q. Isn't that a correct paraphrase of what you said this morning? If not, correct me. A. I don't know anything about paraphrase.

Q. All right. A. But what I say is this: that to the best of my recollection a considerable amount of machinery was added after March 8th, and to the best of my recollection the chocolate spraying equipment was added, and I do believe some air conditioning.

Q. All right, thank you. A. It may have been started prior and I finished paying for it, I don't know.

Mr. Stryker: Will you mark seven pages clipped, or rather put in by a clip as one. Will you mark it for identification.

(Marked Defendants' Exhibit L-1 for identification.)

Q. I show you Defendants' Exhibit L-1 for identification (handing), and ask you first with regard to the first paper, a check, if you can identify it and the maker of the check, the signer of the check? A. Yes, sir; the signer of the check is Roy Hankermeyer.

Q. Do you recognize the next paper—a bill, isn't it? This thing here (indicating). No, I mean this one here,

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the next paper. A. Yes, sir; it is an invoice.

Q. Do you recognize the date of the invoice and the date of the check?

Mr. Wessel: I do not know what that question means, but I object to it. I do not see how anybody can fail to recognize a date that is written on something.

Mr. Stryker: I think you are right about that. All right, let me have it, please, Mr. Lubben.

(Witness hands papers to Mr. Stryker.)

Q. Is it not a fact that Kirby Saunders, Inc., of 330 West 42nd Street, billed the Eatsum Food Products Company for air conditioning equipment as per contract in the sum of $17,600 and the additional $176 for sales tax, making $17,776, and that that bill was dated February 28, 1946? Isn't that a fact? A. Yes, sir.

Q. Roy Hankermeyer was your partner? A. No, sir; he was no partner.

Q. Your associate? A. Yes, sir.

Q. He was your uncle, I think? A. Yes, sir.

Q. Is it not a fact that Roy Hankermeyer drew a check on the account of the Eatsum Food Products under date of March 1, 1946, in the sum of $15,840? Is that a fact? A. I see a check there; I don't remember what the figures

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were on the check.

Mr. Stryker: Well, I will offer this exhibit in evidence, that is marked for identification (handing to Mr. Wessel).

Colloquy

Mr. Wessel: I object to the exhibit on several grounds, if your Honor please. In the first place, it is not authenticated in any way; in the second place, it is not the time for the defendants to be offering exhibits in evidence; in the third place, it is not related in any way to anything the witness has said. He has not denied any of the statements in this document; it does not impeach him in any way and is perfectly consistent with what he said.

Mr. Stryker: I do not think I should have to respond to that, with all due respect to my friend Mr. Wessel. An exhibit is always proper if you identify it at the time and it may be essential to the cross-examination of the witness. That is number one. I have had the witness identify these checks, and we described them, and the date, and it definitely bears on his own testimony as to whether the General Confections put in machinery after he left the partnership. It bears on all those things. Would your Honor look at it.

The Court: The thing that bothers me is that

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there is no foundation for its authenticity. If he identifies it, the check, all right. I may have missed it.

Mr. Stryker: I think I did, but if I did not I will see if I can do it. (Hands papers to the Court.)

Mr. Wessel: May I make clear that the witness has not stated to the contrary of what is in those documents.

Mr. Stryker: That is an argument, Mr. Wessel, and I don't want to debate it with you now.

The Court: Will you ask a further question, Mr. Stryker, on it.

Mr. Stryker: Only if you think I should.

The Court: I would sustain the objection.

Mr. Stryker: Then let me ask a couple more questions.

The Court: Yes.

By Mr. Stryker:

Q. This check which you identified is a check drawn on the Eatsum Food Products Company account, isn't it? That is at the top of the check; is that right? A. Yes, sir.

Q. It is dated March 1st, 1940, isn't it? A. Yes, sir.

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Q. And the partnership was still going at that time? A. Yes, sir.

Q. And Roy Hankermeyer was in there either as a special partner, I think you said he was not, or an associate of yours in the business; is that right? A. Yes, sir.

Q. Was this check then—can you not say this check was issued in the regular and ordinary course of business by the Eatsum Food Products Company through your uncle, Roy Hankermeyer? A. It would appear to be; yes, sir.

Q. Is there any doubt about it? A. Well, sir, I don't know. I am sure it was issued in the regular course of business.

Q. And you have no doubt but that this is a receipt from Kirby Saunders, that is the people you dealt with? A. That is not a receipt. It is an invoice.

Q. I would not know. This invoice; is that right? A. Yes, sir.

Q. No doubt about that? A. No, sir.

Q. In the ordinary course of business; I do not care much about the rest of it.

The Court: Why not take the invoice and the (415)
check and I will receive those.

Mr. Stryker: Yes. Just the check and the invoice.

Mr. Wessel: May I just say this, if your Honor please. It is only a question of the order of proof, and at the proper time the defendants would be entitled to offer the documents.

The Court: That point does not impress me at the moment.

(Marked Defendants' Exhibits L-2 and L-3 in evidence.

Mr. Stryker: While I am working with this, I would like to have these marked for identification.

(Defendants' Exhibits M-1 and M-2 marked for identification.)

Mr. Stryker: (Addressing jury:) Ladies and gentlemen, this is our Exhibit L-3 in evidence. It is a check headed, Eatsum Food Products Company, 19 Rector Street, dated—there is a stamp right over the date. I think we had it before, it was March 1st.

Mr. Wessel: March 1st, yes.

Mr. Stryker: March 1st, 1946. In the sum of $15,840, no cents, signed Roy Hankermeyer, authorized signature. The next one, what I have now been corrected to describe correctly as an invoice, (416)
from Kirby Saunders, Inc. to Eatsum Food Products, dated February 28, 1946.

Those are so similar, I think maybe I can go ahead.

The Court: Sure.

By Mr. Stryker:

Q. Mr. Lubben, I show you Defendants' Exhibit M-1 for identification (handing), and ask you if you can identify that check and the accompanying paper? A. Yes, sir.

Q. Are they records kept in the ordinary course of business by the Eatsum Food partnership? A. Yes, sir; I would say so.

Q. Did you want to examine them further? I do not want to take them away from you. A. No, sir.

Mr. Stryker: I offer them in evidence (handing to counsel).

Mr. Wessel: I have just one or two questions.

Mr. Stryker: Sure.

By Mr. Wessel:

Q. Mr. Lubben, do you know on what date this check cleared the Eatsum bank account? A. When it cleared, sir.

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Q. Yes, sir. A. No, sir, I don't know. I can look at the back here. There is a bank stamp, March 11, on the back here, sir.

Q. Do you know whether the check which is Defendants' Exhibit M-1, is in payment of the invoice, Defendants' Exhibit M-2? In that connection I refer you to the date on the two documents. A. No, sir; this might be for the deposit.

Q. When you say "this" you are referring to Exhibit M-2 or Exhibit M-1? A. It might be, sir, for the deposit. I do know, sir, that when the separation papers were made

there was an item there for the chocolate spray company for some chocolate spraying equipment, which was charged to me. It might be one or the other, I don't know.

Mr. Wessel: I object to the exhibit.

By Mr. Stryker:

Q. There is no question that these documents were from the Eatsum partnership uttered in the ordinary course of business? You have told me that, haven't you? A. Yes, but I do not say whether one check paid for the other.

Mr. Stryker: I think there is ample foundation; without having me at this late date arguing it. Would (418)

your Honor look at it.

The Court: I will look at it.

Mr. Wessel: May I just refer your Honor to the date of the check which appears to be March 1, 1946, and the date of the invoice which appears to be October 4, 1945. I do not say the documents are not authenticated in so far as the regular course of business, but they do not seem to mean anything together (handing papers to the Court).

Mr. Stryker: It is a check to the people who delivered the goods, as I understand it. If I am wrong——

Mr. Wessel: I do not think that understanding is based on what this witness has testified to.

Mr. Stryker: All right.

The Court: Well, I will take pretty near anything subject to connection. I will take this. I will take it.

(Defendants' Exhibits M-1 and M-2 for identification received in evidence.)

Q. Mr. Lubben, before I show this to the jury, as I shall presently, Mr. Wessel has raised the point that perhaps the check and the invoice were not related to each other, as I understand his point. Will you examine, please, this invoice, the green paper—— A. Yes.

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Q. Do you find there at the bottom line, "Ck"—I suppose it means check—number 3144. Do you see that? A. Yes, sir.

Mr. Wessel: I withdraw my objection, if your Honor please. I was incorrect.

Mr. Stryker: And the check is 3144. Mr. Foreman and ladies and gentlemen, will you be good enough to look at that.

The Witness: But, sir, that still don't say whether that check was for——

Mr. Stryker: Pardon me, don't you think Mr. Wessel can handle that?

The Witness: Pardon me, sir.

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Mr. Stryker: Is this the time we usually take an afternoon recess?

The Court: We can do it now, Mr. Stryker.

Ordinarily we take it fifteen minutes later. If it will avoid the sequence of cross-examination I would be glad to take it now.

Mr. Stryker: I will say this: my next topic is quite different and I know I can't develop it in fifteen minutes, so maybe it would be better.

The Court: All right. We will do that as soon as the jurors finish looking at the last exhibits.

Mr. Stryker: All right.

I think the jury has concluded with their examination. Oh, no, they haven't.

The Court: There are two exhibits.

Mr. Stryker: I am very sorry. I am very sorry.

The Court: All right, we will take a five-minute recess now. Don't discuss the case.

(Short recess.)

The Court: I guess we are all here, Mr. Stryker.

Mr. Stryker: Mr. Wessel, could I bother you for Government's Exhibit 34, please.

By Mr. Stryker: (421)

Q. Mr. Lubben, this has already been identified so I won't waste much time with it. It is an exhibit in evidence. This is the bill of sale of yourself, I think, and correct me if I am wrong, of David G. Lubben to the General Confections, Inc.; is that right?

You have already identified it so I don't think there is any dispute about that. A. Yes, sir.

Q. And that, among other things, describes machinery, appliances and so forth. I won't read it all. You read it before when you identified it. A. Yes, sir. I should like to refresh my memory.

Q. You want to read it? A. Yes, sir.

Q. Go ahead. A. Yes, sir.

Q. Now, this bill of sale says the consideration is one dollar, doesn't it? I think so, at the top. A. Yes, sir.

Q. All right. A. And other valuable consideration.

Q. All right. Now when you sold this property that is mentioned here, in this bill of sale, to General Confections, did not General Confections issue to you $100,000 of the stock of this new General Confections Company?

Mr. Wessel: I object to the form of the question. I don't know what $100,000 of stock is; market value, par value, or what? (422)

Mr. Stryker: I think you are quite right.

Q. Did they not issue to you stock for the property assigned by you to General Confections? A. Yes, sir.

Q. Was that $100 par stock or no par? A. I couldn't answer the question, sir, whether it was no par, $100 par or what.

Q. Anyhow, you do know, don't you, whether it was no par or $100 par, whatever it was, the consideration that the new General Confections paid for your sale of this property was $100,000? A. To the best of my recollection, sir, that is correct.

Q. All right. Now we will take another topic.

Now, Mr. Lubben, what part of the year 1949 was it when you had this conference that you testified to in Mr. Ronayne's office?

Mr. Wessel: I must object to the form of the question. I think there was more than one conference. I may be mistaken. Counsel should refer to some specific conference that the witness testified to.

Q. Well, I am talking about the conference where you said "I am going right up to 253 Broadway," that part of it. Do you remember what I am talking about now? A. Yes,

(423)

sir. I had another conference with Mr. Ronayne.

Q. What is that? A. I had two conferences with Mr. Ronayne.

Q. What part of the year 1949 was this conference that I have now identified? A. I couldn't recall, sir.

Q. Was it in the spring? A. It might have been, sir.

Q. That is true, it might have been anything. This was a very important conference. This is the time when you said "I am going right up now to tell all about you, to 253 Broadway," isn't that it? That would be an important date.

wouldn't it, in your life and in your mind? A. I couldn't tell you whether it was the spring or the summer, sir. I am trying to think.

Q. There are only four seasons that I know of, the spring, summer, autumn and winter. Now give us your best recollection. If you can't do it by months, then at least by seasons, and then I could pass on to something else. A. Well, sir, it would only be a guess on my part.

Q. Well, now, only a guess? Well, now, is it not a fact that this particular conference that I am referring to, when you threatened to and did go to 253 Broadway, was a rather important event in your life and in all this transaction? A. (424)

I still can't give you when it was, sir.

Q. What? A. I still can't tell you what time it was, sir.

Q. But in testifying here about these defendants you gave us months, parts of the year with great definiteness. Were those, too, only guesses, or were you giving us your recollection?

Mr. Wessel: I object to the form of the question if your Honor please.

Mr. Stryker: I think it is a fair form.

A. To the best of my recollection, sir, is the way I have been answering.

Q. I didn't catch the last part. A. To the best of my recollection, sir, on those days I answered.

Q. In other words, it wasn't just a guess? A. No, sir. You don't want me to guess.

Q. Now, do you think my question called for that comment. I asked you it wasn't then just a guess? A. No, sir, it wasn't.

Q. All right, but now here to give us the date when you threatened these people who had been your partners,

that you were going up to tell all at 253 Broadway, you can't tell us which of the twelve months in 1949 that (425)
incident occurred in; is that right? A. Well, sir——

Q. Is it right? A. I am trying to answer your question, sir.

Q. It is either right or it isn't.

Mr. Wessel: I object to the form of the question. The witness has done better than identify one of the twelve months.

Mr. Stryker: I am sorry, Mr. Wessel—I know you don't intend to, but sometimes your objections might possibly convey hints. I know you don't mean it—hints to the witness, and I wish you wouldn't do that.

Mr. Wessel: Well, now, if your Honor please, the witness has already testified that it was in the spring or the summer, he believes, to the best of his recollection. Counsel is suggesting that he hasn't been able to fix any time of the year.

Q. As I just heard it, I thought you couldn't tell me which season it was, or did I hear you wrong? A. To the best of my recollection, it was the spring or the summer, and you said there were only four seasons in the year, which was it?

Q. All right, I will drop that, then. In the spring or summer. What is your best recollection as to whether it (426)
was spring or summer? A. I don't know, sir, but I seem to remember—to me it seems like that it was a dreary day and I think I had my topcoat on. I have been trying very hard to remember.

Q. All right. Well, now, in that conference you asked Mr. Giglio to give you $25,000, didn't you? A. Yes, sir, to pay my taxes.

Q. Well, you asked for $25,000? A. Yes, sir.

Q. To pay you that? A. That's correct.

Q. And what you said to him was a threat, that if he didn't pay it, you would go up and fell on him; wasn't that it? A. No, sir, that wasn't it.

Q. No? A. No, sir.

Q. Well, didn't you seek to convey to Mr. Giglio and those present that you would like the $25,000, and then when they declined it didn't you say, "All right, you will find me right up there at 253 if you call up in five minutes," or words to that effect? A. No, sir. I wanted the money that was due me, sir; that is what I wanted.

Q. I am not asking you anything. Do you want to make a statement independent of this? A. No, sir.

Q. I mean, do you want—well, skip it.

Well, now, at that time, I think you said spring or

summer of '49—— A. That is to the best of my recollection, sir.

Q. What? A. That was only to the best of my recollection.

Q. All right. At that time when you told them that you were going to the agents, you were then no longer in fear of them, is that not so? A. At that particular time?

Q. Just my question.

Mr. Stryker: Will you read it?

A. Yes, sir, I was in fear of them but I was certainly mad that day.

Q. Well, you said right here to these people that you were in fear of, after you talked about $25,000, "Call me

up in five minutes and I'll be at the agents." Isn't that what you said? A. I am still afraid of them, sir.

Mr. Stryker: I move to strike that out.

The Court: No, I will let it stand.

Q. Well, you weren't so afraid that you didn't threaten them to go to the agents?

Mr. Wessel: I object to the form of the question, use of the word "threaten."

A. Sir—— (428).

Q. Is that so or not?

Mr. Wessel: Objection.

The Court: I will sustain the objection.

Mr. Stryker: All right.

Q. Well, now, as a matter of fact, from your testimony already given, you had already been to the agents or talked with them before that; isn't that your testimony this morning? A. That is true, sir.

Q. All right. So in this discussion of getting $25,000 you wanted to indicate to them—I mean, to Ronayne, the people in the office, that this was your first contact, or would be your first contact with the agents; isn't that so? A. No, sir, I didn't want to indicate. They knew I had been over there.

Q. You had been there before? A. Yes, sir.

Q. Hadn't you? A. Yes, sir, I had.

Q. And after you had been to the agents before, you went to Mr. Giglio and the others there in the conference and asked for $25,000, is that right? A. I wanted the money for my tax, and Mr. Giglio owed me the money.

Q. I don't care; you asked for it, didn't you? A. I didn't ask for it. I wanted my money.

Q. Did you ask for it? A. I probably more than asked (429)
for it; I wanted it.

Q. Well, you did ask for it. Will you answer that question? A. Yes, sir, I asked for it.

Q. All right. Now you went that day over to 253 Broadway to the agents, didn't you? A. Yes, sir, I did.

Q. Did they take your statement that day? A. I don't —did I sign a statement?

Q. My question was, did they take a statement? It might include signing it or anything. A. Well, I just went in and told them what I just found out.

Q. Will you be good enough to answer me. I will put it this way: Did you sign a statement that you wrote out or one that they wrote out, whether in handwriting or in typewriting, or was there a stenographer present to take down what it is you said you told them?

Is that clear to you, Mr. Lubben? A. There may have been a stenographer present but I didn't sign anything.

Q. All right. Now as a matter of fact, you know there was a stenographer present, don't you? A. There may have been. There is always two or three people in these offices, sir.

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Q. You know there was a stenographer present, don't you? A. I said I don't know whether he is a stenographer or not.

Q. Did you see anyone? A. Yes, sir.

Q. Writing like my friend here at the desk, with a book and pen, making queer marks on a notebook, that most people and certainly I do not understand; did you see that? A. No, sir; I did not see that.

Q. Did you tell the agents before this day in '49 that you were afraid of Mr. Giglio and the former partners?

A. I certainly did from the first time I met him. I won't say the first time. Correction, sir; I will correct myself. After several meetings, yes, I was afraid to go. That is why I was afraid to go to 253 Broadway.

Q. That is not my question. Did you tell the agents you were in fear? A. Yes, sir, I did.

Q. When was the first time? A. Sometime in 1948; probably the second or third visit.

Q. Did you tell the agents you were going down to Mr. Giglio and the people that you mentioned to get $25,000? A. I may have. I don't know for sure. I may have.

Q. As a matter of fact, Mr. Lubben, you tried to get (431)

other money, money from other people, haven't you?

Mr. Wessel: I object to the form of that question. I do not know that I understand it.

Q. (Continuing) Under threat? A. No, sir.

Mr. Wessel: I object to the form of the question.

The Court: I sustain the objection.

Mr. Stryker: I did not finish the question.

Q. Did you ever threaten anyone else?

The Court: No.

Mr. Stryker: This is different.

The Court: Whether he threatened these people.

Mr. Stryker: I will reformulate it.

Q. Didn't you threaten them that if they did not pay you, you were going to 253? A. That is no threat. I just was going over——

Q. Didn't you say to them if they did not pay you the $25,000 you were going to 253 Broadway? A. No, sir; I said no such thing.

Q. Let us see. You knew a man by the name of Morley Cramer, didn't you? A. I did, sir.

Q. Where does he do business? A. In Boston, sir.

Q. And you did a good deal of business in the black

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market with Morley Cramer, didn't you? Yes or no. A. I bought a lot of merchandise. I sold him merchandise, yes, sir.

Q. That does not answer my question at all. Lots of people do that. Did you do it in the black market with Morley Cramer? A. Yes, sir.

Q. When had you stopped dealing in the black market with Morley Cramer? A. I believe, sir, to the best of my recollection the latter part of '46 or maybe early '47.

Q. You went up in the summer of 1947 for a little call on Morley Cramer, didn't you? A. I was up there several times.

Q. Once in 1947? A. Many times.

Q. Once in 1947 and once in 1948, that is right, isn't it? A. It may have been, sir. I have been there many times.

Q. That is not an answer, "it may have been." Isn't it a fact that you did? A. Yes, sir. I do not recall exactly the dates, but I am pretty sure maybe you are right.

Q. Let us say around November 10, 1947, did you go and have a little talk with Morley Cramer; yes or no? A. I do not recall the date, but I have talked to him many times.

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Q. Did you go to Morley Cramer and ask him to pay you money? Yes or no. A. Pay me money for what, sir?

Q. We will come to that. Just answer the question. A. If they owed me any money for merchandise, why I

may have asked him; but I do not think he owed me any money then, sir.

Q. That is right, he did not owe you money, did he? A. I do not have my records, but nevertheless——

Q. You went to Morley Cramer when you knew he owed you no money and tried to shake him down, didn't you?

Mr. Wessel: I object.

A. That is a dirty, rotten, stinking bare-faced lie.

Mr. Stryker: I move to strike that out. I will show it is not.

The Court: I will let it stand.

The Witness: That is a direct answer to you, sir.

Q. Didn't you get some money from Morley Cramer in '47, yes or no? A. I get some money from Morley Cramer in '47?

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Q. Didn't you get money from him after you went up there, when he owed you no money, and asked him for money? A. I believe I asked Morley Cramer for a loan.

Q. Well then you did do that? A. Yes, sir.

Q. And did Morley Cramer make you the loan? A. No, sir; he did not.

Q. Do you want to leave it there? Do you? A. Sir, I received the check——

Q. You got the money from Morley Cramer's treasurer, a man by the name of Hart; isn't that so? A. I think the check was written in Mr. Hart's name.

Q. But Mr. Hart is the treasurer of Morley Cramer's outfit, or was, I mean? A. Yes, sir.

Q. So you went and asked Morley Cramer for a loan when he owed you no money and you got $15,000 from Mr. Hart; is that right? A. Yes, sir.

Q. And I think you gave a note? A. I believe—yes, sir, I did.

Q. Which you did not ever pay? A. Well, sir, I— —

Q. Is that right or not? You know. A. If I tried to shake him down, what did I give him a note for?

Q. That we will come to. You wanted to give that note

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to seal the shakedown. A. Oh, sir——

Q. Isn't that so? Did you ever pay the note? A. No, sir; I never paid the note.

Q. After you had gotten this $15,000 from Cramer's treasurer, did you call on him again in the following year 1948? A. I don't recall, sir.

Q. Don't you remember whether you went up there with Mr. Carey that day? A. Yes, sir.

Q. That was in '48, wasn't it? A. Yes, sir.

Q. Who is Mr. Carey? A. Mr. Carey was the man who owned the Blue Ribbon Truck Company.

Q. He is a truckman, head of a truck company? A. Yes, sir.

Q. And he is the man who was in charge of the trucking of the black market sugar that you sold to Morley Cramer, is that right? A. No, sir. The truth is I bought more stuff in the black market from Morley Cramer than he bought from me, ten to one.

Q. Either way, Mr. Carey did do some trucking of your stuff? A. Yes, sir; he did, sir.

Q. How big a man was Mr. Cramer, physically? A. I would say he is as big as I am, sir.

Q. You are about six feet three or four? A. We are all the same size as Mr. Cramer.

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Q. You are about 6-3 or 4? A. About 6-3; yes, sir.

Q. And weigh about 200 pounds? A. Yes, sir.

Q. And Carey is about the same size man? A. About the same size.

Q. You took Carey along for this interview with Morley Cramer; is that right? A. No, I think——

Q. I asked you if you took him along or he came along. A. He came along; yes, sir.

Q. He came along after you asked him to come along, didn't he? A. Yes, sir. I do not know whether I made two trips or one; that is what I am trying to figure. I think I only made one trip.

Q. You said you went in 1947 and again in 1948. Do you want to change that? A. I am not sure. I do not say yes and I don't say no.

Q. On this second occasion didn't you arrive at Morley Cramer's office late in the afternoon unannounced? A. I don't recall, sir.

Q. I think there were three of you at that time. Was your then lawyer Mr. Davidson with you? A. I think that is the time Mr. Cramer loaned us or we got the $15,000.

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Q. I am talking about the time you went up there with Mr. Carey. A. Sir, I do not know which time it was.

Q. Did this incident occur: that you and two others arrived in Morley Cramer's outside office, demanded to see him at once, and did he tell you he could not see you that afternoon, you would have to come back the next day? Does that refresh your recollection? A. I believe, sir, at the time——

Q. Please. Does that refresh your recollection?

Mr. Wessel: If counsel is going to testify the witness cannot say yes or no, but he must be given an opportunity to explain.

The Court: (To witness) Go ahead and complete your answer.

The Witness: Sir, I believe that is the time we went up there and I asked Mr. Cramer for a loan, that the company was in financial trouble and I asked him for the loan of fifteen or twenty thousand dollars, and I believe Mr. Cramer was busy and we had to wait around his office until later on, and I think Mr. Hart told us to go on back, he would talk to him.

Q. And come back in the morning? A. No, I think he said—in fact the money was delivered down here.

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Q. Now let me see. Isn't it a fact that you called on Morley Cramer on two occasions, when he owed you no money, to get some money from Morley Cramer? That is a simple question; if you would be kind enough to answer it. A. Sir, I can remember calling once and getting $15,000.

Q. Don't you remember calling a second time? A. No, sir; I don't. I don't say it is wrong, or right or wrong.

Q. You do not deny it? A. I say to the best of my recollection I don't know.

Q. Wasn't the second call on Morley Cramer after the conference that you had at the Riviera Club with Byron Cain, the president of the Shotwell Manufacturing Company of Chicago? A. Well, when the——

Q. Mr. Lubben, please, would you be kind enough to answer my question? It just calls for—it will be read so you will have it. I think it is simple. If you do not understand it, tell me; if you do, please give me an answer.

(Question read as follows:

"Q. Wasn't the second call on Morley Cramer after the conference that you had at

the Riviera Club with Byron Cain, the president of the Shotwell Manufacturing Company of
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Chicago?")

Q. What? A. I believe there was a call from Morley Cramer.

Q. What? A. I believe I did go up at that time, sir.

Q. That would be the second time then, wouldn't it? A. Sir, I have called on Morley Cramer maybe two hundred times.

Q. I did not ask you that. I said that would be the second time you went up to Morley Cramer to get some money he did not owe you? A. I did not go up to get any money he did not owe me.

Q. Did you go up a second time about money after you ceased to do business in 1948? A. Yes, sir. I am very sure I did. I feel sure I did.

Q. There is no doubt about it, is there? A. No, sir.

Q. When was the Riviera conference? I will make that a little plainer as I go along. You know, around midnight, out there in the Riviera Club. You know what I am talking about. A. Oh, yes, sir, I know what you are talking about.

Q. Give me the month, please. A. It was in 1949, sir.
(440)

Q. What? A. It was in 1949; I don't remember the date.

Q. 1949? A. I could be wrong.

Q. Maybe I can help you. In the Shotwell trial where you testified as a Government witness—page 1080, Mr. Wessel—were you asked these two or three questions, and did you give these answers:

"Coming to the transaction at the club, the Riviera Club, which you have told us about, when

was that transaction? A. In August, around August of 1948."

Did you so testify? A. Yes, sir.

Q. Was that the truth? A. Yes, sir.

Q. All right, then we have it '48, around August of '48, and it was shortly after that that you went and called on Morley Cramer; is that right? A. I don't recall whether I did or not, sir.

Q. Maybe I can help you again.

Mr. Stryker: Pardon me a niinute, your Honor.

Q. At page 1096 of your testimony in the Shotwell case, where you were a Government witness, were you asked these questions and did you give these answers:

"Q. Well, will you go along with me this far, that you did go to Boston to see Mr. Morley Cramer? (441)

A. I have gone up to Boston many times.

"Q. Well, just about this time? A. I think shortly between the time, sir, as I stated in my testimony for the Government—I think shortly between the time Mr. Cramer—the meeting in the Riviera and the meeting in Mr. Grace's office, I have gone to Boston."

Did you testify to that? Did you so testify? A. Yes, sir.

Q. After the Riviera conference you did go and talk to Mr. Grace, didn't you? A. Yes, sir; later on, sir.

Q. That is right. Now the Riviera, we have got it fixed now, haven't we, as August 1948. How long after that did you talk with Mr. Grace? A. Oh, I think maybe a week or two after, maybe three weeks, I don't know.

Q. Then maybe this would refresh your recollection: that it was between the Riviera conference in August 1948 and a week or two later that you called on Morley Cramer, in 1948. That is right, isn't it? A. Yes, sir.

Q. You had already gotten $15,000 from his treasurer the year before, hadn't you? A. Yes, sir, but I——

Q. Just a minute. Isn't that so? You can give any explanation you want, but I want the answer, and Mr.

(442)

Wessel will take it up. A. I got the $15,000 from Mr. Hart, not from Mr. Cramer.

Q. But you got it from Mr. Hart after you asked for it from Mr. Kramer? A. I got it from Mr. Hart. I don't think Morley Cramer would loan me the money. Mr. Hart loaned me the money.

Q. He called Hart and got you the money that way? A. No, Mr. Hart was there in the office, sir.

Q. How much money did you ask Morley Cramer for on this second occasion? A. I didn't ask him for any money, sir.

Q. You did not? A. No, sir.

Q. Did this happen: that about four o'clock in the afternoon of that day in August, '48, you were in Mr. Cramer's outer office and you introduced him to your lawyer, a man by the name of Davidson—that is right, isn't it? A. Well, sir, as I stated before, I do not know whether Mr. Davidson was there when I got there and asked for the $15,000.

Q. All right, did you say to him, "I am in trouble, the internal revenue agents——

"Q. Keep your voice up."

Mr. Wessel: I object to that.

Mr. Stryker: Strike that out; it has nothing
(443)
to do with this, quite right.

Q. Did you say to him, Morley Cramer, "The internal revenue agents are after me for records and taxes and so forth, and I have come up to see you about it"; and did you say to him that Eddie had taken a slow boat either to the Dominican Republic or to Haiti with a bundle of money; and did you say to him that the living conditions were wonderful, that you could live down there for little money, servants were cheap, and the business opportunities were great; and did he say to you, I have not seen you for eleven months, and that he had his troubles with the depressionary period of business; and then in his presence did you ask him to use your phone and call up Byron Cain in Chicago; did he grant that request, but before that did he tell you of their trip, that is, he and Eddie's trip, and did you say, may I use your phone, I want to call Byron Cain in Chicago; did you say to him that you needed $135,000 to go away either to Haiti or the Dominican Republic——

The Court: This sounds like a hypothetical question.

Mr. Stryker: I am finishing. I am reading not from his testimony but other testimony as to this,
(444)
and I am asking him just from this whether this happened.

Mr. Wessel: If I may, your Honor, I would like to make an objection and I wish counsel would finish because I want him to finish whatever he wants to say and I want the jury to know exactly what is happening in this courtroom.

Mr. Stryker: I am sure I will join you in that.

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Mr. Stryker: I will tell you, if that is your point, from whose testimony I am reading about this, so there will be no doubt about that.

The Court: I think we should make clear——

Mr. Stryker: What's that, sir?

The Court: —this idea of reading from somebody else's testimony: I am going to tell the jury, and I will tell you this ultimately, anyhow, and I will tell you now that if a question is asked and answered "no," the facts recited in that question are not proven, and if a question is read from something else, and this is simply incorporated as a question——

Mr. Stryker: That's right.

The Court: —it doesn't prove a single fact that is being recited.

Now, I don't know why the question has to take this form, and I will sustain an objection to it.

Mr. Wessel: I would like to make an objection——

Mr. Stryker: Would you like me to state—I will be very glad to—on what my question is based, because I certainly am not making it up?

The Court: It seems to me it is not necessary

(446)

to read at great length from some document.

Mr. Stryker: All right.

Mr. Wessel: If your Honor please, I would like to make an objection and I would like to state something at this time to the Court.

Mr. Stryker: Won't you let me finish the question and then make all the objections you want?

The Court: All right. Fine.

Mr. Stryker: All right.

By Mr. Stryker:

Q. (Continuing) Did you call up Byron Cain that day? A. Sir, you have asked me 20 questions.

Q. I am asking you another one now. I will come back to that. Did you call up Byron Cain from Mr. Cramer's office?

Mr. Wessel: If that is the end of the question I wish to object.

Mr. Stryker: That is not the end.

Mr. Wessel: Excuse me.

Q. Did you call him up?

The Court: You have a question. What is your objection?

Mr. Wessel: I object, if your Honor please, (447) based upon this question which is based upon a long recitation, apparently derived from some other source which has all been read to the jury and which is not in any way relevant to the question or to anything which has happened in this court on this witness' testimony. I think it is highly improper.

I think counsel should direct his questions solely to what the witness is testifying to here in court and not to anything else which has happened before.

If he wishes to bring in other testimony, it should be done through other witnesses who are here, subject to cross examination, under oath before this jury, so that the jury can tell whether or not they are telling the truth.

Mr. Stryker: My last question, I don't see any possible objection to that.

The Court: Well, now, I am going to strike out, then, everything that has gone before, because that doesn't lead us anywhere. Does it? It is simply a recital of something which isn't proven.

By Mr. Stryker:

Q. I will start here and ask you whether what I have read to you—Mr. Wessel wanted to know; that is the only (448) reason I stated—from Mr. Morley Cramer's sworn testimony, whether that happened as I read it?

Mr. Wessel: I think that is improper, also, if your Honor please.

The Court: I will sustain the objection as to form and tell the jury to disregard whatever has been read. Now we will go on to the next question.

Mr. Stryker: All right, then, let's go along.

Q. Did you call up Byron Cain from Morley Cramer's office? A. I believe I did, sir.

Q. And did you ask him for money? A. No, sir.

Q. Had you ever asked Byron Cain of the Shotwell Company for money? A. He loaned me money, sir, and took a mortgage on the plant, farm, everything else.

Q. Wait a minute, we will come to that! I am talking about 1947. Did you go out to Chicago and ask Byron Cain to give or lend you money? A. When in 1947, sir?

Q. What? A. When in 1947?

(449)

Q. I don't know. I am asking you. A. Well, sir, the only time I got any money from Byron Cain was in June, I believe, May or June of 1947, when he loaned General

Confections $75,000 and took a mortgage back on the plant, machinery, my house and everything else.

Q. Are you sure you are right about that date? Wasn't that 1948? A. No, sir, 1947, I am sure, sir.

Q. 1947? A. Yes.

Q. Well, before that transaction, didn't you ask Byron Cain for money? A. No, sir.

Mr. Stryker: Just a minute.

The Court: All right.

By Mr. Stryker:

Q. Didn't you swear, in the Shotwell case, or perhaps some other, that you went out in 1947 to Byron Cain and asked him for what you called a loan? Did you do that? In other words, before the mortgage transaction. A. Before the mortgage transaction?

Q. Yes. A. I asked him for a loan, sir, but I believe I got the loan in 1947.

Q. Well, I am wasting time until I get the exact page. (450)

At all events, you called up Morley Cramer—you called up Byron Cain, from Morley Cramer's office, didn't you? A. I believe I did, sir, yes, sir.

Q. And did you in that telephone call ask Byron Cain to give you some money? A. No, sir.

Q. To lend you some money? A. No, sir.

Q. You weren't talking about money at all? A. No, sir. We didn't mention money, sir.

Q. Did you tell him you were up in Morley Cramer's office? A. I believe I did, sir.

Q. Did you tell him what you were doing there in Morley Cramer's office? A. If I remember correctly, sir, he told me to go there.

Q. Well, irrespective of that, did you tell him what you were doing there? A. I had a conversation with him, sir, and I told him I was in Morley Cramer's office and Mr. Cramer got on the telephone.

Q. I am still asking you; if you will be good enough to tell me, if you told Byron Cain on the telephone what you were doing in Morley Cramer's office? A. I wasn't doing anything in his office, sir.

Q. Well, there was some occasion for a long distance

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call by you to Byron Cain, Chicago, wasn't there? A. He asked me to call, sir.

Q. Well, what was the occasion of his asking you to call? What did he say to you? A. He wanted to talk to Mr. Cramer.

Q. But you talked to Mr. Cramer, didn't you? A. I had talked to him before.

Q. Well, you talked to him about some syndicate, didn't you? A. Mr. Cramer——

Q. Isn't that what you talked about? A. Mr., Mr.——

Q. Pardon me. Would you just tell me yes or no.

Mr. Wessel: I object to the form of the question, demanding a yes or no answer.

The Court: I will let him answer. Go ahead, complete your answer.

A. Byron Cain had told me to—he wanted me to take a trip out of the country, and that he wanted to buy my house.

Q. Go ahead, finish it; tell more. A. He wanted to buy my house and that I should contact—that if I went away, why, things would blow over, the factory was closed, and if I went away for a certain length of time I could come

(452)

back and I would have a job representing him in the syndicate stores where I would make myself $25,000 a year, and he told me to contact Byron Cain.

Q. For what purpose? A. Byron Cain—no, no, contact Morley Cramer.

Q. That is what I think you meant, yes.

What was the purpose of that? A. Morley Cramer could——

Q. Do what? A. He just said contact him because he knew I had been paying Morley Cramer a lot of black market money.

Mr. Stryker: Now, would you read that answer again. I didn't quite get it.

(Question read.)

By Mr. Stryker:

Q. Did he say why you should contact Mr. Morley Cramer? A. No, he didn't say particular.

Q. What? A. He didn't say particular.

Q. Well, did he say Morley Cramer might be a good bet to get some money out of because you had been paying him a lot of black market money, or something like that? A. No, sir. I think, sir, what he told me was the fact that Morley Cramer's accountant was holding my books.

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Q. That is Sproul & Scholz? A. Yes, sir.

Q. Well, when he said to you, "You have been paying Morley Cramer a lot of black market money," wasn't anything said why you should go and have a little chat with Morley Cramer? A. Well, he just thought that if I left the country, why, I wouldn't be able to appear as a witness.

Q. Well, all right.

Well, there was some connection between the black market money you paid to Cramer and your visit, wasn't there? A. In my business?

Q. No, and your visit. Was there some connection between what you have just told us, your payment to Morley Cramer over some period of the black market—there was some connection between that and your call on him in August, 1948; isn't that right? A. I don't say it was in August, 1948. I said——

Q. I think we have already gone over that at painful length.

On this call, was there some connection between what you had been paying him in the black market money and

(454)

your call on Morley Cramer; yes or no? A. A lot of people were worried, sir; I mean, the fact that the Government was after my books.

Q. And you thought Morley Cramer would be one? A. Well, I always considered Morley Cramer a friend of mine.

Q. Did you think he was worried about it, because the Government was after your books? A. Yes, sir, I would. I am sure he would be.

Q. And you were sure he would be worried so you went up to talk to him about getting a loan; is that right? A. No, sir, I didn't talk about getting any loan.

Q. Well, you got a loan? A. In 1947.

Q. Well, didn't you go up to get another loan in 1948? A. No, sir, I did not.

Q. Well, what did you go up for? A. Because Mr. Cramer—Mr. Bryon Cain had told me to contact Morley Cramer.

Q. And had told you that—reminded you that you had been doing money in the black market with Morley Cramer.

Now, won't you tell these ladies and gentlemen why you went up? A. Because Mr. Byron Cain wanted to talk to

(455)

Mr. Morley Cramer so that they could buy my house, so I could leave.

Q. Oh. Well, now, dropping that for a moment, after your talk with Morley Cramer, you talked with a man by the name of Cain. I don't mean the agent. Isn't that right? A. I don't recall, sir. If you have the testimony here I can refresh my memory.

Q. Let's see now if I am reading this right. Let's just make sure I am right:

In the Shotwell trial, where you were a Government witness, were you asked these questions and did you give these answers——

> Mr. Wessel: May I have the page reference, please.
>
> Mr. Stryker: Surely. It is page—if you have this bound official record, it is page 1098, Mr. Wessel; I think that is right.

By Mr. Stryker:

Q. "Q. Did you ask him to participate in the syndicate?"

> Mr. Stryker: Parenthetically, I think you will agree that that refers to Mr. Cain. Let me take it that way unless you show me I am incorrect, as I

(456)

> may be.

By Mr. Stryker:

Q. "Q. Did you ask him to participate in the syndicate? A. I told him the syndicate was being formed, sir, and at

that time I felt that it would certainly be better for all concerned if I wasn't here to testify.".

Mr. Wessel: I would respectfully——

Mr. Stryker: Let me finish, please.

Q. Was that question asked and did you give that answer?

Mr. Wessel: I would suspect the "him" would refer to Mr. Cramer: I may be incorrect, but I believe——

Mr. Stryker: Let's straighten that outside.

Mr. Wessel: I think it is important to straighten it out in court.

Mr. Stryker: I mean before the next session.

Mr. Wessel: I am afraid it must be straightened out before the witness is called upon to answer the question.

(457)

Mr. Stryker: What do you think he is referring to?

Mr. Wessel: I suggest the witness be asked the question, in order to deter[illegible] that.

By Mr. Stryker:

Q. First, was that question asked you and did you give that answer? A. Yes, sir. If that is what the book says, that is the answer I gave.

Q. Well, are you indicating that I am not reading the book rightly? A. Well, you have made a few mistakes, sir.

Q. All right, let's take a look at it. I will show it to you, page 1098, right where my finger points, did you give that—was that question asked you and did you give that answer, just those two? Just two questions is all I am asking you. A. Thank you, sir.

Q. Was that question asked you and did you give that answer? A. Yes, sir, I did.

Q. All right. Now, regardless of whether it was Cain or who you said it to—I don't care—did you make that statement to either Cain or Cramer or anyone else that you felt that it would certainly be better for all concerned if you weren't here to testify?

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Mr. Wessel: I object to the use of the word "here" if it in any way implies this case.

Mr. Stryker: Of course it means "there." I am reading the word, yes, that is right.

By Mr. Stryker:

Q. If you weren't there to testify. A. Yes, sir, I did.

Q. Now, you say going away was discussed at the Riviera conference between you and Byron Cain, against whom you later testified; is that right? A. Yes, sir.

Q. And Byron Cain did guarantee a mortgage that you had with the Sterling National Bank of $75,000; that is right, isn't it? A. I don't know how that worked, sir. Byron Cain loaned me the money.

Q. All right, he loaned you the money. A. Yes, sir.

Q. All right. $75,000.

Now, incidentally, after you got the $75,000 from Byron Cain, did you, afterwards, dun him for another $0,000? A. I think, sir—well, when I got the $75,000, we really, it wasn't enough that we needed to see us through, and Mr. Cain had told me at that time that he would give

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me some more money at a later date.

Q. And you asked him for it? A. Well, we needed it.

Q. You asked him for it? A. To the best of my recollection, sir, he or Mr. Huebner, some of them.

Q. Did you ask him for it. You were the one that wanted to get the money. Did you ask him for it? A. I think I talked to either he or Mr. Huebner, who was his man, that we needed more money because——

Q. You mean Huebner? A. Huebner is the name, sir.

Q. Who is Huebner? A. The man you are calling Mr. Huebner.

Q. All right. The man—who are you talking about, Huebner, Huebner, what is it? A. The name is Huebner.

Q. Huebner. All right, was he connected with Byron Cain? A. Yes, sir.

Q. In the Shotwell Company? A. Yes, sir.

Q. In what capacity? A. He was vice president.

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Q. All right. Then you either dunned the vice president of the Shotwell Company or the president to get $50,000 more after he had made you a loan of $75,000; yes or no?

Mr. Wessel: I object to the use of the word "dunned."

By Mr. Stryker:

Q. All right, leave out "dunned"—asked, requested; is that right? A. Yes, sir, for the balance of the original understanding that I was going to get additional money. When I got $75,000 I was supposed to move the plant.

Q. I didn't catch that. You dropped that. A. When I got the $75,000, it was on the condition that I move the plant; and most of the $75,000 was used in the plant.

Q. You got $75,000 from a man or a company that you claimed you had been doing business with in the black market and against whom you later testified as a Government witness; is that true? A. I don't claim anything. I was doing business with him in the black market.

Q. All right, and against whom you later testified. (461) But at that time, that time of the Riviera conference, you say the question of your going away was discussed and that you did say, to someone—we don't seem to have it; whether it is Cramer or Cain, I don't care—that it would certainly be better for all concerned if you were not there to testify. You said that, didn't you? A. Yes, sir.

Q. All right. Now, the question of a passport was discussed, wasn't it? A. Yes, sir.

Q. To South America; is that right? A. I don't know whether I discussed the passport with them or not, sir, but——

Q. At the Riviera conference wasn't the passport, a passport to South America, discussed? A. Yes, sir.

Q. All right. And didn't you after that go out and actually apply for and get a passport to South America? A. Yes, sir.

Q. And never used it? A. No, sir.

Q. But dangled it over their heads; you told them that you had it, didn't you?

Mr. Wessel: I object to the form of the question and the summation at this time.

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Mr. Stryker: Withdrawn.

By Mr. Stryker:

Q. You told them that you had the passport, didn't you? A. No, sir, I don't believe I ever did.

Q. You never told them you had the passport? A. I didn't say I did or I didn't, but I didn't dangle it over anybody's head.

Q. Well, you did tell them—leave out the dangling part? A. Tell who?

Q. Oh, anybody in the Shotwell Company will do, the president, vice president, lawyer—I don't care who—anybody. A. Be specific, sir.

Q. What? A. Be specific.

Q. Usually that comes from the judge or the district attorney— A. Pardon me.

Mr. Wessel: I move to strike that part.

Q. —so I don't think I need that, but I will try to obey it.

The Court: A lot of things here today haven't come from the judge, so it balances off.

Q. After you got this passport to South America, you did tell somebody in the Shotwell crowd that you had it, didn't you? A. I don't know. I told a couple of people

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I had it.

Q. Whom did you tell it to? A. I don't remember.

Q. Someone connected with the Shotwell crowd? A. I don't remember that either.

Q. Well, it wasn't just told to any chance person you met on the street, was it? A. No, I think I just talked around my home. I don't remember who I told it to. It was never used, sir. It is still in the original bag it came in.

Q. Oh, I know you never used it and we are aware of that, but didn't you tell them that you had it? That is the point. A. I don't recall ever telling him, sir. If you have anything to refresh my memory I would like to see it.

Mr. Stryker: It is a few minutes before 4——

The Court: If this is a good time to break, we can break.

Mr. Stryker: Yes.

Mr. Wessel: I would like to call for your Honor's instruction to the jury to disregard what

counsel read from Mr. Cramer's testimony or what he said was Mr. Cramer's testimony.

(464)

The Court: I have so instructed them, and for the reason that I said: The evidence before you is the answers we get from the witness stand, not the questions of counsel, not things that counsel read, that are not exhibits. It is either testimony from the witness stand or the exhibits, and that is what you will consider ultimately, and nothing else.

Now, as I have told you, I think there is one thing that all parties are in agreement on, and that is you shouldn't discuss this case. We will come back again at 10:15 tomorrow morning.

(Adjourned to January 19, 1955, at 10:15 a.m.)

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New York, N. Y., January 19, 1955,
11.10 o'clock a.m.

Trial resumed.

The Court: Mr. Stryker, could I see you and Mr. Wessel here for a second.

(Discussion at bench not recorded.)

(Jury present.)

The Court: Now, I think, Mr. Foreman, ladies and gentlemen, we have been patient enough. This is the second time, so we are going to go ahead with one of the alternates, I think, in place of Juror No. 8.

The Clerk: Nathan Appel, alternate juror, will replace Juror No. 8.

DAVID GEOGRE LUBBEN, resumed.

The Court: All right, I guess we can go ahead, Mr. Stryker.

Cross Examination Continued by Mr. Stryker:

Q. Mr. Lubben, you told us, I don't know whether it was yesterday or the day before, that you bought a 26-acre (466) place in New Jersey; is that right? A. Yes, sir.

Q. And you learned, in December, 1945, that the property was zoned, didn't you? A. I don't remember the exact date, sir. I learned it was zoned for something I didn't have.

Q. Would this refresh your recollection as to that point, from the Weleck trial——

Mr. Stryker: If you want to follow it, I will give you the pages, Mr. Wessel, so you can follow it. Page 150A.

By Mr. Stryker:

Q. "Q. When did you first learn that the property was zoned? A. I believe about November or December, 1945, I learned that it was. I had to make some kind of an application to the Borough Council for renewal of the temporary non-conformity permit."

Does that refresh your recollection? A. Yes, sir.

Q. Now, there came a time after '45 when you moved your candy factory of the General Confections from the Bronx to this property in New Jersey; is that right? A. (467) Yes, sir.

Q. Up to the time it had been a house and rather elaborate buildings for breeding of chickens; is that right? A. What do you mean by "elaborate," sir?

Q. Well, you had extensive houses or chicken houses that you used for breeding chickens? A. I believe there was a building on it, sir, 14,000 square feet of space.

Q. All right. Now, when did you buy the property, Mr. Lubben? A. I believe in '45, sir.

Q. During the time you were a partner of Mr. Giglio's? A. I think shortly thereafter, sir.

Q. And did you spend a considerable sum of money for furniture? A. I did, sir.

Q. And I believe you bought that from B. Altman & Company, didn't you? A. I did, sir.

Q. And did you also spend a considerable sum of money for grading or landscaping or something outdoors with the Shield Construction Company? A. Well, the Shield Construction Company, sir, was for remodeling the buildings.

Q. Well, you spent some money, some considerable sum of money to remodel the building that Shield Construction

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Company was the remodeler; is that about right? A. Yes, sir.

Q. Now, when you transferred the General Confections plant to this farm, did you spend from $200,000 to $225,000, in reconstructing it into a factory? A. No, sir. I believe that was the total investment, sir, from the very beginning.

Q. Would this refresh your recollection——

Mr. Stryker: Page 25A of the Weleck trial, Mr. Wessel.

Mr. Wessel: I seem to have a photostat of the stenographer's minutes this time and you have the printed——

Mr. Stryker: You can come over and look at it any time you want. I will read it with you.

Mr. Wessel: Does it have a reference to the folio.

Mr. Stryker: I don't know whether it does or not.

Does it? I don't think so.

Well, anyhow, I will read it and I will show it to you afterwards, if you want to see it. I am reading from page 25A of the record on appeal.

Q. "Q. What was the name of the corporation?

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A. General Confections, Inc.

"Q. How much money did this corporation, General Confections, spend in and about the transformation of the chicken coop into a candy manufacturing plant? A. From the day it was started until it was was completed, sir?"

Mr. Stryker: The answer was in the form of a question.

Q. (Continuing) "Q. To the best of your ability. A. I would say, in installing the machinery, I would say, sir, better than somewhere in the neighborhood of $200,000, $225,000."

You so testified out there, didn't you? A. Sir, I said from the beginning——

Q. All I am asking you is, did you testify as I have read? A. Yes, sir; but I said from the beginning, when I bought—from the beginning, from the time I bought the place until the end I invested $200,000 to $225,000.

Q. Just a minute, Mr. Lubben. Did you give the answer that I have read? A. Yes, sir.

Q. Was that true? A. Yes, sir, with the answer, from

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the very beginning, from the time, to the end——

Q. Are you telling me that was a part of the answer, that I did not read it, is that what you mean? A. Well, I

gave the answer, sir, but I just want to tell you the whole answer.

Mr. Stryker: Have I not, Mr. Wessel? If you don't find it, there is the one I read.

A. From the beginning I said——

Q. "Q. How much money did this"—I am reading exactly from the record. I am just asking you if those are the questions asked you, and if you gave that answer; that is all I want to know at the moment.

"Q. How much money did this corporation, General Confections, Inc., spend in and about the transformation of the chicken coop into a candy manufacturing plant? A. From the day it was started until it was completed, sir?

I read that, and I noted that the answer was in the form of a question, and it went on.

"Q. To the best of your ability. A. I would say, in installing the machinery, I would say, sir, better (471)
than somewhere in the neighborhood of two hundred, two hundred twenty-five thousand dollars."

Now, I have read you those questions and answers. Could we move along? Did you so testify? A. That is the answer I gave, yes, sir.

Q. And that was true? A. To the best of my recollection, sir.

Q. All right. Now, there came a time when you sought to get a contract with the Town Board of Hillsdale, allowing you to use the property for a factory; isn't that correct? A. Well, sir, we had a lot of zoning trouble over there.

Q. I didn't ask you that, Mr. Lubben. I am very acquainted with it. Don't worry.

Is that not correct, the question I asked you? A. That we wanted to use the property for a candy factory?

Mr. Stryker: Read the question, Mr. Reporter.

Would you be good enough, Mr. Lubben, to listen to it and just answer.

(Question read.)

Q. Is that so or not? A. Well, sir, the offer was made (472)

to me by the mayor of the town.

Q. Mr. Lubben, my question was, did there come a time when you sought to get a contract. Can't you answer that?

Mr. Wessel: I think the difficulty is in the word "sought."

A. I didn't seek it, sir. The mayor came to me.

Q. Well, you wanted the contract, didn't you? A. I accepted it. I thought it over. We considered it, yes, sir.

Q. Didn't you send your lawyer, Mr. Davidson, down to Albuquerque, New Mexico, where Mr. Charles Welech was, in order to have him examine the contract that was contemplated? A. Well, this was considerably after, sir, that the mayor came to my house.

Q. Well, it was in the year 1946, wasn't it? A. I don't recall the year. Sir, I believe it was, yes, sir.

Q. And it is a fact, isn't it, that Mr. Davidson was your lawyer? A. Yes, sir.

Q. And that you did send him down to Albuquerque, New Mexico, to see Mr. Charles Welech, the attorney for the Town Board; isn't that right? A. Well, I didn't send (473)

him, no, sir.

Q. Well, did he go for you? A. This is after the town had—

Q. I don't care what it was. In 1946 you said it was. I just want to know, did you send him or did he go in your behalf? A. Do you want me to answer, or do you want me to answer something that is not so?

Q. I want the answer.

Mr. Stryker: Repeat the question, Mr. Reporter, will you please. And that is the answer I want to that question.

(Record read.)

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"Q. And it is a fact, isn't it, that Mr. Davidson was your lawyer? A. Yes, sir.

"Q. And that you did send him down to Albuquerque, New Mexico, to see Mr. Charles Weleck, the attorney for the Town Board; isn't that right? A. Well, I didn't send him, no, sir.

"Q. Well, did he go for you? A. This is after the town——

"Q. I don't care what it is. In 1946 you said it was. I want to know did you send him or not?" A. There is more to it than that, sir.

Q. Could I have an answer to my question.

Mr. Stryker: I ask your Honor to direct him to answer unless you think my question is at fault.

Mr. Wessel: If the witness cannot answer it yes or no, he should not be compelled to.

Mr. Stryker: I am entitled to an answer to that simple question. I ask your Honor to direct him to answer.

The Court: You want an answer yes or no?

Mr. Stryker: Did he do it or not? Yes, that calls for yes or no.

The Court: Are you able to answer it yes or no?

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The Witness: A yes or no answer, sir—may I talk to you, sir?

The Court: Yes.

The Witness: Well, through this trial, sir——

The Court: I would not bother discussing it. Tell me about this question.

The Witness: Sir, when the Mayor came to my house and said he had been thinking it over and so forth, that he could change the zoning from poultry, because some people were objecting to the poultry farm even though it had been a farm years before me, and make it into a factory zone for the duration of the five-year non-conforming permit, what did they think about it, I said I would talk it over with my attorneys, accountants and so forth.

Now, sir, then after I talked it over to the best of my recollection a contract was drawn, and I believe the contract—whether the Town drew it or not I don't remember, it has been some years, and the contract was presented to the Mayor or something. Then Mr. Weleck was on a vacation, and Mr. Weleck was in Albuquerque, New Mexico, and was going to be out there for an extended period, and Mr. Davidson took the contract out there. That is the whole story, sir.

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The Court: Mr. Stryker wants to ask if Mr. Davidson went out there for you. You said you could not answer because there was an explanation to go with it. By and large, I think you can answer

the question as Mr. Stryker puts it, and leave it to Mr. Wessel to bring out any explanation. That would be the way to do it. Every now and then you get a question and some I remember end with "Is this true?" Sometimes you cannot answer that yes or no, but this was not that kind of question, but did Mr. So-and-So go to Albuquerque for you.

The Witness: Yes, sir; but the inference is that Mr. Davidson went out there——

The Court: No.

The Witness: I know on the other trial, sir——

The Court: Let Mr. Wessel worry about the inference.

By Mr. Stryker:

Q. Now have we got, after some minutes, the answer Mr. Davidson, your lawyer, did go to Albuquerque to talk to Charles Weleck, the attorney for the Town Board of Hillsdale? Is that so?

Mr. Wessel: I think counsel should refrain from such comment, "have we got after some minutes."

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Mr. Stryker: I will strike out the "some minutes." I will withdraw it.

Q. Is it a fact that Mr. Davidson, your lawyer, in your behalf did go to Albuquerque, New Mexico, where Charles Weleck, the attorney for the Town Board, was on vacation, in order to talk to him about this contemplated contract between you and the Town Board? That is a fact, isn't it? A. Yes, sir.

Q. All right. Mr. Weleck looked over the contract, did he not, and made some suggestions, and it was brought back by Mr. Davidson to you or the Mayor? Is that right? A. Yes, sir.

Q. How long have you known Mr. Weleck before that? A. Sometime, sir, I think before—I think about the first time in 1945. I know he came to my house at Christmas, sir.

Q. In '45? A. Yes, sir.

Q. Did you in February 1947 discuss with Mr. Weleck the question of his acting as your attorney in any way? A. February of 1947?

Q. Yes. A. There was a time, sir, that——

Q. Mr. Lubben, I do not want to interrupt you. If that question is not clear, please tell me, and I will clarify it; if it is, I would like an answer, a plain answer. A. Sir, I

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open my mouth and say two words, and you object. You don't know what I am going to say.

Mr. Stryker: Now, your Honor, will you speak to the witness——

The Witness: I am sorry, I apologize to Mr. Stryker.

Mr. Stryker: Will you read the question.

(The question was read by the court reporter as follows: "Q. Did you in February 1947 discuss with Mr. Weleck the question of his acting as your attorney in any way?")

Mr. Wessel: Your Honor, I object to that question, and I would be glad to state my objection out of the presence of the jury. That is what is called a loaded question.

The Court: That is characterizing it.

Mr. Stryker: Does your Honor let that characterization stand? Isn't my question a fair question?

The Court: No. I will have the question read again.

(Same question repeated by the court reporter.)

Mr. Wessel: I make specific objection to the words "as your attorney". It cannot be answered (479)

in my opinion yes or no.

The Court: I think I agree with you, but go ahead, Mr. Stryker.

Q. Can you answer that question?

The Court: No.

Mr. Stryker: Are the words "in any way" what you object to, Mr. Wessel?

Mr. Wessel: My objection is to the characterization, "as your attorney".

The Court: I will let it stand, but won't compel a yes or no answer. If you want to modify the question to get it yes or no, you can do that.

Q. There came a time, did there not, when you paid Mr. Weleck two sums of money by check, one for $100 and the other for $150? Is that right? A. Yes, sir, but that was not in 1947, sir.

Q. Irrespective of the date, did there come such a time? A. Yes, sir; I paid him money before that, too.

Q. By check? A. Yes, sir.

Q. Whether I am right about '47 or what the date was, did there come a time when you paid him two sums of money at least, one for $100 and the other for $150? A. Now you have modified the question, sir, and maybe I should ask (480)

somebody. You asked me before did I engage him as attorney or not.

Mr. Stryker: Your Honor, I think this is improper, these speeches.

The Court: Let us not have those speeches from either side, and I will settle this. Do not worry about the questions that have gone before; I think they have been withdrawn. There is only the one question before you, did you at any time pay this man two sums of money?

Mr. Stryker: That is right.

The Court: A hundred dollars and a hundred and fifty dollars, by check?

Mr. Stryker: Yes, sir.

The Court: That is the only thing you have to worry about now.

The Witness: I think it was three sums, sir.

Q. What was the third sum? A. I think for a thousand dollars, if I recall rightly.

Q. Three sums, one for $100, one for $150, and one for $1,000, all paid by check; have I got that right? A. Yes, sir.

Q. Now is it not a fact that in March 1948 the Jersey court declared the contract between you and the Town illegal? A. Yes, sir; they did, that the Town had no right

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to make the contract.

Q. They held——

Mr. Wessel: I think, if your Honor please, the use of the word "illegal" has implications in it, and the witness has a right to answer about that.

Mr. Stryker: Will you read the answer.

(Answer of witness read by court reporter.)

Q. Now then, did litigation ensue after that determination by the court? A. What do you mean by litigation, sir?

Q. I will withdraw it for the moment. Did you after that contract was declared illegal through your attorney start negotiations to work out some sort of a deal that might be legal? A. When, sir?

Q. I think it was 1948, but I will try to help you. Whatever date it was, what did you do then? A. I think the factory just closed, sir.

Mr. Stryker: Will you read the question.

(Question read by the reporter.)

The Court: He answered, "I think the factory just closed."

Q. I ask you if this question and answer were given in the Weleck trial, page 163a of my record.

Mr. Stryker: Look it over with me if you want.

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Mr. Wessel: I do not want to interrupt you.

Mr. Stryker: That is all right, see if I make a mistake.

Q. "Q. Now when that contract was declared illegal didn't you then through your attorneys start negotiations with the the Borough to work out some sort of different deal that might be legal and would give you what you wanted? A. Yes."

Was that question asked and was that your answer? A. Yes.

Q. Is that right? A. We started negotiations to get it resumed.

Q. What you said was the fact? A. Yes, sir.

Q. I will make this as short as I can; your lawyer at that time was a man by the name of Carlson, wasn't he? A. Yes, sir.

Q. What is his full name? A. Vincent.

Q. Vincent Carlson, all right. Did Mr. Carlson in your behalf ask Mr. Weleck to submit a rezoning ordinance to the zoning board? A. I think that your——

Q. No matter what you think I am, I am asking you a question. Will you give me the answer? A. I cannot give you an answer there, sir. There is considerable more that you are jumping around in the book, sir. I cannot

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answer that question.

The Court: Read the question.

(Question read by reporter.)

Mr. Wessel: May I say that there is a good deal to that question, and a good deal to the subject, and counsel is selecting parts. I agree with the witness it cannot be answered yes or no, or with a terse statement.

Mr. Stryker: I am not reading the whole record, of course, but I am asking a question.

The Court: I do not see why it could not be answered. Read it.

(The question was again read by reporter.)

Mr. Wessel: I specifically object to the words "in your behalf".

Q. For the moment I will withdraw "in your behalf," and ask you if Mr. Carlson, your lawyer, submitted a rezoning ordinance to the planning board? A. Mr. Carlson submitted a rezoning ordinance to the planning board?

Q. That is right. A. I don't recall that was the way, sir.

Q. Well, was this question asked and this answer given in the Weleck trial, page 425a, the folio is 842 there:

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"Q. Well, anyway, Mr. Carlson wanted you to get going to submit to the planning board that evening; is that correct, sir? A. Yes."

Was that question asked and that answer given? A. Sir, I could not answer that one question. You would have to read some more.

Q. My question is very simple. I have read to you what purports to be the question and answer. I only ask did that happen; were you asked it and did you give that answer?

Mr. Wessel: I object. That is not Mr. Lubben's testimony that he is reading.

The Court: I am at the disadvantage of not having any of the background, and that question does not mean anything to me.

Mr. Stryker: There is probably a lot there, but I don't go into it.

Mr. Wessel: It should be clear that he is reading the testimony of the defendant in that case, not Mr. Lubben's at all. I believe I am correct in that.

Mr. Stryker: That is correct; I was. I withdraw the question. You are quite right about that.

Mr. Wessel: I just would like to interrupt and say that the recess that I asked for before would be

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in order at any time now.

Mr. Stryker: I would just as leave stop now.

The Court: All right. I will tell you I have something I would like to attend to. We will excuse the jury and excuse the witness. I would like to see this Juror No. 8.

Mr. Stryker: You do not need us, then, your Honor.

The Court: No, but I wanted you to know what I was doing. There is no need for you to be here; and I won't recess, but excuse all of the parties now.

(Jury leaves the courtroom.)

The Witness: Your Honor, may I speak to counsel during this recess? Is it wrong? If it is, I don't want to do it.

The Court: I do not see any reason why you may not. Mr. Stryker, the witness has asked to speak to Mr. Wessel, during this recess. I am going to let him.

The Witness: If it is wrong, I withdraw the request.

The Court: That is all right, go ahead. I do not need the defendants here for this, Mr. Stryker; I want to know what the juror's excuse is for being late.

(Informal recess.)

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(Jury in.)

The Court: All right, Mr. Stryker.

By Mr. Stryker:

Q. It is the fact, isn't it, Mr. Lubben, that in 1953 Mr. Weleck was indicted and you testified in the New Jersey court against him? A. You mean he was indicted or convicted, sir? What did you say? Would you repeat the question, please?

Mr. Stryker: I think that calls for a stern rebuke from the Court.

Mr. Wessel: I object to that comment, if your Honor please.

The Court: Go ahead, read the question.

(Question read.)

The Witness: Well, I don't know whether Mr. Weleck——

Mr. Stryker: Wait a minute. Didn't you say something else there?

The Court: You have a question of a date in there.

Mr. Stryker: He added something. Read that answer again.

Mr. Wessel: I think counsel knows what he added.

Mr. Stryker: If your Honor heard it, I think it calls for a stern rebuke from the Court.

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The Court: Would you read the answer?

(Answer read.)

Mr. Stryker: That is what I mean.

The Court: I am not disposed to administer a stern rebuke at this point. Go ahead. Can you answer the question?

Mr. Stryker: All right.

Q. He was convicted after you testified, wasn't he? A. Yes, sir, he was.

Q. And that was sometime in 1953, wasn't it? A. I believe it was, yes, sir.

Q. Well, did the trial not start on March 16, 1953, in the Superior Court of New Jersey?

Mr. Wessel: I object to this line of examination as irrelevant.

Q. Can you tell me that?

Mr. Wessel: Objection still stands.

The Court: Wait a minute now.

Mr. Stryker: It will be perfectly relevant, I assure you.

The Court: We will go ahead for a way.

Mr. Stryker: All right.

A. I believe that was around the date, yes, sir. I can't remember the exact date.

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Q. Now, let's see. You knew what the charge against Mr. Weleck was, didn't you? A. Yes, sir, I believe I did, sir. Yes, sir.

Q. Well, give me your recollection of the charge against him.

Mr. Wessel: Now I object to that, if your Honor please. I think what the charge was is a matter of record. It has got nothing to do with this case. I think it is way beyond the scope of the direct examination and not proper cross-examination in any way.

Mr. Stryker: I will withdraw the question.

Q. And I will ask you if the charge was not that, in effect——

Mr. Stryker: I have got it here, Mr. Wessel, if you want to follow it.

Q. —that you had paid him, or that—let me read this right.

Mr. Stryker: Without the preliminary matters, which you can read if you want.

Q. —saying that he had certain duties, Mr. Weleck, to the Borough of Hillsdale, "to the best of his ability and uninfluenced by motives adverse to the best interests of said Borough for compensation from said Borough and the duty not to request or accept any gift, gratuity or promise to

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make any gift under an agreement"——

Mr. Stryker: Do you want to object?

Mr. Wessel: Yes, I think that part, it just isn't the whole. If counsel wishes to read the whole, and if the Court feels that is proper, I think the whole must be read.

Mr. Stryker: I will read any part of it. What I want to get at is the charge.

Q. (Continuing)—"not to request or accept any gift, gratuity or promise to make any gift under an agreement or understanding that he would act in any particular manner with reference to the affairs of his employer, the said Borough, did wilfully and unlawfully and in violation of his said duty as said Borough attorney, demand, request and receive from one David G. Lubben, a private citizen, a promise that he, the said David G. Lubben, would pay to him, the said Charles W. Weleck, the sum of $15,000 in lawful money of the United States of America, which sum was to be paid in equal monthly installments of $500 each, commencing in July, 1949, in return for an agreement or understanding that he, the said Charles W. Weleck, would use his influence and office as said Borough attorney, corruptly to influence, export"—"exhort" I should say—

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"and advise the Mayor and Council of the said Borough of Hillsdale to enact a certain ordinance then pending, to amend the zoning ordinance of said Borough of Hillsdale so as to permit the manufacture, storage, packing and sale of candy at wholesale in a district created in said amendment and to be known as 'B' Limited Commercial and Light Manufacturing District."

Mr. Wessel: Now, if your Honor please, if that question is permitted, I shall be required to bring in all the witnesses that testified, to go through that whole issue again, and I think it would be improper and unduly prolong this trial beyond the scope of any possible cross-examination.

Mr. Stryker: If your Honor please, I am only reading this in order that it may be intelligible to you, sir, and to the jury, what Mr. Lubben did, and what he testified to.

It would be meaningless if I didn't do it. I am reading as best as I can.

The Court: What escapes me is the relevance of the charge, which isn't anything that Mr. Lubben did. I assume that some other body did that, so I will sustain the objection.

Q. Prior to your testifying in that case, you have told

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us this morning that you paid Weleck three different checks; is that right, $1,000, $100 and $150, is that correct? A. I believe it was brought out in the testimony, yes, sir.

Q. It was brought out in your testimony, wasn't it, this morning? A. I don't know whose testimony it was brought out in, sir, but——

Q. Didn't you testify to that this morning? A. I think Mr. Weleck admitted some of those things too, sir.

Q. I didn't ask you that. I asked you if you didn't testify to that this morning. A. Yes, sir.

Q. All right. Now what were those payments to the Town attorney made for? A. Well, the first payment, sir, of the $1,000, I never did know what that was for, because Mr. Weleck went down to Trenton, New Jersey, and he stated there that he represented the Borough of Hillsdale at a water hearing, and then I believe I got a bill, to me—if I recall correctly; I haven't got my notes, and that is some years past—I got a bill for $1,000.

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Q. From Mr. Weleck? A. And I was at a loss to understand how Mr. Weleck could represent the Borough of Hillsdale and send me a bill for a thousand dollars.

Q. Yes; did you pay him? A. Yes, sir.

Q. And what was the $100 for and the $150? A. Later on, sir, when the mayor and the council, by an overwhelming majority of the people in the town who signed petitions, requested that the town rezone my piece of property so I could operate, there was a stipulation that in the event that anybody would attack this zoning ordinance, which the town had now approved, that I would guarantee to defray the expenses of the town.

Q. Legal expenses? A. The attorney's expenses, so the town wouldn't be put to any expense.

Q. All right, thank you. A. And that, sir, was the $150 that I gave him.

Q. Now, did there come a time when you asked Mr. Weleck out to your house, March 4th, to be specific? A. March 4th when, sir?

Q. I will give it to you. Just a minute. March 4, 1949. A. You will have to refresh my memory, sir; it's been some time.

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Q. Well, there came a time, didn't there, when you rigged up a recording apparatus in your house and asked Mr. Weleck out there? Does that refresh your recollection? A. If you have my testimony there, sir, if you can refresh my memory or if I may look at it, I will be glad to answer the question.

Q. Are you telling the jury that you don't remember fixing a Dictograph or recording apparatus in your house?

Mr. Wessel: I object. That wasn't the question. The date is the question.

Q. I am asking you——

The Court: I am sure the witness knows that the first question is withdrawn.

Mr. Stryker: First question withdrawn.

The Court: Go ahead.

By Mr. Stryker:

Q. Did you or did you not at about that time——

The Witness: May I ask, how do I know a question is withdrawn?

The Court: Just go ahead and do the best you can.

The Witness: All right.

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By Mr. Stryker:

Q. Did you at that time rig up a recording apparatus in your house? A. When?

Q. On or about March 4, 1949. A. Well, I don't know about the date, sir. If you can let me see the minutes, the testimony——

Q. Regardless of the date, did you do that and ask Mr. Weleck out to the house? A. Regardless of the date?

Q. Yes. A. Yes, sir, I did.

Q. And who fixed up that appartus for you? A. A Mr. Hellstern, sir.

Q. Who? A. A Mr. Hellstern.

Q. Who else helped doing it; was there someone else helped? A. I don't recall, sir.

Q. Well, now, when you invited Mr. Weleck up to your house, did you tell him that you had a Dictograph, that you were going to get him out there to get what he would say and record it? A. No, sir.

Q. Well, now, you were doing that, I suppose——

Mr. Stryker: Strike it.

Q. Were you doing that in the interests of justice? A. I was doing that, sir, in the interest of protection.

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Q. Protection. Well, now, you had the tape recording made, didn't you? A. You see, I didn't want ever to be misquoted, sir.

Q. No, I understand. You had the tape recording made, didn't you? A. I had it made?

Q. I think my question maybe is faulty.

Mr. Stryker: I will withdraw it.

Q. After Mr. Weleck left your house, did you have what was recorded on the tape transcribed in some way? A. No, sir.

Q. All right. But you kept the tape, did you? A. I kept the tape?

Q. Yes. A. Well, sir, first of all, it wasn't a tape——

Q. Did you keep the tape? A. I couldn't keep a tape. We didn't have any tape.

Q. What was it, then, wire? A. Yes, sir.

Q. A wire, all right, fine. A. Well, sir——

Q. Now, did you take that wire recording—am I using the right word? If not, correct me. A. Yes, sir, you are (496)

using the right word.

Q. Did you take that to the public prosecutor immediately? A. No, sir, I did not.

Q. Did you take it at any time during the year 1949? A. No, I think it was sometime later, sir.

Q. Did you take this wire recording any time during 1950? A. I don't recall the date, sir. If you have something to refresh my memory I would appreciate it. It's been some years, sir.

Q. Well, perhaps I can. Now, I am going to be sure that I have got your testimony this time.

Mr. Stryker: 68A, Mr. Wessel.

What was my last question?

The Witness: You said, "I want to be sure I have your testimony this time," sir.

By Mr. Stryker:

Q. What's that? A. You said, "I want to be sure I have your testimony this time," sir.

Q. I said that? A. I believe that is what you said, sir.

Q. Did I? A. When you picked up the book, yes, sir.

Q. Maybe you are right. I sometimes misspeak.

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Mr. Stryker: Strike it all.

By Mr. Stryker:

Q. Would this question and answer at page 69A of your——

Mr. Wessel: May I have the folio, please, sir?

Mr. Stryker: Let's see if I have it here. Yes. That is page or folio, I don't know, 212 to 219. Anyhow that is where it is.

Q. Would this refresh your recollection:

"Q. Will you look at those spools carefully sir, and tell the jury whether or not they are the spools which contain the recording taken on March 4, 1949, in your home. A. Well, they are the spools sir, but I have no way of knowing what is on that wire until it is played."

Was that question asked and did you give that answer? A. Yes, sir.

Q. Well, later on you heard it played in court, didn't you? A. Yes, sir.

Q. And what was played was what was on the wire recording; is that right? A. What was played——

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Mr. Wessel: I object to the form of the question, if your Honor please.

Mr. Stryker: I think it is a poor question. I would like to withdraw it.

By Mr. Stryker:

Q. You heard played in court what you had heard said when you took the wire recording in your house?

Mr. Wessel: I object to the form of the question. I will be glad to explain.

Mr. Stryker: I don't care much about it. Let it go.

Q. Well, now, is it not a fact that the first time that you took that wire recording to the prosecutor was on

June 12, 1951, more than three years and three months after you had the recording made? A. There was some lapse sir, of time. The exact time I don't know.

Q. Let me see if I can help you again. I will try.

Mr. Stryker: My page 68A. It says 212 to 219. I guess it is the page you have, Mr. Wessel.

By Mr. Stryker:

Q. "Q. And now, did you go to the prosecutor's office following June 12, 1951? A. Yes."

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Does that refresh your recollection? A. Yes, sir.

Q. Now, in the meantime, between the time you took the recording in March, 1949, and the three years later when you delivered it to the prosecutor, were various questions arising about ordinances? I don't care to go into detail. Was there still a controversy about whether you could use this place for a factory? A. Yes, sir.

Q. And Mr. Weleck was the attorney for the Town Board, wasn't he? A. He was, sir.

Q. Now, don't you know as a fact that the recording that you took of this conversation did not contain any promises by Mr. Weleck to influence the board or do anything improper?

Mr. Wessel: I think I object to the form of the question.

Q. You know what was in the recording, don't you, in general? A. Yes, sir.

Q. Well, can't you help me with that? Don't you know that there was nothing said by him because—I know you were cross examined about it. I would rather save time if you can tell me.

(500)

Mr. Wessel: Counsel is overruling my objections. I object to the form of the question.

The Court: I think he changed the question, but I am ready to sustain an objection relevancy as to the contents of that tape.

Mr. Stryker: It bears on his credibility, and I will show you how.

The Court: Well, I will wait for the connection.

Mr. Stryker: All right.

Mr. Wessel: I think this is a good place to break. It is now five minutes to one, in any event, if your Honor please.

The Court: Is this a good place?

Mr. Stryker: I will stop any place. My only hope is that we won't lose out on the time for lunch.

The Court: That I will take good care of. That is not quite a constitutional right, but it is an important one.

I am very sorry that the jury has wasted so much time this morning. It is unavoidable, I can assure you of that. We will suspend now, and we will come back at ten minutes after two, which is a bonus of an extra minute.

(501)

Don't discuss the case.

(Recess taken to 2:10 p.m.)

(501a)

AFTERNOON SESSION

(2:10 p.m.)

DAVID GEORGE LUBBEN, resumed.

Cross Examination by Mr. Stryker (Continued):

Q. Did you agree to pay Mr. Weleck $15,000? A. I told Mr. Weleck I would pay him, but I had no intention of giving him the money.

Q. Then you did not agree to pay it to him?

Mr. Wessel: I object to the form of the question.

The Court: I will let the answer stand sustain the objection.

Mr. Stryker: I did not hear your Honor's ruling.

The Court: I will sustain the objection.

Q. When you got this recording did your lawyer advise you, that is, Mr. Carlson, to turn it over at once to the prosecutor? A. To the best of my recollection he did, sir.

Q. Did you do it? A. No, sir.

Q. You told him why you did not do it, didn't you? A. To the best of my recollection I did, sir.

Q. What did you tell him? A. That I didn't want to make any trouble.

Q. What? A. I believe I didn't want to make any trouble.

(502)

Q. You did not want to make any trouble? A. No, sir.

Q. At the wind-up there, when you turned it over to the prosecutor in '51—by the way, this morning I think I said it was three years from the date of the recording, and I am wrong, it is two years—at that time you had found definitely that you could not get an ordinance so as to make

it possible for you to have the factory there; is that right? A. I beg your pardon, I didn't quite get it all.

Q. I will have it read.

(Question read by the reporter.)

A. At what time, Mr. Stryker?

Q. At the time you turned the recording over to the prosecutor. A. Yes, sir; I had found I could not have it.

Q. Then you waited from the date of the recording, which I think was March 4, 1949, until you found it was impossible to get the ordinance you wanted, and then you went to the prosecutor; is that right? A. No, sir; the ordinance had been given to me, sir.

Q. But at the end you found that you could not get the ordinance?

Mr. Wessel: I object unless that earlier ques- (503)
tion is stricken and this question is reframed. This has no reference to the earlier question.

Q. You told me, unless I misunderstood you, that there came a time in 1951 that you knew you could not get an ordinance zoning the property so you could use it. Did I hear you right just a minute ago? A. There came a time I could not use the property for anything.

Q. It was at that time you went with the recording to the prosecutor; is that right? A. At the end I guess it was, sir.

Q. Between those two dates, March 4, 1949, and I forget the month in 1951, you saw Mr. Weleck right along, did you? A. No, sir. I saw him several times in the——

Q. In that interim. You know what I am talking about, between the recording and your turning it over, did you see Mr. Weleck several times? A. Yes, sir; I did.

Q. And you wanted him to help you? A. I don't recall whether he would help me.

Q. He was still attorney for the Town Board of Hillsdale, wasn't he? A. I just believe I took the money over to him, sir, and paid it.

Q. He was still the attorney for the Town of Hillsdale

(504)

between the date of the recording and the time you took it over to the prosecutor? A. Yes, sir.

Q. And you wanted his help in connection with the ordinance, didn't you; you wanted to get your properties to use as a factory? A. I did, sir.

Q. Did you talk to him about it? A. I do not recall any specific conversations at this time, sir.

Q. Leave out any specific conversation, but did you at any time talk to him about what was going on, whether you would get the ordinance or would not? Did you have any conversation with him at any time between those dates? A. Sir, I think he called me on the phone several times and asked me for his first payments, this money, and I think——

Q. I don't want to interrupt you. A. And I think at that time, sir, I told him we were back in court, and he said, Don't let it worry you, and everything will be taken care of.

Q. Did you talk to him about getting this ordinance, is my question—getting an ordinance that would enable you to use the property as a factory? A. I do not recall at that time; no, sir.

Q. When Mr. Weleck was in your house on the evening

(505)

of March 4, 1949, did you give him something to drink? A. I believe, sir, I——

Mr. Wessel: I think I must object to this. It is completely irrelevant.

Mr. Stryker: I will tie it in in a minute.

Mr. Wessel: I do not see how it could be tied in.

Mr. Stryker: It can be tied in.

The Court: Overruled.

The Witness: I believe I asked him whether he wanted a coke or something.

Q. Did you give him something to drink? A. I don't recall whether he took it or not, sir. It has been some time since that, sir.

Q. You know he vomited twice on the way home, don't you? A. That is what he said, sir.

Q. Did you put anything in that drink? A. Absolutely not, sir.

Mr. Stryker: I will have this marked for identification, page 1756a, the record in the Weleck case.

(Marked Defendants' Exhibit N for identification.)

Mr. Stryker: Would you be kind enough also to mark this paper, marked Exhibit D12E, the way I

(506)

read it in the record. I think both of them for identification, but will you mark this one I am handing you (clerk) for identification.

Mr. Wessel: Perhaps the Court may instruct the jury at this time that although apparently this is colloquy between counsel and the clerk, these exhibits attached to the transcript are not in any way authenticated as part of the record.

Mr. Stryker: I do not think we need that comment, Mr. Wessel.

Mr. Wessel: I think it is a very important comment.

Mr. Stryker: I do not.

Mr. Wessel: I do so request.

The Court: I do not think there is any doubt about it.

Mr. Wessel: I do not think the jury understands that.

Mr. Stryker: I think I will make it clear.

(Marked Defendants' Exhibit O for identification.)

(507)

Q. Did you have some correspondence, put it that way, with Mr. Weleck, after his visit at your house, when you had a wire recording apparatus there? A. No, sir, I didn't have any correspondence with him.

Mr. Stryker: Will you mark for identification here the paper appearing at 752a of the record in the Weleck case? It is there marked Exhibit D-9-E. It doesn't tell me whether for identification or not. I am not sure.

(Marked Defendant's Exhibit P for identification.)

Q. Did Mr. Weleck verbally or in writing denounce you after his visit to you on March 4, 1949?

Mr. Wessel: I object to the form of the question.

The Court: Sustained.

Q. Did he write you a letter about your conduct? A. He did not, sir.

Q. I show you Defendants' Exhibit P for identification and ask you if you ever received a letter from Mr. Weleck, in words or substance, those contained in the exhibit I show you. Will you look at it, please? A. Did I write that letter, sir?

(508)

Q. No, I did not ask that.

Mr. Stryker: Will you read the question. I don't think you did write that one.

(Question read.)

A. I did not receive that letter.

Q. All right. I show you——

Mr. Stryker: I don't believe I have that marked, after all, or did I? Is that marked for identification?

The Clerk: No, it is not.

Mr. Stryker: Will you mark that for identification?

(Marked Defendants' Exhibit Q for identification.)

Q. I show you Defendants' Exhibit Q for identification. I don't know whether to call it a photograph or a photostat or whatever it is, but something that purports to be a replica of a letter, and ask you if you will look at it and tell us whether you wrote the letter of which that is a reproduction, a photograph or what the process is, I don't know. A. I did not write this letter, sir.

Q. At the trial they showed you the paper of which this is a reproduction, did they not, and asked you if you (509)

had signed it.

Mr. Wessel: If your Honor please, I object.

Mr. Stryker: It is merely for the purpose of identifying the letter, that is all.

Mr. Wessel: I am very sorry, Mr. Stryker.

Mr. Stryker: Withdraw it.

Mr. Wessel: I object not only to this question but to the line of examination. I think it is now

apparent exactly what is going on, and I think the Court is getting into an issue which is one of the main issues in that trial.

Mr. Stryker: I think you will see the point is a minute.

Q. Is there a written signature, a written signature? A. There is, sir.

Q. And is that a replica of what at least purported to be the original letter that was shown you?

Mr. Wessel: If your Honor please, I object again.

Mr. Stryker: All right, I withdraw it. I withdraw it.

Q. Is that signature at the bottom of that letter your signature?

Mr. Wessel: I will let this question be answered. (510)

Q. Is it? A. I stated, sir——

Q. Will you tell me now, is it your signature or not? A. Yes, sir, but I didn't write the letter.

Mr. Wessel: Now, if counsel wishes to show that to the jury, which he seems to be doing——

Mr. Stryker: I am not showing it to the jury.

Mr. Wessel: —I suggest he offer it in evidence, in the proper way. I saw that page with the letterhead being shown——

Mr. Stryker: That is not a fact. That is not correct.

Mr. Wessel: If your Honor please, this particular document was one of the key documents in the Weleck trial.

Mr. Stryker: Indeed it was.

Mr. Wessel: The issue as to that signature on that letter was the key issue in that trial. If we get into it, if your Honor please, it will take perhaps days, and witnesses, to establish the very fact which counsel is now inquiring about, and which is completely irrelevant to this proceeding.

Mr. Stryker: It won't take more than two minutes to establish what I want to establish.

(511)

The Court: We will spend another two minutes on it.

Q. Don't you know that by stipulation between the District Attorney and the defendant's counsel, that letter was submitted to Mr. Osborn, a handwriting expert, and that he reported that it was your signature; don't you know that?

Mr. Wessel: If your Honor please, not only do I object to a number of things with regard to that question, but I move that the question be stricken from the record and the jury be advised to disregard it.

The Court: All right, I will sustain your objection, and I will instruct the jury to disregard the question, and I tell you once again, a recital of facts incorporated in a question is no proof of anything before you. There is no need to strike the question. The question should stand.

Q. Well, you have told us——

Mr. Stryker: I don't have to repeat it.

(512)

Q. Didn't you use that recording to dangle over Mr. Weleck's head, the same as you did the passport for the Shotwells?

Mr. Wessel: I object to the form of the question. This is not the time for summation.

The Court: I agree with you. I sustain the objection.

Mr. Stryker: All right.

By Mr. Stryker:

Q. Did you not obtain the passport——

Mr. Stryker: Strike it out.

Q. Did you not procure, have made, the recording in order that you might hold Mr. Weleck in line? A. No, sir, I did not.

Q. When I came in from lunch I asked you a question. Just tell me if I heard it right. Did you tell Mr. Weleck that you would pay him the $15,000, but that you did not intend to pay it?

If that is not a correct paraphrase I will turn back to the record.

Mr. Wessel: It certainly is not a correct paraphrase, and I would object to the question.

Mr. Stryker: All right, withdrawn.

Would you turn back and let me have it.

(513)

Mr. Wessel: I can't conceive of anybody telling him that he didn't intend to pay the money.

Mr. Stryker: Can we settle that now about what this witness said?

Mr. Wessel: I will be glad to state my recollection if counsel wishes.

Mr. Stryker: No, I don't care about your recollection with all due respect. I would like the record. I want to see if I am right in my memory. I may be wrong. The only way I can settle it is by the record.

Mr. Wessel: I have now been called both Mr. Leone and Mr. Weleck.

The Court: Let's not get——

Mr. Stryker: That is a fault of mine and I want you to forgive me.

The Court: —into any further difficulty than we have.

Mr. Stryker: I don't want to call you either one.

The Court: You need that now, Mr. Stryker. We will get the other stenographer.

Mr. Stryker: No, I can wait.

The Court: All right.

(514)

By Mr. Stryker:

Q. What is Mr. Carlson's first name? A. Vincent.

Q. Have you become an accuser against Mr. Carlson? A. No, sir.

Q. Didn't you testify in some proceeding against your former lawyer, Mr. Carlson? A. No, I didn't testify against him, sir.

Q. What? A. I didn't testify against him.

Q. Well, there was this disbarment proceeding at which you appeared as a witness, I am informed. If I am not right, tell me. A. Yes, sir, I appeared as a witness.

Q. And don't you know whether you appeared for him or against him?

Mr. Wessel: I object to the form of the question. The witness is generally the witness of the court.

The Court: Well, I will sustain the objection.

Mr. Stryker: Your Honor allows it, I think I heard you to say, or you did not ?

The Court: No, I will sustain the objection.

(515)

Mr. Stryker: All right.

By Mr. Stryker:

Q. Well, without asking what it was, do you remember the testimony that you gave in your lawyer's disbarment proceeding? I am asking you now only if you remember, not what you said. A. If you have anything to refresh my memory, sir——

The Court: You are asking him for all of his testimony?

Mr. Stryker: No, sir, I specifically did not.

The Court: Oh.

Mr. Stryker: I asked him if he read what he said.

A. Pretty much, sir.

Q. Were you subpoenaed in that proceeding? A. Yes, sir.

Q. Who subpoenaed you? A. The State of New Jersey.

Q. Not Mr. Carlson? A. No, sir. I don't know whether it was the State of New Jersey or some papers came down. I don't know what it was.

Q. At any rate, it wasn't Mr. Carlson? A. It wasn't really any court proceedings, it was in some lawyer's office.

(516)

Q. I know, disbarment proceeding. A. I didn't know it was a disbarment. It didn't state that.

Q. At any rate, you weren't subpoenaed by Mr. Carlson. Have I got that correct, and I don't care about the rest of it; is that right? A. No, sir, I was not.

Q. And you were put on the stand and interrogated—I am not asking what you said; not asking what you said at all—and questioned by the lawyer representing the Bar Association; is that right?

Mr. Wessel: I object to the question. It is completely immaterial.

The Court: Well, I will sustain the objection.

By Mr. Stryker:

Q. Mr. Carlson's lawyer didn't call you to the stand, did he?

Mr. Wessel: I object. The same objection, if your Honor please.

The Court: I will sustain the objection.

Mr. Stryker: Until I get the court recorder, I (517)

will leave this line for the moment, not being quite completed.

The Court: All right.

By Mr. Stryker:

Q. Do you remember testifying in the Shotwell case in Chicago about a conversation you had with Mr. Huebner, the treasurer of Shotwell, about three checks. You remember that you did have such a conversation, or, rather, my question is, do you remember testifying that you had such a conversation?

Mr. Wessel: I object to that question; I mean, to what he testified in Chicago.

The Court: Yes. I sustain the objection.

Mr. Stryker: Well, I will approach it in a different way.

Q. Let me show you——

Mr. Stryker: By the way, will you look up the first two questions I asked the witness after lunch. I will come back to it, but I have something else at the moment.

The Reporter: I haven't got that, sir.

Q. Were these two or three questions asked you in Chicago, and did you give these answers——

(518)

Mr. Wessel: I think I will object before they are even asked.

The Court: I will sustain the objection, unless it is something that he has already testified to here.

Mr. Stryker: No, sir. It bears upon a reckless, accusatory disposition.

Mr. Wessel: I object.

The Court: Let's not characterize things.

Mr. Stryker: That is the purpose of it.

The Court: That may well be the purpose of it, but there comes a time in which we tell the purpose of things and that is when you sum up.

Now at this time I am not going to have the reading of testimony unless it relates to something you have asked him about. If you ask him about something and he doesn't remember, or he gives you an answer at variance with what he said before, then I will permit him to be questioned as to what he testified to, but I am not just going to sit here and have him asked what he testified to in Chicago.

(519)

Mr. Stryker: Well, I do not want to make any statement in the presence of the jury. I would be glad to make it to you and Mr. Wessel if you would permit me.

The Court: I would be glad to have you come up.

Mr. Stryker: Is that all right?

The Court: We will go into chambers.

(520)

Mr. Stryker: The purpose of the questions which I would desire to ask is to show the method by which this man commits perjury. I want to show that he went out there—that he says he went out to Chicago—I will give it to you. He goes out to Chicago and he says he has this conversation, I will give it to you. Those are the checks or copies of them (indicating). He is shown these checks and he is asked if he has seen them before. Yes, I have. Is that your signature at the bottom? Yes, it is. These are Eatsum Food Products Company and they are signed Lubben. There they are.

Mr. Wessel: May I say, Mr. Stryker, that just because they appear to be what they appear to be, does not mean that they are.

Mr. Stryker: I do not know whether they are, but I am saying what he said. Now he says this: he is asked about when this paper was prepared, one of these checks; is that your signature at the bottom? Yes, sir. Is the entire document in your handwriting? It is, sir. Was it prepared on or about the date it shows thereon? A. Yes, sir; February 14,

(520-1)

1946.

I hope I have this right this time; they are questions asked by the prosecutor of David Lubben on

his direct examination. He is asked, "Don't tell me what the date is, just say yes. Was this prepared in the ordinary course of business? Yes, sir.

I show you Government's Exhibit for identification 14-B, I think that is the next check, and ask you if you have seen that before? Yes, sir; I have.

Is that document yours? Yes, sir.

Is the signature on the bottom in your handwriting? It is.

Did you prepare that in the ordinary course of business? I did, sir.

Now I show you Government's Exhibit 14-C, which I think was the third check, and I ask you what do the numbers and the names on the back thereof have reference to, the figure here, 3017, Byron Kane? I guess those are the check numbers. Yes, 3017, you see it there. 3018, Harold Sullivan, and 3019, Frank Huebner.

The answer: The numbers are the numbers of the checks that I just identified and the names were the names that I wrote on the checks.

As the payees? Yes, sir.

(520-2)

Now with reference to the other numerical computations on the back of that sheet, what do they signify? Well, I took the figures 41682.10 and divided by three and I got 13894.03.

What did you do after you had determined that figure of 13894.03? I wrote three checks, one check No. 3017 to Byron Kane for 13894.03. What is the number again? 3017. Is this the check No. 3017 that is referred to? Yes, sir.

And what else? A. I wrote 3018 for a similar amount to Harold Sullivan.

Is this the check 3018 to which you refer? Yes, sir.

Go on. And I wrote check No. 3019 to Frank Huebner. And this is the check 3019 to which you refer? Yes, sir, it is.

Now what is the date on the settlement sheet in your hand? February 6, 1946.

Did you prepare these checks on February 14th, on the date shown thereon? Yes, sir.

And what did you do with them after you had them prepared? These checks were prepared in Chicago and I went to the plant of the manufacturing company and I spoke to Mr. Huebner.

(520-3)

On what day was that? February 14, 1946.

And was anyone else present? Either that day or the next day, but right around there.

Was anyone else present? No, sir; there was not.

And what was the conversation at that time? I told Mr. Huebner we owed him $14,000, by me, I mean the partnership, the Eatsum Food partnership owed him $41,682.10 on that day, and I told him I was getting ready. I was getting ready to leave the partnership and I could no longer have any access to the cash box to take the money out to pay them. I also told him I was forbidden to draw any checks to cash for Eatsum or anyone else for that matter, that I had to pay these people, and I said these—he was interrupted: Who do you mean by "these people"? I had to pay, I said, the oldest money, the only way I can pay it to you is if you will take this and checks for the amount I owe; otherwise I am not—I said that is the only way I can pay the money.

Was there any further conversation? Yes, sir; Mr. Huebner says, Well, I don't know, Dave, I will have to check up and see; he says, It is a little unusual, and I explained the circumstances, as I said, I had no way of paying the cash or drawing the check for cash.

(520-4)

Let me interject the comment. This about the date he has given, February 14, 1946. That is important to keep in mind when I come to the point.

So he says all right, he would see what could be done, and so on, I am quite sure—would you care to read with me? And so on, I am not quite sure if it was in my presence that he called Harold Sullivan or Byron Kane, but I know he called one of them.

And what did you do then? If my memory serves me correctly, sir, I mean I went to the Bellevue-Stratford where I saw Mr. Byron Kane.

And who was present? Mr. Kane and myself.

And about when was that? I would say it was around February 14, 1946.

And do you have any recollection of a conversation? Yes, sir; although I am not—I am just a little bit hazy on the date, with Byron Kane, but the conversation I had with Byron Kane was that——

By Mr. O'Connell: Who was present? To my knowledge Byron Kane was there, and I explained that I was getting ready to leave the partnership and I had to pay this bill and I had no way of paying the money, and it was the only way I could pay the money, and so forth.

Did he say anything to you? Yes, sir; Byron

(520-5)

Kane told me that—he said "Well, I don't know, Dave; we certainly did not get this thing to handle cash, just for the sake of handling cash and paying taxes on it; and I don't want to take any checks.

Let me explain that the conversations which he said he had on February 14, 1946, fitted into certain facts, namely, he was then leaving the partnership, and it may have been true he was told not to draw checks. The point is then he was leaving the partnership. But he had what he claimed were these checks. The testimony later is that the names were cut out. I don't think it states by whom, but at any rate that is the testimony.

Now you have got that. That conversation with the checks fitted in perfectly with the situation as it then was. February 14th. You remember he got out March 8th or 9th.

Mr. Wolfram: And he had a similar conversation with Harold Sullivan.

Mr. Wessel: May I say, Mr. Stryker, I do not understand the context of all this. That examination before trial was a voluntary disclosure. Defendants indeed admitted the fact before the judge, and the judge many times said in colloquy with counsel——

Mr. Stryker: I am not one bit interested in

(520-6)

what was said.

Mr. Wessel: When he suggests that these persons were not called——

Mr. Stryker: I am not interested in that. Let me say what I want to show you. I think I will make my point, though you may not agree with it.

(The Court, without counsel, leaves the robing room and addresses the jury from the bench.)

The Court: Ladies and gentlemen, I think we will take our five-minute recess now while I hear some further argument. You might just as well be out in the jury room. Do not discuss the case.

(The Court returned to the robing room, where the following discussion ensued:)

Mr. Stryker: While I am waiting to get this—here it is. This is on September 17, 1953, still on direct. The next morning Lubben returns to the stand and this happens.

The Court: Go ahead. You do not make very many mistakes.

Mr. Stryker: I have made several.

The Court: Well, proceed.

Mr. Stryker: "By the Court: You may proceed.

By the Witness: Your Honor, I would like to correct a little testimony I gave yesterday and I feel (520-7) I am in error in the——

By the Court: May we have that right?

The Witness: May I go ahead and state it. Wednesday when the——

The Court: Speak up.

By the Witness: Yesterday, when Mr. Lockley —when the prosecutor here gave me three checks on which the names were cut out, I remember the transaction of giving the checks to Mr. Huebner, and I thought that that was the time I had gone to see Mr. Kane and Mr. Sullivan. But that wasn't the time, sir. I went to see him on another time, but it wasn't in regard to these three checks around February—I suppose he means February 14th, but at any rate that is what he said.

It was not at that time, sir. I did go, however, to Mr. Kane and Mr. Sullivan on another date, the exact date I do not remember.

By Mr. Kenyon: Do I understand these conversations with Mr. Kane and Mr. Sullivan did take place?

The conversation with Mr. Sullivan did take place, but did not take place on that day; the conversation with Bill maybe was when I went with reference to slow payments.

What that means, I don't know. Where I was to bring the cash money home, and it was not with

(520-8)

reference to the checks.

Let me return to that in a minute and I will explain what I am trying to prove in that connection.

By Mr. Lockley: Do I understand you then that you actually had the conversations?

Oh, yes, sir, I had the conversation. This time it is singular. And I had a conversation with Mr. Sullivan and I had a conversation with Mr. Kane.

But you were in error as to the time?

Yes, sir."

Then Mr. Lockley, the prosecutor, says:

"Has anything transpired since you were on the stand yesterday that more nearly refreshes your recollection as to what the time of these meetings was?

Yes, sir; to the best of my recollection it was sometime around September or October of 1946, and I believe, sir, if I remember, sir, that it was—there was a time when we were having a little difficulty getting up the payments, and the cash payments in

time, and that is the time to the best of my recollection that I talked to Mr. Huebner and to Mr. Sullivan.

Is your testimony changed in any respect other than the conversation instead of taking place I believe you earlier said around February, that it took

(520-9)

place later in the year? Later in the year, sir, but it wasn't in regard to the checks; the checks, Mr. Huebner came and gave me the checks back and said that they decided that they didn't want to take them."

Now this is by the prosecutor:

"Well, have you arrived at this more refreshed recollection just through your own mental processes or have you had something that you have seen since that time, or have you had something that you have seen that helps you refresh your recollection?

Sir, I have seen nothing, but each day and each night I asked for divine guidance to remember as correctly as I possibly can; this happened back in 1946 and I am trying very hard and I don't want to say anything that is not true, I am doing the very best I can."

Now here is the point, I think, although it would take me a little time to develop, that this is a signal piece of proof, that shows not only the reckless accusatory disposition of this witness, not only that he lied, but that he is a cunning and contriving liar.

Let me back that up. The conversations he swears he had with Huebner and with Cain——

Mr. Wolfram: And with Sullivan.

(520-10)

Mr. Stryker: And Sullivan the same—I did not bother to read it. The conversation as I pointed out is a conversation in which he gives the reasons for the checks. He is going to leave the partnership and he cannot draw any more checks. He now puts these conversations in September or October of 1946, three or four months after the formal dissolution, and I think about six months after he says he left the partnership, on March 8th. No doubt I will fail to get from him the answers, but with your permission I will try. In my opinion the real reason why he changed his testimony was not divine guidance, but that he found Mr. Cain was not in Chicago at that time but was somewhere else, and he saw that if he went on with that he would be caught flatfooted in plain mathematical perjury, because he could not very well have had a conversation with Cain in Chicago when Cain was I think on the West Coast.

Now you see it does relate somewhat to this partnership and to these defendants and, as I have said, and I want to say it on the record, it is my view and belief, and I want the fullest scope and opportunity to substantiate that belief, that this is the most cunning perjurer that I have seen since back in the State trials.

(520-11).

Now he could not have said in September I am leaving the partnership, could he? Because he was not. The conversation would have been idiotic in September. It was easily credible in February. It is complicated, but there is the thing.

I think the primary question, Judge, and I would say one of the vital questions in this case, is the

veracity of this witness. He has admitted he committed perjury deliberately in a case; and certainly, then, my assumption that he would commit it elsewhere is not, as I say, fantastic or far-fetched. And here is a concrete sort of mathematical demonstration of perjury. Now have I made myself intelligible to you?

The Court: I think you have.

Mr. Wessel: May I say two or three things very briefly?

The Court: Yes.

Mr. Wessel: This relates to what I said not so long ago in chambers here—this sounds to me very much like a motion under Section 2255, or a motion based on newly discovered evidence. I know it is not, but it sounds like that now.

The Court: I am not interested in its effect on the Chicago proceeding but on this proceeding.

(520-12)

Mr. Wessel: The jury heard that case, your Honor. They found the defendants guilty. All witnesses make errors from time to time as to dates; I am sure this witness and every other witness in the case will make errors. I am sure his recollection is based on what he says, his refreshments of recollection are based on what he says, because I am sure Mr. Lockley would not have brought it out if he believed he was coached by examination. I do not think counsel should take something in which he says he made a mistake in another case, in relation to this case, and bring it out the same way, to say that this man is a liar or a perjurer.

Mr. Stryker: If I may interject right here, I do not know if it sounds like a motion and I am not

making any motion. Secondly, I agree with Mr. Wessel that honest witnesses from time to time do make mistakes. I agree with that; we all know it. But this, I submit, by the demonstration I have made, was not an honest mistake, because of the fact that while he says he had the conversation on February 14th, and gives it, and it is one that well could have been true, that he was about to leave the partnership, that was definitely true—and then he shifts that conversation, which could not have been true, to September or October.

(520-13)

Now this is not a case of honest mistake.

The Court: Mr. Stryker, here is what is bothering me. What you are doing, if you proceed with this cross-examination is not to elicit an admission of perjury, because I think we all think that is pretty unlikely, but what you are doing is putting these facts before this jury, drawn from another case, and you are going to sum up and ask the jury to believe from these facts he committed perjury out in Chicago. In other words, we are going to be trying a Chicago perjury case here. That is what it will wind up with.

Mr. Stryker: No, not as I view it, with all respect. What I am going to do if I am allowed is to show that this man is not worthy of trust or credence; that he has given the story which relates to these people which is demonstrably false, it could not be an innocent mistake, or else I have not made myself plain.

Mr. Wessel: I am sure I have made mistakes like that many times.

The Court: I would like to hear any point you have on the assumption that he was lying in Chicago. That is my real test. Not is he lying or not, but assuming just for the sake of argument he was, is there any reason it should come in here?

(520-14)

Mr. Wessel: I certainly do not think so. If a witness had sometime in his life made a statement and it is a lie, or assuming it is a lie, unrelated to any issue in the case on trial, if counsel is permitted to inquire into that lie without asking for the fact, but asking about the lie, he is not only inquiring into something which is not within the scope of the direct, but something which would become in any event unlawful.

Mr. Stryker: That just is not my point at all. Mr. Wessel suggests this is not related to this case. It is directly related, in this way: the veracity of this man is in fact a vital issue in this case, isn't it?

The Court: We all agree on that; we are not going into the proof of independent crimes or misdeeds to establish veracity, though. We cannot do that.

Mr. Stryker: If I can show, and I should think I could, by what I have read to you, that he has a particularly cunning method of perjury in that he takes a document, weaves a conversation about it as of a certain date, transposes the conversation four or five months later, when the conversation could not have taken place?

The Court: If that is all so.

Mr. Wessel: I think I understand what counsel

(520-15)

is saying. He says the peculiar way, if it is peculiar, that this witness answers questions, is in issue, and something he is entitled to inquire into. If that is so, I think, as your Honor as now seen, there are hundreds if not thousands of pages of testimony by this witness on varieties of subjects, and if the method by which he answers questions is here, we will never finish.

Mr. Stryker: No, it is the method by which he commits perjury.

The Court: Mr. Stryker, to drive your point home, you have got to establish perjury out in Chicago, and that is something I just think we haven't got time to do.

Mr. Stryker: With all due submission to the Court, I thought you might rule against me but I have the right to produce such evidence as in my humble thinking proves it. It is mathematical. He could not have had that conversation in September, it is impossible; he says it did not happen, with Cain, in February, but it did happen in September, and I say——

The Court: I recognize the point you make and I recognize the problem you have, and I recognize the importance of the credibility of this witness; but

(520-16)

I think we have got to put limits at some point on how far we can go afield on these questions, and I think I am just going to draw the line here and exclude this.

Mr. Stryker: You are the one has the power to do it.

The Court: I know. It is my practice to let the cross-examiner go as far as he can, but at least here——

Mr. Stryker: It is not an idle move, but was based——

The Court: None of my rulings are based on the thought of idle moves.

Mr. Wessel: I do not suggest any move of counsel is idle.

Mr. Stryker: At least in my poor way I have made my point.

The Court: You have made your point.

Mr. Stryker: Your Honor has ruled on it. With the utmost respect, I take an exception. That is that, and I have no more to say.

Mr. Wolfram: Does that apply to any questions relating to that particular incident, whether based on the record or a paraphrase of the record? In other words, what Mr. Stryker did with your Honor was to read the record. Does your ruling cover not

(520-17)

only reading the record but asking the witness concerning this very incident, as to what happened in Chicago?

Mr. Stryker: It is a good question, your Honor.

The Court: I will try to limit this. I will work it from the other side. If Mr. Stryker asked him, Did you commit perjury in Chicago, did you deliberately change your testimony——

Mr. Stryker: And he said no.

The Court: —knowing it was false, he is going to say no. You would not want to ask that, because that is a silly question.

Mr. Stryker: It is a foolish question.

The Court: That is within the proper limits of the cross-examination. If he said no, then you could cross-examine as to that No. Didn't you say this,

and didn't you say that—I suppose you could go to some limit, but where it gets to the point where you are building up a case from which you are going to ask the jury—in other words, we are going to get into a question based on collateral evidence, as to whether he lied in Chicago; not his admissions, which you would be entitled to elicit. Then I think you are going too far.

(520-18)

Mr. Wolfram: Can the inquiry be related to whether he did or did not see anything between the first time and the next that made him change his testimony?

The Court: Yes, you ask him did he change his testimony in Chicago after the date of the meeting. Without all this elaboration, and bringing in the questions and answers; and then what compelled him to change it, I suppose you could ask him.

Mr. Wessel: The witness probably has forgotten, and I am sure he has.

Mr. Stryker: That is divine guidance. I wish I had that. I think it is just a plain lie. I do not think he has divine guidance—not at this time, but he found out he was in the midst of complete falsehood.

Mr. Wessel: They made a motion, as I recall, before trial to dismiss on the ground of voluntary disclosure. They lost the motion, but that tactic was before the court in that case.

Mr. Wolfram: There was a lot more to the defense.

Mr. Wessel: Yes, but the judge knew the voluntary disclosure and the facts set forth there. The judge knew the jury could not have this evidence that

these gentlemen admitted what is claimed they had done.

Mr. Wolfram: There was a very sharp issue (520-19) of intent, a very sharp issue on how much was involved in the dealings, and a lot of other dealings.

Mr. Wessel: I can point out where Judge Nordby tried the case and he said you have talked about voluntary disclosure and you do not impress me with that.

(Discussion off the record, at Mr. Stryker's request.)

Mr. Stryker: I am allowed, if I correctly understand it, to ask him whether he committed perjury in Chicago, if I choose to ask what seems to me a silly question. I am allowed to do that.

The Court: I would think so, yes.

Mr. Stryker: All right. And I am allowed to ask him whether he did not testify that he had a certain conversation, not naming it at the moment, with Huebner and Cain and Sullivan, on or about February 14th, and if he did not later come back and change the date, and if he did not give as his reason for the change that he had divine guidance?

The Court: No, wait a minute. Let us see how far away we are getting. The question of fact is whether he had the conversation. Now we are going to get him into whether he made a mistake in his testimony about that conversation and whether he attributed the rectification of that mistake to divine (520-20) guidance. I think we are getting afield.

Mr. Wessel: I think the law is with regard to the scope of cross-examination that within reason-

able limits—of course the judge can use his discretion, but within reasonable limits that is totally within the discretion of the trial court. Where cross-examination has gone on as it has here for some time, I do not say improperly but where it has gone on, and the circumstances involve many things in another trial or proceeding, it is within the sound discretion of the court to limit cross-examination on subjects which at best are nothing more than possible lies unrelated to the issues in this case.

Mr. Stryker: Of course, in general I agree with you, but this is nearer than any case I have ever had, where it is so hard to prove a lie.

The Court: You have admission of perjury already.

Mr. Stryker: I have that.

The Court. This is bound to be cumulative.

Mr. Wolfram: No, it is not, because he testified he perjured himself under fear, and we want to show he perjured himself because of other things.

(520-21)

Mr. Stryker: He said he perjured himself because of fear, and I want to show it is not fear but he perjured himself under circumstances where it could not be fear. I am so serious about this I wish you would think about it, because I really believe I am right about this one.

The Court: Have you something else you can cover now? I will think about it over night.

Mr. Stryker: Yes, I think I have.

Mr. Wolfram: What is open?

Mr. Stryker: You will reconsider the whole thing over night?

The Court: Yes, I will reconsider it.

Mr. Stryker: I really think with all due respect you are making a mistake, and I want you to think it over.

The Court: I want to give you all the scope I can, but I do not want to try six cases in one.

(Discussion off the record, after which the trial resumed in the courtroom before the jury.)

(520-22)

(Court and counsel, and the jury, returned to the courtroom.)

Mr. Stryker: With your Honor's permission, I will drop for the day the particular line I was on, and I may or may not go to it tomorrow morning.

By Mr. Stryker:

Q. Mr. Lubben, you did tell Mr. Weleck that you would

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pay him $15,000, didn't you? A. Sir, I believe I said—you were referring to what, what part of the testimony?

Q. I am not referring to any book at all, but asking you for your memory, what you said you told Weleck. A. If I remember, sir, in the wire recording——

Q. No, Mr. Lubben, I am sorry to interrupt you. I thought that was a fairly simple question. Did you tell Mr. Weleck that you would pay him $15,000? Now you either did or you did not. What is your answer? A. Sir, I don't recall whether I told him I would pay him, but I believe I said I would owe him or I owed him $15,000.

Mr. Stryker: Turn back to your notes, Mr. Reporter, to the first question I asked after lunch.

(The reporter read the question and answer referred to as follows: "Q. Did you agree to

pay Mr. Weleck $15,000? A. I told Mr. Weleck I would pay him but I had no intention of giving him the money.")

Q. That is correct, isn't it, what you swore to? A. Yes, sir; but——

Q. Is it? A. I stated it, sir, but——

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Q. Did you tell the truth when you gave the answer to the question the reporter was kind enough to read to us? A. No, I think I said I owe you $15,000. That is only a guess, sir, I don't recall directly; I think I said I owe you $15,000, is that right?

Q. It is only a guess? A. No, I think I am very sure on that, sir.

Q. Then what you told me after lunch, you were mistaken in that respect, in that testimony; is that right? A. To the best of my recollection, yes, sir.

Q. Did you tell Mr. Weleck that you owed him $15,000 and that you were going to pay it to him? A. I think there was more testimony in there, sir, and I——

Mr. Stryker: Your Honor sees my problem. It may not be his fault. I am asking for an answer to a simple question. I am asking if he would be kind enough to answer it. If your Honor does not think it is susceptible of yes or no, I will change it.

(Last question read by the reporter.)

Q. You either did or did not. Can you tell us? A. There was a lot of——.

Q. If there were a million other words, did you tell him that? A. I think there was other words——

Q. There may have been, I don't know, but would you

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tell me and the jury whether you told him that? A. I think there were other parts of the conversation may have had a bearing on it.

Q. Before we get to the other parts, will you answer my question, did you tell him that? A. As I say, I think there were other parts of the conversation——

Q. I have no doubt there are pages of conversation, but did you tell him that? A. I may have, sir, but I say it is the best of my recollection, but I still think there is other parts of the record.

Q. Did you tell him that? A. That is the best answer I can give.

Q. And you do not know whether you told him that or not, sir? A. I didn't say that, sir.

Q. I am asking you for your recollection of whether you told him that. You know what I mean by that, because I have said it until we are all worn out hearing it. A. Sir, I think still there are other parts of the conversation have a bearing on that conversation.

Q. I still think I would like to get an answer to my question. Did you tell him that?

Mr. Wessel: I object to the question.

The Court: I think I must sustain it.

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Mr. Stryker: Did your Honor sustain it?

The Court: Yes.

Q. But you had no intention of paying Mr. Weleck the $15,000; is that right? A. That is correct, sir.

Q. In other words, you were intending to mislead Mr. Weleck? You were intending to mislead Mr. Weleck, is that right? A. No, I was not intending to mislead him.

Q. Didn't you intend to convey to him that you would pay him the $15,000, although—— A. This was Mr. Weleck's idea, sir.

Q. Didn't you say to him that you did intend to pay the $15,000? A. No, I believe I asked him how he wanted it paid, sir.

Q. Didn't you lead him by what you said to believe that you were going to pay it? A. Sir, I would have to go over that testimony that was on the wire recorder to refresh my memory.

Q. Your memory does not serve you that much? A. Sir?

Q. It does not help you answer my question? A. Yes, sir; but you are not interested in my memory, sir; you are interested in some exact words here, sir.

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Q. Not at all; use any words you want. Did you tell him that in substance? I don't care what words you use. A. That is the best of my answer, sir.

Q. What? A. That is the best answer I can give you, sir.

Q. Haven't you sworn in another place that you had a marvelous memory? A. Yes, sir, but I think I said in other places my memory was not so good, to the same man.

Q. Let me call your attention to one place. Did you not in the San Juan deposition—page 100, if you want to follow me, Mr. Wessel—I am only interested in the answer, read anything else you want. Did you say under oath, "I have a good memory, sir, you bet your life, a wonderful memory." Did you swear to that? A. Of course, sir, that was my opinion.

Q. Did you swear to what I have just read you? A. I was under oath, sir.

Q. Did you say under oath what I have just read you? A. Yes, but I also said later on my memory was not so good.

Q. Which is it now, good, bad, or what? A. Well, sir, we were talking about things today that go back to 1945, not only today but other days here. Sir, each day I am getting a little older, sir.

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Q. And it is hard to remember? A. A little harder, sir.

Q. Let us see. The conversation you said you had with the defendants, particularly with Howard Lawn, that was in 1945, wasn't it?

Mr. Wessel: I do not know what conversation counsel refers to, and I object to it.

Mr. Stryker: About Mr. Lawn knowing Hannegan and Mr. Lawn was going to run the whole thing, and a lot of things.

Mr. Wessel: I object to the form of the question, if it is a question.

Q. Do you remember testifying about conversations you had with Mr. Lawn and with Mr. Giglio about Mr. Lawn back in 1945? Don't you? A. I do, sir.

Q. Is there any difference in the matter of memory in remembering those from remember the things I have just asked you about for the same year? A. Sir, there are always certain things that are——

Q. Standout? A. That you remember better, sir.

Q. A conversation with a man counsel for the Town Board about paying him $15,000, wouldn't that be the kind of thing would stand out in your mind? A. Yes, but under the circumstances, sir, I would hesitate to pick out just a

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couple of words for you, sir.

Q. I do not ask you to pick out a couple of words for me; I do not care what words you use, I want the idea. A. I am not trying to evade anything, sir. I am just trying to give you a truthful answer.

Q. You did testify here I think on the first day of your direct, or maybe it was the second, I am not sure; you answered a great many questions about Howard Lawn, didn't you? A. I don't recall a great many, sir.

Q. Well, let us see. You said that Mr. Giglio told you that Mr. Lawn had a great deal of influence with Bob Hannegan, do you remember that? A. No, I can't remember that specific conversation, sir.

Q. Well, I suppose I will have to go back to the record. How could you remember what you said about Howard Lawn on direct examination if you cannot remember now?

Mr. Wessel: I object to the form of the question.

Mr. Stryker: It is a perfectly logical question I should think.

The Court: I will sustain the objection.

Q. Don't you remember now whether you did testify (527)

to conversations, a great many conversations in 1945 in which Mr. Lawn's name was used by you? A. I would not say there were a great many mentions of Howard Lawn by me, sir.

Q. There were a great many. I counted them myself, I think it was fifteen or twenty, though I may be wrong. Don't you remember using Mr. Lawn's name? A. Yes, sir.

Q. Some fifteen or twenty times in your direct examination? A. I would not say it was fifteen or twenty times, sir.

Q. How many times do you say it was?

Mr. Wessel: I object to it, your Honor.

Mr. Stryker: I am testing his memory, sir.

The Court: You cannot test it that way. I sustain the objection.

Q. Do you know whether Mrs. Lubben was deceased or was divorced, your wife? A. A divorce, sir.

Q. Do you know where the divorce occurred?

Mr. Wessel: I object, if your Honor pleases.

Mr. Stryker: It is definitely on credibility, and I would like to show it to you.

Mr. Wessel: I do not see that it has the slightest thing to do with the witness's credibility.

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Mr. Stryker: We are talking about memory.

Mr. Wessel: It is so far beyond anything that is proper——

The Court: I will sustain the objection.

Mr. Wessel: I may point out to the Court that even counsel's memory as to the conversations with Mr. Lawn is not accurate.

The Court: No, let us not get into that.

Q. Let me ask you this way: Weren't you asked—I am not asking now, but weren't you asked about when the divorce took place and the city where it took place, and whether Mrs. Lubben was deceased or whether you were divorced?

Mr. Wessel: I object because this is an indirect way of bringing out something that is not relevant.

Q. Weren't you asked about that?

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Mr. Wessel: Now, I object.

Mr. Stryker: I am not asking any questions, just "Were you asked about that."

Mr. Wessel: This backhanded way of bringing into the record material which counsel believes may be prejudicial I think is highly improper, and I should like an opportunity to complete my objection, if counsel please. Counsel should be admonished to allow me to speak.

Mr. Stryker: See if I base it on anything or not. I have the original minutes. That is a copy.

The Court: Well, I will sustain the objection.

Q. Well, isn't this a fact?

Mr. Stryker: I think this is under your Honor's ruling. If not, of course, you will sustain the objection.

Q. Isn't it a fact you didn't know where your wife was divorced?

Mr. Wessel: I fail to see any relevancy of that to this case, if your Honor please.

The Court: Yes, I think that is a subject-matter that doesn't have much bearing here. I will sustain the objection.

Mr. Stryker: All right. Let me have a paper marked for identification.

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I ask you to mark page 159 of the pretrial deposition of David Lubben, taken in San Juan, Puerto Rico.

Mr. Wessel: If I may, at this very point, say, if your Honor please, there is a rule regarding prejudicial evidence. Evidence brought into the record

with one ostensible purpose which, in fact, as another, should be excluded.

The Court: I think we are all pretty well aware of that rule.

Mr. Stryker: I believe I have heard that.

The Court: We are doing our best with regard to that.

Mr. Stryker: Will you mark that for identification, please.

Mr. Wessel: The exhibit is being marked, if your Honor please.

(Marked Defendants' Exhibit R for identification.)

Q. Didn't you state in this courtroom that when you mentioned the corn deal to Mr. Giglio, that he liked the idea and would check it up with Howard Lawn? Did you say that? I believe I said he was impressed with the—he seemed to like it.

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Q. Will you give me an answer? Is that what you said? A. Well, I am just trying——

Mr. Wessel: Counsel is seeking to use words which may or may not be what the record shows.

If counsel wants to use the words of the record, that is one thing.

Mr. Stryker: All right, I will do that.

Mr. Wessel: If counsel will use his own words, that I think cannot be answered by the witness.

Q. Now wait a minute, without looking at the record, without looking at the record, can't you tell us from memory what you testified to here three or four days ago?

The Court: Mr. Stryker, I am not going to ask him to tell us what he testified to three or four days ago.

If you want to ask him about the transaction with Mr. Lawn again, afresh, ask him your questions, go ahead, but I am not going to sit here now and see whether a man can repeat three days later what he said three days earlier. I don't think that is the way in which we test memory. It is an unfair test.

Q. Did you testify in this courtroom that Giglio liked the idea and said he would check it with Howard Lawn and see what Howard Lawn thought about it? Did you not so

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testify with respect to the corn deal? A. I believe I testified in words more or less of that form.

Q. Did you testify told you that Howard Lawn had connections with Bob Hannegan, and he could get his own corn?

Mr. Wessel: I object to the form of the question. That is not a proper summarization of what is in the record.

Here is page 141, and I think I might even read it:

"Howard Lawn told me that he had terrific connections, sir, with a syrup company that was in St. Louis and that he was connected in some way with Bob Hannegan."

This, I think, reflects the error of this kind of examination.

Mr. Stryker: All right, I will do it that way. What page is that?

Mr. Wessel: Page 141 of this transcript.

Mr. Stryker: O.K., all right.

Q. Well, now, I am reading to you, and Mr. Wessel can follow me. Did you testify in this court before this jury:

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"Well, sir, maybe a month after we were in the corn syrup deal, or there were weeks after the corn syrup deal, Mr. Giglio called me in his office."

Mr. Wessel: The word "there" should be "three"—"or three weeks after the corn syrup deal."

Mr. Stryker: What did I say, two? Well, I will start again:

Q. "Well, sir, maybe a month after we were in the corn syrup deal or three weeks after the corn syrup deal, Mr. Giglio called me in his office and told me that from now on I should not concern myself with buying the corn or having anybody go out to pay the premium to the farmer, that Howard Lawn had much better connections and that he would take care of it."

You swore to that? A. Yes, sir.

Q. Now, Mr. Lubben, you have testified about this corn deal and about these defendants in sev al other courts, haven't you? A. More or less, sir.

Q. Well, you described, more or less, your dealings with your former partners in the Shotwell case, in the Weleck case and in your San Juan deposition; is that not correct? A. Wherever I was asked questions, sir, I answered.

Q. You were asked questions in all those three matters, weren't you? A. Yes, sir, to the best of my recollection.

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Q. Let me ask you this: And also you testified—I forgot—at great length about your dealings, what you said were your dealings, with these defendants in the

Kefauver Committee, before the Kefauver Committee, did you not? A. Yes, sir.

Q. Now is it not a fact that in none of those proceedings which I now have before you, did you ever say what I just read you said here, is that right? A. I wouldn't recall, sir. I don't know.

Q. Well, will you mention—and I can look at it; I am certainly not going to bore his Honor or the jury by reading through every word of all these proceedings; if I tried I am sure I wouldn't be allowed—will you tell me, just so I can examine it, any place in any of tho e trials or proceedings where you testified concerning the corn deal with these defendants, where you ever said what you said here about it, referring to what I have just read about Howard Lawn? A. Well, I don't say I didn't, and I don't say that I did, but I believe——

Q. Well,—— A. Just a minute, sir.

Q. Yes, go ahead. A. I believe that the testimony I was giving—I mean, you were more or less guided by the

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people that were asking the questions; I mean that——

Q. You were guided by that? A. No, but I mean in the Kefauver quiz, Mr. Halley was asking questions, and in Chicago there was some other attorney asking questions, and maybe you may overlook one point here and pick it up over there.

Q. I know. Now will you tell me this: is it not a fact that you told this story about Mr. Lawn, which I have read to you, for the first time, at least in public, in this courtroom? Is that not true?

Mr. Wessel: I think I must object to the form of the question.

Mr. Stryker: I think it is very important, your Honor, to determine whether this——

The Court: I will overrule the objection. Go ahead.

Q. Will you tell me that, Mr. Lubben, please? A. Well, sir, I couldn't specifically place certain words I said years back or something like that, but I believe that the sum and substance of my testimony has remained the same throughout.

Q. Well, will you tell me, so I will know which, if any, of the testimonies that I have referred to, in which, if any,

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you said anything like—I don't care about the words and substance—what you swore to about Mr. Lawn, namely, the testimony I just read you, in any of them did you say anything like that, where you used Mr. Lawn's name? A. Well, sir, I couldn't remember, sir.

Q. Isn't it a fact that you didn't? A. I am not clear, sir. I mean, to the best of my recollection, I couldn't say that I did or I didn't.

Q. You couldn't say that? A. No, sir.

Q. Your memory isn't good enough to tell me that? A. Well, I just can't answer the question, sir. I can't.

Q. Let me see: you testified in the Shotwell case in 1953. That is only two years ago, isn't it? A. Yes, sir, about.

Q. Well, it is easy to remember a thing two years ago than it is ten years ago, isn't it, for all of us? A. Sometimes yes and sometimes no.

Q. Well, can't you tell me now—and I am not asking you at all, don't misunderstand me—to say in any kind of verbatim at all—but did you say anything in the Shotwell case a few years ago—I am asking for your memory—in words or substance, not identical but similar to what you

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have sworn to in this courtroom?

Mr. Wessel: I object to the form of the question.

Mr. Stryker: I don't know how else I can ask it.

Mr. Wessel: The question should be, was he asked any question about it.

Mr. Stryker: How should it be? Tell me, I will try to follow you.

Mr. Wessel: Whether the witness was asked any question with regard to that subject-matter in Shotwell.

I will let the question stand. Go ahead, answer. Do you want the question read back?

Mr. Stryker: Yes, I would. I have kind of forgotten.

(Question read.)

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The Court: Well, that does get pretty broad.

Mr. Stryker: I think the question is not very well stated.

By Mr. Stryker:

Q. Did you ever say to any of these proceedings anything about Howard Lawn at all? A. I can't say specifically I did or I did not, sir.

Q. What is your best recollection? Let's take the most recent. I think the most recent was the Shotwell case in '53.

You have no recollection as to whether you mentioned there Mr. Lawn's name at all or not? A. Well, sir, you will have to agree with me, sir, when you are on the stand you are very limited to what you can say and you can't say and——

Q. You heard Mr. Wessel make that objection a moment ago, didn't you? A. I did hear him make an objection.

Q. Well, regardless, you were given a pretty fair scope down there in the Kefauver Committee. They don't have judges there; you can say any old thing you want. You were given a full chance, weren't you? A. You had senators

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there, sir. I think they are pretty good.

Q. Yes, I know you did—Senator Tobey, among others; right? A. Yes, sir. A very fine man.

Q. Nobody was objecting to any questions. There was no lawyer to stop you. You were just asked a question and you went right ahead and said any old thing you wanted, didn't you?

Mr. Wessel: I object. We are arguing about a written record. I will be very happy to turn to the written record.

Mr. Stryker: Suppose I do.

The Court: I will sustain the objection.

Just before we get to deep in this, I am not going to start getting into a characterization of how the Kefauver Committee ran its hearings, the difference between senatorial committees and court-run hearings.

Mr. Stryker: I think the court is much better for justice.

The Court: I appreciate that, Mr. Stryker. I wouldn't want to come to that kind of decision without hearing the other side.

Mr. Stryker: Well, I think that is fair enough.

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All right.

The Court: Let's avoid that. I think we can get along.

Mr. Stryker: I have seven minutes—let's see.

By Mr. Stryker:

Q. Well, all right, in the Kefauver investigation, or whatever they called it, hearings, did Mr. Halley ask you:

"Then will you go on to your negotiations with the Doughnut Company officials"——

Mr. Stryker: Wait a minute, now.

Q. "Mr. Lubben: We went to the Doughnut Corporation of America with Mr. Roth. I was ushered through the offices and I met a great many people. I was slapped on the back and said, 'Dave is coming in with us, becoming a part of the organization'. I met a number of people. I don't recall their names but they were up in the front office —in the front of the office, on the Seventh Avenue side. They could have been the officials of the company. We went all around the offices and we went into an attorney's office called Mr. Goldhill.

"Mr. Halley: He was counsel for the Doughnut Com-

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pany.

"Mr. Lubben: Yes, sir. This is all in the Doughnut Corporation's offices.

"So I discussed selling these people 50 per cent interest in my business. In exchange they were to see that I got some sugar. They were going to use their good graces, their connections to get a sugar quota for Eatsum Food Products. That was the whole basis of selling a half interest in the first place.

"Mr. Halley: What deal was finally made?"

Were you asked those questions and did you give those answers? A. Yes, sir.

Q. Is it not a fact that you did not mention Mr. Lawn being present on that occasion? A. I don't recall whether I mentioned, whether I didn't, sir.

Q. Well, now, I have read to you what you said you swore to. Did you hear Mr. Lawn's name in any of the questions or answers I read? A. No, not in those questions and answers, no, sir, I did not; not in what you just read, I didn't hear Mr. Lawn's name.

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Q. All right. Is there any other place in the Kefauver record where you think you mentioned Mr. Lawn? A. It's a big record, sir. I wouldn't know.

Q. Well, you don't say that you did, do you? A. And I don't say that I didn't.

Q. If you did, I would appreciate your telling me. I will look it up.

Mr. Wessel: I would be glad to assist counsel if he wishes.

Mr. Stryker: You would. That will be fine. All right.

Mr. Wessel: Does counsel wish assistance?

Mr. Stryker: Well, I think you could give it to me.

By Mr. Stryker:

Q. Did you mention in the testimony before Kefauver that I have read that Lawn was present at the Doughnut conference? A. I don't recall whether I did or whether I did not, sir.

Q. Well, in what I have read to you, you did not, did you? A. No. What you have read so far, you haven't said Mr. Lawn's name.

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Q. Have you anything else in mind— A. No, sir.

Q. — that I haven't read?

Mr. Stryker: Now, Mr. Wessel, I would be glad to accept your offer of assistance. Maybe you will

show me some other place I have skipped. You have offered it. I accept it.

Mr. Wessel: Yes. I happen to have here, if your Honor please, something which cannot be disclosed except through the witness. If I may hand this piece of paper to the witness, then counsel——

Mr. Stryker: You said you were going to help me. Can't you show me?

Mr. Wessel: — then let counsel ask the question; I am sure the witness can answer it.

This happens to be a copy of the confidential record which preceded the public hearing and which excluded some of the things——

Mr. Stryker: Are you going to show me that?

Mr. Wessel: I can't show it to counsel unless the Court so directs me, because it is confidential.

The Court: I will direct that you show it.

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Mr. Stryker: Let me see it, will you.

By Mr. Stryker:

Q. Now, you testified in private, before you testified in public; is that right? A. Yes, sir.

Q. Was that testimony taken by Mr. Halley? A. What do you mean, taken by him, sir?

Q. I mean, did he ask the questions? A. Yes, sir.

Q. And after he had asked you these questions in private, then he chose to ask the questions that he did ask you in the public hearing; is that right? A. Well, I wouldn't know what his intentions were, sir.

Q. Well, didn't he tell you? A. No, sir.

Q. Did Mr. Leone talk with you about your testimony in the Kefauver Committee? A. Where, sir?

Q. I don't know. A. I don't ever recall Mr. Leone talking to me hardly at all, sir.

Q. Well, didn't you see him with Mr. Twohig? A. When, sir.

Q. I don't know. You tell me. A. I would like you to be a little more specific sir.

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Q. Did you ever see him with Mr. Twohig? A. Yes, sir, I did.

Q. Well, did you see him at or before the time of the Kefauver hearing? A. At or before?

Q. Well, I think your criticism of the question is well founded.

Did you see Mr. Halley within a short time before you testified——

Mr. Stryker: Strike that.

Q. Did you see Mr. Leone within a short time before you testified before the Kefauver Committee? A. I don't ever remember seeing Mr. Leone, sir, before the Kefauver Committee.

Q. Maybe I have confused the word "before." I mean in point of time, a few days or a few weeks before you testified in the Kefauver Committee, and you talked with Mr. Leone. A. I say I don't ever remember speaking to Mr. Leone, sir——

Q. Ever in your life? A. Just a moment, sir. Let me finish the question. I don't ever remember seeing Mr. Leone or speaking to him prior to the Kefauver hearing.

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Q. Did you talk with Mr. Twohig before you testified? A. Yes, sir.

Q. Was he down there at the hearings, the public hearings? A. The only place I can remember Mr. Twohig, sir, was in the hall. He may have been in the hearing room, sir. I don't recall. But my eyes that day were only on Mr. Halley.

Q. Mr. Twohig was just around the hall. He didn't come in as far as you know to the hearing room? A. I don't say that he did or he did not.

Q. Well, have you become fairly friendly with Mr. Twohig? A. What do you mean by "friendly," sir?

Q. Just what the ordinary word means.

Mr. Wessel: I object to the form of the question.

Q. I would think that was a common word. If it isn't —"friendly" is a word that I would think I would understand or anyone could find in the dictionary.

Mr. Wessel: I don't think it is proper to ask the witness "fairly friendly." I don't know what it means either.

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Mr. Stryker: Maybe you are right.

By Mr. Stryker:

Q. Were you friendly with Mr.——

Mr. Stryker: I seem to tire today. I am sorry.

Q. Were you friendly with Mr. Roth——

The Court: We will finish when you are through with this examination.

Mr. Stryker: I will finish after this question. I think I should while I can still talk.

Q. Were you friendly with Mr. Twohig? A. Well, sir, I have always given Mr. Twohig the respect he deserves as an agent of the United States Government.

Q. What is his first name? A. I believe it is James, sir. I always call him Mr. Twohig.

Q. You always call him that? A. Always.

Q. And he called you—— A. Mr. Lubben.

Q. Mr. Lubben. Did you ever entertain Mr. Twohig down at your estate in Puerto Rico?

Mr. Wessel: I object.

A. What estate?

Mr. Wessel: Completely irrelevant.

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Mr. Stryker: Well, suppose we drop it there. I am tired.

The Court: Very good. Let's get off to a fresh start tomorrow.

I hope that the jury will be able to participate more tomorrow. We will start at 10:15.

Don't discuss the case. Goodnight.

(Adjourned to January 20, 1955, at 10:15 o'clock a. m.)

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New York, N. Y., January 20, 1955.
10.25 o'clock a.m.

Trial resumed.

The Court: On the scope of cross examination that I had under question, I think I will exclude the subject. I think there is too little basis for your—with no reflection on you, but I mean, just balancing all factors, I just think there is not enough basis as to your belief as to the reason he changed that testimony as for some innocent reason to justify getting into such a complicated and collateral matter and on that basis I am going to exclude it.

Colloquy

Mr. Stryker: The matter you are referring to is the one we discussed in chambers with you, writing the three checks and his testimony in the Shotwell case?

The Court: And the date of those two conversations.

Mr. Stryker: I respectfully take an exception and I trust my exceptions are always respectful.

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Mr. Wessel: So the record may be complete on that, may I state, which I didn't yesterday, that the fact whether the person about whom this testimony was given was in Chicago or not on a particular date is not in this record and it will require collateral evidence.

The Court: All right, that is fine.

Mr. Stryker: In other words, your Honor's ruling is, as I understand it, and correct me if I am wrong, that we cannot inquire as to why he changed his testimony.

Mr. Wessel: May I rephrase that, if I may, that your Honor has exercised his discretion to limit the cross examination with regard to his subject matter in view of all the circumstances which have gone before and in view of counsel's statement in chambers.

Mr. Stryker: Does that include a ruling that I may not inquire as to why he changed his testimony?

The Court: Yes. Because I think the whole thing would be too cumbersome.

(Jury in at 10:30 a.m.)

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DAVID GEORGE LUBBEN, resumed.

The Court: All right, Mr. Stryker.

Cross Examination Continued By Mr. Stryker:

Q. Did you ever pay a $5,000 bribe to a man by the name of Holland, an agent of the OPA? A. No, sir.

Q. The Reserve Trading Company was a company that you organized after you left the partnership, wasn't it? A. Yes, sir.

Q. And you have already told us such was the case also with General Confections? A. Yes, sir.

Q. Now, before you joined the partnership, you were running the Eatsum Company as a proprietorship, your own business, weren't you? A. Yes, sir.

Q. And you were in the black-market in your own proprietorship before you ever joined the partnership? A. I was buying merchandise, sugar, in the black market, yes, sir.

Q. And was that also true after you left the partnership and organized General Confections and Reserve Trading? A. I bought merchandise in the black market, yes, sir.

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Q. And was that also true after you left the partnership and organized General Confections and Reserve Trading? A. I bought merchandise in the black market, yes, sir.

Q. Well, after you left the partnership, while you were running General Confections and Reserve Trading; is that correct? A. I bought sugar in the black market, yes, sir.

Q. Can't you give me a direct answer, Mr. Lubben? I am asking if you dealt in the black market in connection with General Confections and Reserve Trading after the time that you left the partnership? A. Well——

Mr. Stryker: Your Honor, can't I have a plain answer to that?

The Court: I won't hold him to a yes or no answer. No, go ahead.

A. General Confections, sir, we paid over the ceiling prices, and we bought sugar in the black market, and Reserve Trading Company, we paid over the ceiling prices, and merchandise—but I don't think we—you can say that Reserve Trading Company—anything they sold, sir, I am sure was the ceiling price, to the best of my recollection.

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Q. In other words, your testimony is that you did not do it in Reserve Trading but did it in General Confections; is that it?

Mr. Wessel: I object to the form of the question.

The Court: I will sustain the objection. I think the testimony was that they both bought it over the ceiling prices.

By Mr. Stryker:

Q. Is that what you intended to say, what his Honor just said? A. Sir, I said that——

Q. No——

The Court: I would rather have him state it, Mr. Stryker.

Mr. Stryker: All right.

A. I said that General Confections, sir, bought raw materials in the black market, for the use of their factory, and so forth.

Q. Did you also sell in the black market for General Confections after the partnership? A. We sold some merchandise over the ceiling price, yes, sir.

Q. That was black market, wasn't it? A. Yes, sir.

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Q. That was General Confections? A. Yes, sir.

Q. Same is true of Reserve Trading? A. No, I didn't say that. Just a minute. On Reserve Trading Company, Reserve Trading Company we bought over the ceiling price, but in the case of corn syrup, sir, it was sold with an invoice, and I am convinced——

Q. Pardon, did you sell goods in the Reserve Trading Company over the ceiling price, after the partnership? A. I can't recall of any instances, sir. There may have been.

Q. Now, were you present—my question is confined just to that—when Mike Cohen testified before the Kefauver Committee? A. Yes, sir. In Washington, sir?

Q. That is it? A. Yes, sir.

Q. You heard him testify? I am not asking you what he said. You heard him testify? A. Yes, sir.

Q. And did you after he testified ask permission to return to the stand? A. I?

Q. And did you return to the stand after Mike Cohen had testified? A. I don't recall retestifying after Mike

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Cohen.

Q. Did you ask permission to do so? A. I think, sir, I had to come back in the afternoon about some other thing that the senator asked me to find out.

Q. Well, did you come back and deny anything that Mike Cohen had said? A. No, sir, I don't—I think I came back before Mike Cohen.

Q. After Mike Cohen had testified, did you go back on the stand and deny what he had said?

Mr. Wessel: I now object to this question in the light of the examination. I think it is perfectly clear what the examination is about and it is improper.

Mr. Stryker: I shouldn't think I would have to respond to that.

The Court: Well, I am probably missing some of the finer points, but at this point I am going to sustain the objection.

Mr. Stryker: I except.

By Mr. Stryker:

Q. Did you hear what Mike Cohen said when he testified?

Mr. Wessel: I think I make the same objection, (556)

if your Honor please.

The Court: I think I will sustain the objection.

Mr. Stryker: I except.

By Mr. Stryker:

Q. Well, did you not hear Mike Cohen say——

Mr. Wessel: I object to this before it is stated, if your Honor please.

The Court: I really don't think that we are interested here in what Mike Cohen said unless Mike Cohen is going to come here and testify.

Mr. Stryker: I don't want to ever argue with your Honor about a ruling.

The Court: Very good.

Mr. Stryker: Because you are the supreme judge of the law, but to my mind it is very relevant and I don't think I should have to, in advance, explain the relevancy to this witness.

The Court: No, I don't think you have to do that.

Mr. Stryker: If your Honor denies permission, I very respectfully bow and very respectfully take an exception.

The Court: All right. I sustain the objection.

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Mr. Stryker: Can I speak to the Court with Mr. Wessel?

The Court: Certainly, fine.

(Discussion at the bench as follows:)

Mr. Stryker: I offer to show that Mike Cohen in the Kefauver investigation, in the presence of the witness, who has already said it was in his presence, that was the testimony—testified as follows:

"Mr. Halley: Did you ever have an OPA case of your own involving some cars of glucose that had been shipped to Florida?

"Mr. Cohen: Yes, sir.

"Mr. Halley: What was that?

"Mr. Cohen: At that time I was partner with Dave Lubben, Reserve Trading Company, and we settled for $10,000. We gave cash to Mr. Louis Roth. Mr. Lubben gave him $5,000, and I gave him $5,000.

"Mr. Halley: What happened there? Let's get that.

"Mr. Cohen: Then we opened up. I had to keep out of the office for two days because they

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kept annoying me, a fellow by the name of Mr. Holland in the OPA."

Mr. Wolfram: He identifies that as a Reserve Trading transaction.

The Court: He mentioned it in that.

Mr. Wolfram: Oh, he did?

The Court: It is in there in what you have read.

Mr. Stryker: All right. Now, there is this witness' company, Reserve Trading Company; here, a man who says he was a partner, says they paid this bribe, in the presence, as he said it, in the presence of the witness who did not deny it.

Now I can't see how I can cross examine this man as to his credibility, veracity, character, without being able to ask him about that, about the facts.

The Court: May I see it?

Mr. Stryker: You want to read it.

Mr. Wessel: May I make a short statement?

The Court: You don't have to say anything here.

Mr. Stryker: It begins some line somewhere there (indicating).

Mr. Wessel: I would like to make a short state-
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ment.

The Court: The reason that I am sustaining the objection at this point is that I don't think that the failure of this witness to deny anything before the Kefauver Committee is in any way susceptible of an inference against him, knowing how the Kefauver Committee was run.

Mr. Wessel: That is not what I am trying to say.

Mr. Stryker: That isn't my sole point. That is an incidental point.

Mr. Wessel: In the first place, if your Honor please, whether or not Mike Cohen is telling the truth—and, of course, the witness has already stated about that; in the second place, even the authenticity of these minutes is a question which will be established by collateral evidence.

In the third place, this evidence, if brought to the jury, would be prejudicial. Obviously, the witness already answered the question.

The Court: All right, I will stand on my ruling.

Mr. Stryker: Very well, sir. I will take an exception.

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Q. While you were a partner of Mr. Giglio you had your own accountant, a man by the name of Mr. Bercu, did you not? A. Yes, sir.

Q. And we have it in evidence here, I am not sure whether it is one or two of his monthly reports, have we not? A. Yes, sir.

Q. Did Mr. Bercu render you monthly reports during the time that you were in the partnership? A. Yes, sir.

Q. You were there about nine months, I think you said; is that right? A. Yes, sir; but Mr. Bercu left prior to me, sir.

Q. I think you said yesterday he left in February. Am I wrong about that? A. Some time in there; yes, sir.

Q. Up to the time he left did he render you monthly reports of the business of the Eatsum Food Products Company? A. He rendered two reports, one to me and one to Mr. Giglio.

Q. Did he do that up to the time he left in February? A. Yes, sir.

Q. When you got those reports, what did you do with them? A. Looked at them, sir, to see if we were making any money.

Q. Did you keep them? A. I think I put them in the

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file, sir. I don't recall. Some of them I did.

Q. You kept them, anyway. I am not interested in the exact place you put them, but you did keep them? A. To the best of my recollection, sir.

Q. And there came a time when you engaged the firm of Sproul & Scholz as your accountants, did there not? A. Yes, sir.

Q. And in fact Sproul-Scholz prepared your own return for the year 1946, did they not? A. Yes, sir.

Q. You assisted Sproul-Scholz in making up that income tax return of yours, did you not? A. How do you mean I assisted them, sir?

Q. Well, they asked you questions and you answered them? A. I don't recall—they may have asked me some questions, sir. I can't recall.

Q. I am not asking what they were, but if before they made up the report they talked to you and asked you what facts you could give them. A. I do not recall any conversation, sir. There may have been.

Q. I am not asking for the exact conversation or time, but somewhere when Sproul-Scholz were working on your return did you not talk to them about what was to go into the return.

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Mr. Wessel: I object to the question as immaterial.

Mr. Stryker: I am sure it is very material at the moment. I think your Honor will not sustain that objection.

The Court: I will let him answer again. I believe he has answered.

A. I do not recall any conversation with——

Q. What? A. I do not recall any conversation specifically about my income tax for 1946.

Q. Is it your testimony when they made up the report you had no conversation with them at all about what was going into it? A. Where did I say that, sir?

Q. I am asking you. A. No, I didn't say that, sir. I do not recall any specific conversation in regard to my income tax paper. I don't recall any.

Q. And even if you don't recall it, you do not know you did talk to them?

Mr. Wessel: I object.

Q. Did you talk to them about it? A. No, I do not recall talking to them at all.

Mr. Wessel: I do not see that it makes any difference, your Honor.

Q. Did you show them these monthly returns? I mean. (563)

Sproul-Scholz. I said "returns" but monthly reports, made to you by Bercu, your accountant. A. I think they went over them; yes, sir.

Q. Let me get that very clear so that you do not misunderstand me. Did you take from wherever you had these reports, these reports themselves, and hand them to Sproul & Scholz?

Mr. Wessel: If this is important, I object to the use of the words "these reports."

Mr. Stryker: The reports we have talked about in the prior testimony, monthly reports.

Mr. Wessel: I object to the use of the words, "monthly reports." I think there is confusion to it.

Q. You have told us that Bereu made monthly reports and gave you one copy of them, month by month, until he left some time in February.

Mr. Wessel: I object to that if your Honor please. I will be glad to state my ground for the objection.

Mr. Stryker: Is that not his testimony this morning?

Mr. Wessel: There are two sets of reports.

Mr. Stryker: Read my last question.

(Last question read by reporter.)

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Mr. Stryker: What is confusing about that?

Mr. Wessel: I think I can bring it out. It is perfectly clear what is confusing about it.

Q. I am asking you if when Sproul & Scholz were working up your income tax return for the year 1946 you showed them these reports that you had received from your accountant Bereu? I think that is clear. Will you give us an answer to that? A. For what period of time, sir? You start off referring to the General Confections.

Q. Referring to the time or the period for which you received monthly reports from Bereu. We have had that quite a few times, you did receive them down to the time you left in February. Will you tell me whether the reports that you personally got from Bereu were handed to you by Sproul & Scholz? A. I don't remember handing them to him, sir. I think they were in the office; they may have looked at them and may not.

Q. Whether you took it in your hand and handed it to them or had it on the desk, I don't care, I am asking you if in some way, whether by your hand or somebody else's hand, you made those monthly reports you have described you received—did you lay those in any way, or cause them to be laid, or have them on the table, or show them, however

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you did it, to Sproul & Scholz? A. I can't remember any—I don't say I did not and I don't say I did. I am sure that they went over my books from one end to the other.

Q. My question is confined for the moment to the monthly reports, copies of them that Bercu gave you. That is my question, and what it is directed to at the moment, and not books. Did you show them to Sproul & Scholz; and did they or did they not see them on the table, whether you had them in your hand or not? A. Sir, I think you should separate the reports. There was two phases of the business there.

Q. What is that? A. I think you should separate the reports. There was two phases of the business there, there was proprietorship and the partnership.

Q. All right, I will do just that. I am talking about the monthly reports that Bercu made and gave you copies of during the partnership, that is, from the time he was there, which I think you have said began in June, and ended sometime in February. Now is that clear to you, Mr. Lubben? A. Now you are speaking of the partnership?

Q. I said it three or four times; that is exactly what I am speaking of. Do you understand it now? A. Yes, sir.

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partnership.

Q. Of the partnership. A. I do not recall giving Sproul-Scholz any specific copies of my income tax returns on the partnership. I do not recall that.

Q. Will you deny that you did or that you did not? A. No, sir; I said I just do not recall it.

(Last two questions and answers read at Mr. Stryker's request.)

Mr. Stryker: I missed that, and Mr. Wolfram was kind enough to call my attention to it.

Q. I am not asking about income tax returns you had from Scholz. I am talking about the monthly reports that Bercu made to you during—only the partnership, that is all I am talking about, for whatever time he was there. I think you have said from June to February. That is what I am talking about. I am not asking about income tax returns that you had. Did you hand Scholz or submit in any way at all, I don't care how, those monthly reports that I think I have made clear, to Sproul & Scholz when they made up your return for the year 1946? A. During the partnership, sir, I don't recall giving Sproul-Scholz any copy of any monthly reports——

Q. That is not what I asked, Mr. Lubben, whether you (567)

did it during the partnership. I asked whether when Sproul-Scholz came to make up your income tax return you showed them, gave them, handed to them, let them see, whatever it is, these monthly reports. Do you understand the question? A. You keep changing the question, sir.

Mr. Stryker: Read the question to the witness.

Q. (Read by reporter.) A. Now, sir, you are speaking of the reports during the partnership? Q. I am speaking of the reports I have been speaking about for half an hour, maybe not that long—but it seems so to me. The reports that Bercu made and handed to you during the partnership.

those are the reports I am identifying. My question is, when Sproul & Scholz came to make up your 1946 income tax return, you showed, gave, or permitted them to see those reports. Isn't that clear to you? A. Yes, now you are getting it very clear, sir.

Q. Thank you. Will you give me an answer, then? A. Yes, sir; when the time came to make up my——

Q. Just a minute, Mr. Lubben, let me ask you first, are you not able to answer that question yes or no? If you are not, that is one thing—— A. I said before——

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Q. Pardon me. Are you not able now to tell this jury by a plain yes or no answer, whether you did the things I asked you about in the previous question?

The Court: I won't compel him to answer it that way.

Mr. Stryker: I understand that, but I asked him if he can.

Q. Can't you do that?

The Court: (To witness) Answer the question without limiting it to yes or no.

A. I don't recall giving or showing Sproul-Scholz—I cannot recall specifically showing Sproul-Scholz copies of the 1946 reports. I mean of the partnership, monthly reports made by Mr. Bercu, when they made my 1946 income tax return. I don't say that I did not and I don't say that I did; I just can't recall it.

Q. Which particular person or partner of Sproul-Scholz made up your 1946 return? Was it Sproul or who was it; whom did you talk with about it? A. I think Mr. Scholz used to come up to the plant. I used to talk to Mr. Sproul, too. Which particular one made it up I cannot remember,

Q. Whom did you talk to of that firm about the making up of your 1946 return?

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Mr. Wessel: I object to this questioning and this line of examination as immaterial.

Mr. Stryker: It is very material, and I do not propose to state for this witness what I am leading to, and do not think I should be required to.

The Court: I think the question is objectionable in form, in view of the previous answer. He is just talking about a specific return.

Mr. Stryker: I am asking now, your Honor, about the particular individual in Sproul-Scholz who prepared that, the man he talked with, that got it up.

The Court: In view of his previous answer——

Mr. Stryker: He said he does not remember the conversation, but I do not understand that to mean he does not remember whom he talked with.

The Court: My recollection is he said he did not talk to anybody. Maybe I am wrong.

Mr. Stryker: Perhaps I better find that out. May I find that out?

The Court: You better find that out again.

By Mr. Stryker:

Q. Is it a fact you don't remember whom you talked to in Sproul-Scholz's concern making up the 1946 return? A. Sir, I talked to Mr. Sproul, I talked to Mr. Scholz, a number of times; told him all about my previous business.

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Whether I showed him reports then at the particular time of making that report up or previously, I don't know, I don't remember. I do not know who signed the name, who

was the certified public accountant on my statement. Whose name it is I do not know.

Q. Mr. Lubben, in your direct examination you told us you lied in the College Town case because of two things, one is fear, fear of the defendants, and the other was that you did not want to reveal publicly your black market operations. If that is not a correct paraphrasing I will have to turn back to the testimony.

Mr. Wessel: I think it is better to turn back to the testimony.

The Court: All right, get the testimony.

Mr. Stryker: It will take a minute to do that, your Honor.

The Court: All right.

Mr. Wessel: Pages 199 to 202, I believe.

Q. Page 201, interrogation by Mr. Wessel. Was this question asked you and did you give this answer:

"Q. What were those two things? A. Well, sir, number one, I was told many times to keep my mouth shut about anything that happened in Eatsum Food (571) Products, and if I didn't it would be just too bad for me. I was—well, for the same reason, sir, I was afraid, for the same reason I didn't go to the court when I dissolved my partnership to get a split down the middle because how could I go into court, sir, here I am a black marketeer and if I did go in——"

That is the end of the answer. Was that question asked you and did you give that answer?

Mr. Wessel: I do not believe that is the end of the answer.

Q. I am asking you if you gave that testimony, if that question was asked you and you gave that answer? A. I think there is more to the answer than that.

Q. Surely, there are maybe two or three hundred pages in the record, but I am confining it at the moment to the topic under discussion, namely, the reasons for your lying in the College Town testimony. Are not those I have just read the reasons you gave for lying? A. I don't think it is a complete answer, sir.

Mr. Wessel: May I refer——

Q. All right, the next page, 202:

"Q. What was the other reason? A. The second, sir—well, sir, here was a civil case and I didn't want to get my name in the newspaper, and the fact I had been in the black market, and I didn't

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want to make any trouble and I just told a lie. Shortly thereafter, sir, why, it didn't make any difference at all."

Were those questions asked you and did you give those answers? A. Yes, sir; I did.

Q. Those were the reasons that you gave here as to why you lied; isn't that so? A. Yes, sir.

Q. Your testimony where you lied in the College Town case was given, was it not, on March 6, 1950?

Mr. Stryker: If that is not right, Mr. Wessel, correct me. I am sure it is.

Mr. Wessel: We believe it is March 7.

Mr. Stryker: What is it, March 7?

Mr. Wessel: I believe that is correct.

Q. All right, then, March 7, 1953, that is the day you testified in the College Town case and lied under oath, isn't it? A. You say 1953, sir?

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Q. Did I say '53? If I did, I am wrong. Of course I mean 1950. A. Yes, sir.

Q. All right. Now, less than six months later, namely, on August 22, 1950, you testified before the Kefauver Committee; is that not a fact? A. Yes, sir.

Q. And some two years before your testimony before the Kefauver Committee, namely, sometime in the year 1948, you have told us that you met Agent Twohig for the first time; is that right? A. Sometime in 1948, yes, sir.

Q. And that was before you had given this false testimony in the College Town case, wasn't it? 1948 is before 1950. A. Yes, sir, it was.

Q. All right. And you met Agent Twohig—Agent Twohig and other agents, I think you have said—if not, tell me—many times after you first met Agent Twohig in 1948; is that correct? A. Well, I would change the word "many," sir to a number of times.

Q. All right, take it that way. And that was what you have just said, before you testified in the College Town case; is that not so? A. Yes, sir.

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Q. And before you testified in the College Town case, you had been to 253 Broadway, had you not?

Mr. Wessel: I think I must object. This is repetition, and it appears to be summation.

Mr. Stryker: I don't think there is any question about it. Your Honor will not exclude that, I am sure.

The Court: Mr. Stryker, it does seem to me we went all over this the first day of cross examination.

Mr. Stryker: But this is in connection—I am only asking these to identify dates. It is in another connection.

The Court: Go ahead.

Mr. Stryker: We have been over it, I grant you.

Mr. Wessel: I am still willing to stipulate 1948 is before 1950, if your Honor please.

Mr. Stryker: Please don't.

The Court: Let's not develop any more issues than we already have.

Mr. Stryker: Would you read my last question. (575)

(Question read.)

A. Well, you mean that specific day, sir?

Q. I did not ask that and I don't mean that. I mean only what I have asked in the question. A. You will have to be a little more specific, sir. I mean I don't want to have my words misconstrued. If you will say was I there——

Mr. Stryker: Read the question. If it is not clear to you I will try to make it clearer.

Read the question.

(Question read.)

A. You will have to clear up the question a little bit and be a little more specific, sir, before I can give you an answer.

The Court: I think Mr. Stryker said that he did not mean on that day. He means at any time.

Mr. Stryker: That's right. That is just what I meant, your Honor.

A. Yes, sir, I had been to 253 prior to that, sir.

Q. When you say "prior to that," you mean March——

Mr. Stryker: Strike it.

Q. When you say "prior to that," you mean, do you not,

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prior to March 7, 1953—why do I do that?—March 7, 1950? A. Well, your dates might be a little mixed up, sir, so I will say prior to the College Town Candy case.

Q. We have had it sometime this morning, with Mr. Wessel's help, that the date was March 7, 1950, haven't we?

Mr. Wessel: Well, the witness may not know that.

The Court: I think we can all agree that this witness has testified that prior to his testimony on March 7, 1953, at sometime prior thereto, between then and 1948, he had been to 253 Broadway.

Mr. Stryker: Your Honor, you see, even a very learned man on the dates might misstate it. I am talking about 1950.

The Court: All right.

Mr. Stryker: I admit I have said it wrong a couple of times. I hope I will get it right this time.

The Court: It shows how I can add to the confusion.

Mr. Stryker: Well, you didn't.

Now, let's see if I can get at it.

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The Court: I will promise to let you state this next question without any interruption or help.

Mr. Stryker: It is all right, your Honor. 253 got me confused with 1953, and so on. Now, let's go back.

The Court: All right.

By Mr. Stryker:

Q. I think—whether I said it or not, I will ask you now—when you said a moment ago prior to the College

Town testimony, did your mean prior to March 7th—I hope I get this right—1950? Is that what you meant? A. Well, prior to the College Town Candy case, sir, had been to 253.

Q. Well,—all right, all right.

And you had told the defendants in the Ronayne office, in 1949, that you were going to 253 Broadway; is not the fact? A. In 1949, sir—I told the defendants——

Q. Now, Mr. Lubben—— A. I told the defendants I was going to 253, yes, sir.

Q. And that was in 1949, wasn't it? A. To the best of my recollection it was, yes, sir.

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Q. All right. And that was before your testimony in the College Town case, was it not? A. To the best of my recollection, sir, it was.

Q. Well, if it was in 1949, it had to be before March, 1950, didn't it? A. Yes, sir.

Q. Now, all of these things that I have mentioned in these previous questions took place before you testified in the College Town case; that is so, isn't it? A. Yes, sir.

Q. And when you testified in the College Town case, you had the protection of the United States Government, in the shape of Mr. Twohig; isn't that so, and other agents?

Mr. Wessel: I object to the form of the question.

The Court: I will sustain it.

By Mr. Stryker:

Q. Well, didn't you feel, after you had talked with Mr. Twohig, and whatever other agents there were, that the Government was going to protect you? A. No, sir; they never told me they were.

Q. You didn't think so? I am getting your state of mind. A. Getting what state of mind, sir?

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Q. Yours. A. Is that a question, sir, you said?

Q. That's right. A. Whose state of mind?

Q. I have said yours, y-o-u-r-s, yours. A. What about my state of mind?

Mr. Wessel: I don't think there is a pending question.

By Mr. Stryker:

Q. I am inquiring about your state of mind: A. When? Now? I don't know what you are talking about, state of mind. What about my state of mind?

Q. I am inquiring about your state of mind when you lied under oath on March 7, 1950, in the College Town case. Now is that clear? A. My state of mind at that particular time is very much the same as it is today.

Q. Much the same as it is today? A. I am very, very much afraid, yes, sir.

Q. Well, is your state of mind today that you have the protection of the Government? A. Well, sir, since I have been here, yes, sir, I have asked to have some protection. That is why they have Mr. Twohig in the room next to me at the hotel.

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Q. Well, you feel, then, that the Government is protecting you and that was the state of mind, you have already told me, that you had when you testified falsely, under oath, on March 7, 1950, in the College Town case? A. I didn't say the Government was protecting me then.

Q. You did not say that your state of mind then was the same, or much the same as it is now? Did I not hear that correctly? A. And I went on a little further and I said I was afraid.

Q. All right. And you are afraid now? A. Well, sir, I read in the papers every day people get knocked off, sir.

Q. Are you afraid now? A. Yes, sir, I am.

Q. All right. Now, have you lied in this court because of fear? A. I have told the truth, sir, to the best of my ability.

Q. You have told the truth? A. I have been in the black market, sir. I have told the truth. I testified in the Kefauver quizzing. I have paid my sentence, and I am going to get it finished.

Mr. Stryker: I am going to ask your Honor to (581)

stop this tirade. It is not an answer at all.

The Witness: It is the truth, sir.

The Court: I think that—by and large, I will say this——

The Witness: I am sorry, sir.

The Court: All right. I am not interrupting it because it was a tirade, and I will tell you, if you will give as simple an answer to a question as you can, it is better. At the same time I don't think that when a question embraces, in one way or another, an accusation, and a series of questions suggest an accusation, that a mere answer must be "No."

I think a man can underline the "No."

Now we will go on.

Q. Now, to go back, it was fear——

Mr. Stryker: Strike it out.

Q. Fear was one of the two reasons that you gave for perjuring yourself in the College Town case, isn't that so? A. That is correct, sir.

Q. Now, less than six months later——

Mr. Stryker: Strike that, please.

Q. The College Town case was a case in a small courtroom like this, comparatively unpublicized; I mean, there weren't many people there, is that right? A. I don't know how many was there, sir. It seemed——

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Q. I didn't ask you to count them. A. It seemed a lot to me, sir.

Q. What? A. It seemed a great many to me.

Q. Did it seem as many as were in the Senate chamber room in Washington when you testified before the Kefauver Committee? A. No, sir, but there the crowd was behind my back, so I don't know how many were in the Kefauver Committee.

Q. There were a great number of people there, weren't there? A. I saw plenty in the hall, lots of photographers, taking pictures, and reporters.

Q. Reporters taking pictures outside, and even in the hearings; the committee allowed them to be taken, didn't they? A. Yes, sir.

Q. And there were a great many people in the hearing room when you testified before the Kefauver Committee on August 22, 1950; is that not a fact? A. Yes, sir.

Q. Well, fear didn't deter or prevent you from telling all that you wanted to say about your connection with these defendants, about your black market operations, did it? A. I didn't care any more, sir.

Q. You weren't in fear then? A. I was in fear, but you

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can go so far, sir, and you say, "What have I got to lose? I have lost my reputation, my name is gone; my business is gone; everything is gone, because I have been in the black market. What else can I lose?"

Q. Well, how about being indicted for perjury? Would you lose that? A. Sir, I don't care what you do to me, believe me.

Q. Could you lose by being indicted for filing a false income tax return, yourself? A. Sir——

Q. Isn't that something else you could lose? A. Sir, my income tax returns are filed by certified public accountants.

Q. Yes, I am very well aware of that. A. Yes, sir. There are men who go to school, who know how to do it.

Q. I am aware of that, too. A. So I didn't file any false ones.

Q. You didn't? A. I filed what my accountants told me was correct.

Q. And they told you what was correct after you told them what the facts were. They couldn't get the facts from—— A. My facts came from the books of my company.

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Q. You don't recall whether you gave them these Bercu monthly reports; you have already told us, haven't you? A. I said I don't know whether I did or whether I didn't.

Q. All right, all right. Now—well, then, whatever fear you had on August 22, 1950, when you appeared before the Kefauver Committee, did not restrain or prevent you from telling all about these defendants, and your own operations in the black market, did it? A. What am I going to do, sir? I told you——

Q. Mr. Lubben—— A. I told you it was the end——

Q. My question, see, is this: you have given fear as the reason why you perjured yourself in College Town. Now did fear restrain you from telling what you said was the truth before the Kefauver Committee, that is all I am directing this point to.

Mr. Wessel: If counsel is going to use words like "fear" and "truth," to which I have no objection, the

witness cannot be compelled to give a yes or no answer.

The Court: I think you are right.

Q. At any rate, whatever——

Mr. Stryker: Strike that.

Q. At least this is the fact, isn't it: that five months after you perjured yourself in the College Town case you testified (585) to what you said were the facts in the Kefauver Committee. You told the whole story, is that right? A. Yes, sir.

Q. All right, now we have that.

You said a moment ago that the accountants made up your return from your books. Did you turn over to the accountants, Sproul & Scholz, the cash disbursement book of General Confections or of Reserve Trading? A. Sir, all of the books were in the office. The accountants came over every month; sometimes they were in there for a couple of weeks; all the books were there. I had nothing to hide.

Q. Mr. Lubben, you have got me a little confused. When you say "there", are you referring to Sproul & Scholz or "there" meaning during the partnership?

Mr. Wessel: I think it means neither one, and I object to the form of the question.

The Court: I will sustain it.

Mr. Stryker: Well, I want to get it clarified. Can't I ask what he means by a word?

Mr. Wessel: He has given two alternatives, neither of which could be a correct answer.

Mr. Stryker: That isn't an objection, is it?

The Court: I think it is.

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Mr. Wessel: It is.

Mr. Stryker: Well, all right, you are the judge.

Q. Did Sproul & Scholz have available for them, when they made up the 1946 income tax return, the cash disbursement book or books of General Confections and Reserve Trading Company? A. They had all the books. Now we are talking about General Confections and Reserve Trading Company for the year 1946, are we right, sir?

Q. That is right. A. All right, sir. They had all of the books that were carried in the normal course of business.

Q. Then that would include the book, the specific book I mentioned, the cash disbursment book or books of those two companies, General Confections and Reserve Trading; is that correct? A. Well, sir, they must have had it. They were giving me monthly statements. They weren't taking them out of their hat.

Q. They weren't giving you monthly statements, Sproul & Scholz? A. I think so, sir, sometime in 1946, yes, sir.

Q. Aren't you referring to the Bercu monthly statements? A. No, I think Mr. Bercu started in 1946, but then, sir, we changed to Sproul-Scholz.

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Q. Mr. Bercu started in 1946? A. I believe, sir, to the best of my recollection. Mr. Bercu started——

Q. Let me get that. Go ahead. A. In 1946, sir.

Q. Haven't you told us that Mr. Bercu came in as your accountant in 1945, when you joined the partnership?

Mr. Wessel: I object to the form of the question.

Mr. Stryker: Merely identifying a fact.

Q. Haven't you told us that?

Mr. Wessel: We are talking about different companies.

Mr. Stryker: Now I must object to these interjections of what we are talking about. They can't be other than advice to the witness, however well intentioned.

Mr. Wessel: The witness knew this long before I said it, if your Honor please.

Mr. Stryker: You shouldn't say it. You shouldn't say it.

Will your Honor pardon me a moment?

The Court: Surely.

Mr. Stryker: There are quite a few details, your Honor. I hope you will pardon me a minute. I may (588)

save your the time.

The Court: Would you like to take a recess now?

Mr. Stryker: I think I would.

The Court: All right, let us take the noon recess now. Don't discuss the case.

(Jury out.)

(Jury in box.)

By Mr. Stryker:

Q. Mr. Lubben, when your companies went into receivership, did you turn over to the receiver the cash disbursements book of General Confections for the period from March, 1946, to February 1947? A. I gave him all the books that were in the place. Whether I gave it to him or not I don't know. I don't know a cash disbursement book from any other kind of book.

Q. You do not know much about books. A. I don't know anything about books.

Q. Did you destroy that book before you went into receivership? A. I have never destroyed any books, sir.

Q. You had it just before you turned over whatever you did turn over to the receiver, did you? A. Sir, we had all the books in the place and——

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Q. "All" means that—it would include that. A. Nobody ever said there was any books gone or not; I don't know anything about it.

Q. I ask if you had the cash disbursement book before you turned over your books to the receiver. A. If there was any book necessary for the normal conduct of the business it was there.

Q. Let me be specific: was that book there? A. How do I know, sir. I don't know if any books were there, and I don't know if it was not there.

Mr. Stryker: Could I have Defendants' Exhibit E for identification?

(Mr. Wessel hands exhibit to counsel.)

Mr. Stryker: The two are numbered differently, that is why I am hesitating a moment, if you will be kind enough to bear with me.

Q. Did you in this trial, before this Court and jury—were you asked this question and did you give this answer—page 291, Mr. Wessel—

"Q. Just like you want this jury to believe you, don't you? A. I am here under oath and I am telling the truth."

That question was asked and you gave that answer in this trial, didn't you? A. Yes, sir.

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Q. Did you make the same statement in the College Town case? A. I don't recall making any statement in the College Town Candy case. If you will refresh my memory and you have a copy of it, sir, why read it to me.

Q. I will try, yes. Page 70 of the College Town testimony:

"Q. Be sure, now. A. I am under oath, sir."

You did so testify, did you not? A. If it says that in the College Town Candy, sir, I said it.

Q. Are you doubting that I read it right? A. No, I just simply said if it said that in the College Town testimony, I said it.

Q. Are you disputing something there? A. No, sir; I think the answer was sufficient.

Q. You do. In other words, not only were you perjuring yourself in that case, but you took occasion to tell the jury that you were under oath; that is so, isn't it? A. Yes, sir.

Q. In other words, in deceiving the jury you added to the deception of your perjury the statement "I am under oath," didn't you? A. Yes, sir.

Q. Well, did you adopt any other means of deceiving the jury in the College Town case? A. I don't think I ever

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deceived the jury, sir, because the case never went to the jury.

Q. Well, you at least tried to deceive them? A. Well, sir, I told a lie.

Q. You also added, "I am under oath," didn't you? A. Yes, sir.

Q. Weren't you thereby endeavoring to deceive the jury? A. I told a lie, sir.

Q. No; that is not my question. Weren't you thereby, by adding the statement, "I am under oath"—weren't you thereby attempting to deceive the jury? A. What question were we talking about, sir, when I stated that?

Q. I think we had it that you said under oath that you told the jury, or said before the jury, "I am under oath." We have that settled. Now did you not thereby, in addition to your perjury, attempt, whether you succeeded or not, to deceive that jury in the College Town case? A. I told a lie, sir.

Mr. Stryker: Will you read the question, and I want an answer.

Mr. Wessel: I do not think it is necessary. I object to it.

Mr. Stryker: His Honor may rule on that. I think it is very necessary.

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(Last question read by the reporter.)

The Court: I think it has already been answered, hasn't it?

Mr Stryker: No. I submit to the Court that he answered he told a lie, and I am now inquiring into his motive, intention, and state of mind.

The Court: Go back to where the testimony was first read from the College Town case, Defendants' Exhibit E, and read that.

(The reporter then read from the testimony beginning with the question, beginning "I will try, yes," to the following question and answer:

"Q. In other words, in deceiving the jury you added to the deception of your perjury the state-

ment, 'I am under oath,' didn't you? A. Yes, sir.")

The Court: That last question is what I had in mind.

Mr. Stryker: May I have an answer to that?

The Court: Read the last question.

(The reporter reread the above quoted question and answer.)

The Court: Do you want an answer beyond that?

Mr. Stryker: Yes, he answered he so testified. (593)

My question is directed to whether that is an additional method or attempt at least to deceive the jury, that is the point.

The Court: You realize your question incorporated that. All right, read the last question and answer.

Mr. Stryker: Suppose I save everybody's time, including your Honor's, by asking another one.

The Court: All right.

Q. From your testimony we know that you committed perjury in the College Town case, you have told us that; and by that perjury you attempted to deceive that jury, didn't you? A. Well, sir——

Q. Didn't you attempt by your perjury to deceive that jury?

The Court: You do not have to answer it yes or no. Go ahead and answer?

A. Sir, that day, I was not thinking of any jury. It is true a jury was there, but I wasn't attempting to deceive them.

My mind just wasn't there, sir. I was telling a lie, yes, sir, and if you can——

Q. Didn't you know the jury was listening to that lie and were weighing and had to weigh under the court's instructions, the truth of what you were saying? A. You

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can be in the witness chair, sir, and your mind can be a little bit different, sir, you don't think of those things.

Q. You did not think whether it was perjury or not? A. No, sir; I never thought of perjury, sir. I told a lie, but I didn't think it was perjury.

Q. When you tell a lie it is not perjury? A. No, sir; I went out there, went home, went to my priest. I confessed my sin, I am sorry for it.

Mr. Stryker: Is that a proper answer; I ask the Court?

The Court: (To witness) You were asked when you tell a lie did you perjure yourself? He says he did not. I think that is the force of his answer.

Q. Now we have it that you stated to the jury you were under oath. Did you adopt any other means in that trial of attempting to deceive that jury in the College Town case? A. What do you mean, any other means, sir?

Q. I have not defined it yet, I am asking you. A. I can't answer that question, sir.

Q. You do not know? A. I do not know what the question means, sir.

Q. Did you not in addition to what we have been over,

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engage in irresponsive answers and speeches for which you were rebuked by the court?

Mr. Wessel: I object to the form of the question and ask that it be stricken from the record.

The Court: I will sustain it.

Mr. Stryker: How does your Honor rule?

The Court: I leave the question in the record but sustain the objection.

Mr. Stryker: At this point, your Honor, I offer in evidence——

The Court: I think the element of surprise is gone. Go ahead.

Mr. Stryker: I offer in evidence Defendants' Exhibit E for identification which—I am not quite through——

The Court: Without describing it, I am familiar——

Mr. Stryker: Let me add this: this is the very paper that Mr. Wessel produced in this court.

The Court: I wouldn't care if the judge had come down with it. I do not see that it has anything to do with this trial.

Mr. Stryker: With all submission to the Court, it has to do in my less-informed view and a great deal

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to do with the vital issue in this court of this man's veracity in this case before the jury.

The Court: It is not receivable for that purpose.

Mr. Stryker: May I speak to the Court and Mr. Wessel?

The Court: We had some discussion on it. I did not mean to be a little brusque.

Mr. Stryker: You are not brusque at all sir. I may make that mistake, but you won't.

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(Discussion out of hearing of the jury, at the bench, as follows:)

Mr. Stryker: Your Honor, if I raise my voice even once, you tell me. I now make the following offer of proof. It relates to the vital question in this case of the veracity of this witness in this court. There are as far as I know, no set limitations as to the method of attack upon a witness's veracity. They may be innumerable, the proper ways to do it. We have it that he perjured himself in this case. We have it that he told the jury that he was under oath.

I now desire to show that those were not the only two methods that he employed for the purpose of deceiving that jury; that an additional method that he employed was recalcitrant conduct, irresponsive answers, the making of speeches voluntarily, and what I would like and the reason I offer this document, the whole testimony, is that to read a part of it only does not sufficiently enable this jury to get the demeanor and conduct of this man when he is testifying falsely. This part I wish to interrogate him on reads as follows, at page 154——

Mr. Wessel: Could we have it copied to save time?

(597-1)

The Court: It is marked for identification.

Mr. Stryker: It is only a few lines.

The Witness: Your Honor, could I hear this? I can hear it very well.

The Court: We will keep our voices down.

Mr. Stryker: Page 154, what Judge Noonan said to him and what he said to Juge Noonan, beginning with the words, "Suppose you confine yourself to answering the questions," and on to the words "I will see that you get here" (handing transcript to Court).

The Court: I will take a look at it now.

Mr. Stryker: Here is the point Mr. Wolfram has talked to me about. Mr. Wessel produced this paper. Did not offer it in evidence, got it identified, and later I had it marked for identification. He used this paper in the following way, as I recall it—correct me if I am wrong. He brought out himself that Lubben had lied. He then proceeded to give the reasons for lying, which we have been over ad nauseam this morning. I did not produce the paper, it was produced by the Government. In the record here, I believe I am right—if there is any question about it I will show it to you——

Mr. Wessel: At Mr. Stryker's request.

The Court: It does not make any difference. (597-2)

Go ahead.

Mr. Stryker: He asked the witness concerning a certain page of the record, or he then referred to a certain page.

Mr. Wessel: I will tell you exactly what I did.

Mr. Stryker: Page 154 or something like that.

Mr. Wessel: I asked the witness whether he had lied. I did not refer to any particular page or line. At that point you asked me to produce it, you wanted it, and I took out the transcript and handed it to the Court, and the Court asked me what I was referring to, and I said page 149.

The Court: I think he never had to use it.

Mr. Wessel: I did not have to refresh his recollection.

The Court: However, I will sustain the objection.

Mr. Stryker: To the offer?

The Court: Yes.

Colloquy

Mr. Wessel: May I state my ground. In the first place I object on the ground that his questions are irrelevant and immaterial; in the second place, as to competence I object on the ground that the record is not authenticated; in the third place, if the

(597-3)

evidence is not improper on those grounds, then the judge should be subpoenaed and testify to his opinion.

The Court: I would like to get down to the ground of my ruling so you will have it.

Mr. Stryker: I limited my offer of the testimony, of this record, to Lubben's testimony. I do not want any other testimony.

The Court: That doesn't meet the ground I will deny it on. I will sustain the objection because I think this gets us into the trial of collateral proceedings. I am not going to have this jury review the testimony in another proceeding and come to a conclusion on whether his testimony can be characterized one way or another. If we get by all that, there might be some cumulative value to it, but I just do not think we can undertake the trial of such a complicated matter on that ground alone.

Mr. Wessel: May I renew my objection as to authenticity.

The Court: Yes.

Mr. Stryker: Mr. Wessel was the first person to characterize this testimony.

The Court: I think Mr. Wessel was perfectly right in bringing out the fact that this man testified

(597-4)

falsely under oath. I don't know, you seem to use that to some advantage.

Mr. Stryker: I don't know; I hope so.

The Court: Or in the course of any such discussion.

Mr. Stryker: I hope so.

(597-4a)

Mr. Stryker: Your Honor somewhat threw me off my schedule.

The Court: I regret that.

Mr. Stryker: I know you do. I am only apologizing. Let me take a minute or two until we go to another topic.

The Court: If you want another recess or anything, I will be glad to do that.

Mr. Stryker: Thank you, your Honor.

By Mr. Stryker:

Q. When the receivership in General Confections ended, was the property sold? A. Yes, sir, it was.

Q. Who was it sold to? A. To Mr. Edward Dane Bookman.

Q. Did you put up the money? A. No, sir, I did not.

Q. Is Mr. Bookman, Edward Dane Bookman, whatever his name is, a friend of yours? A. Yes, sir, he is.

Q. Lives with you? A. Yes, sir.

Q. Well, do you know where he got the money from? A. Yes, sir.

Q. Where from? A. The money was borrowed from Mr. J. H. Millstein.

Q. Was Mr. Bookman acting for you in that purchase?

(598)

A. Yes, sir, he was.

Mr. Stryker: Again, I have got to ask your Honor to pardon me.

The Court: All right.

Q. While I am looking for that, was it Mr. Bookman who assisted you in arranging for the wire recording apparatus behind the picture, when you got Mr. Weleck to your house? A. I don't recall whether he did or whether he didn't, sir.

Q. He had something to do with it, didn't he; don't you remember? A. I said I don't recall whether he did or he didn't.

Q. Was he there at that time? A. If I remember correctly, sir, he came later. I don't remember. I know that Mr. Hellstern was the man who arranged it.

Q. You don't remember that Mr. Bookman was there when it was being arranged? A. I know later on in the evening he was there, sir. Whether he installed it or not or helped Mr. Hellstern, I don't recall, sir.

Q. Did he do anything about the wire recording? A. I have answered the question, sir.

Q. After, later in the evening, when he came, did he take the recording, or read it off, or do something with it—I don't care—I just want to identify the man. A. Sir,

(599)

I don't recall whether Mr. Hellstern played it back to us or whether Mr. Bookman played it back to us.

Q. Did you, while you were operating the General Confections Company, which we all know now was after the partnership——

Mr. Stryker: Strike the question. I am wrong.

Q. Did you, while you were—during the Eatsum proprietorship, before the partnership, ever buy from Mike Cohen or anyone else, a forged ration check in the amount of 200,000 or 300,000 pounds? A. No, sir. I don't recall buying a forged ration check from Michael Cohen for two or three hundred thousand pounds.

Q. Did you buy it from anyone else? A. I recall, sir—you are talking about what particular period now, sir?

Q. During the proprietorship, when you ran the business yourself, before you joined the partnership. A. Yes, sir, I recall, sir, that I bought a certificate from somebody—whether it was—I think it was—I think it was Ronald Stone.

Q. Do you recall whether my figures that I read you of (600)
the number of pounds is approximately correct? A. No, sir.

Your figures were not wrong, sir, but I know that the figure, the ration certificate was supposed to have been issued to a company who had no use for the sugar.

Q. Well, you knew that you had no right to buy that ration certificate, at all events, you knew that? A. That's right, sir, I did.

Q. And that that was a crime? A. Yes, sir, it was a crime.

Q. Have you ever been prosecuted for that crime? A. Well, sir, nobody ever said anything about the—I am trying to explain it to you.

Q. You would know whether you have ever been prosecuted or not; that is, arrested, indicted, compelled to give bail and go to trial. Did that ever happen to you for that crime? A. Well, sir, you asked me a question and I am trying to follow through.

Q. That isn't my question. Can you answer this question now? A. How can I answer regardless of your question?

Q. I am asking you to answer the last question. A. No, sir, I was not prosecuted for the crime. I don't know (601)
whether there was any real penal offense attached to it,

sir, that you had to go to jail for it. I knew that we had to take some ration certificates—the Government deducted so many pounds as a penalty. I believe that was the story, sir.

Q. Well, regardless, I am not asking, Mr. Lubben, with all respect, for your legal opinion; I am just getting the facts as well as I can. You knew that was wrong, didn't you? A. I certainly did, sir.

Q. Well did you tell Mr. Twohig about that in your various talks with him? A. I don't know whether I did or whether I didn't, sir.

Q. Did Mr. Twohig ask you various searching questions about all of your conduct and transactions both in the proprietorship, the partnership, and later on in General Confections and Reserve Trading? He must have asked you questions, didn't he? A. I think that sugar ration certificate was a matter of a public notice. I believe it was in the paper once where our ration bank account was deducted so many pounds. The amount of pounds I don't know.

Mr. Stryker: Will you read back the question? I am going to ask your Honor to strike the answer when you hear the question. It doesn't have any relationship at all to my question. Read it back, please. (602)

(Question and answer read.)

Mr. Stryker: Strike out the answer as totally unresponsive.

The Court: I won't emphasize the totality, but I will strike it out.

Q. When you gave that answer, you knew you weren't answering my question, didn't you?

Mr. Wessel: I object to that, if you Honor please.

Mr. Stryker: This demeanor of this man in this courtroom is an issue bearing on his veracity here, and I submit that my question goes right straight to that point, that he knew he was not answering my question.

The Court: I will tell you, Mr. Stryker, I agree with you completely that the demeanor of this man answering your questions, in the light of those questions and in the light of the examination, is an issue; it is a matter of great importance here, but I am not going to start having this witness analyze your questions or his responses to them. I mean, I have considerable difficulty when faced with the same problem, and I am not going to ask him, who I believe has had less training in it than I have, to do it.

(603)

So you go ahead and ask your questions. When he is wrong I will try to strike his answer for you. When I think he is within the limits, I will let it stand, we will go along that way. But let us not get his opinion on it now.

Mr. Stryker: I have your point, but is my question one that is proper, that should be allowed or not?

The Court: You asked him did Mr. Twohig ask him about this thing, and I think he may have jumped two or three steps ahead in his answer, so we struck it out.

Let us go back. Now, did Mr. Twohig ask you about this, do you remember?

The Witness: Sir, Mr. Twohig asked me many, many questions. I can't specifically say that he asked

me. He asked me upside down and backwards, sir. I don't know what he asked me.

The Court: Go on to the next question.

Q. May I have this: You were very frank and truthful in all your answers—I am not asking what they were—to Mr. Twohig's various questions, is that right? A. Well, sir——

Q. I mean, you didn't hold back anything to Mr. Two-

(604)

hig? A. Well, sir, in the beginning, sir, when Mr. Twohig and Mr. Cordes came to the house, sir, I won't say that I was very cooperative. I mean, I certainly wasn't, sir. After all, I wasn't looking for any trouble so——

Q. Well, that was the time—— A. Now, let me answer the question, sir. I am trying to tell it to you, sir.

Q. Take all the time you want. A. Please, sir, don't interrupt me.

(605)

Q. I will try to obey you. A. I don't mean to be fresh, sir. If I say something wrong, I am very sorry. I don't want to offend you, the judge or anybody, but, sir, I wasn't very cooperative, no, sir. I just wasn't cooperative, sir, until finally they told me some things, sir; then I realized the Government knew more about the business than I did.

Q. Now, have you finished? A. So, sir, then I just told them the truth.

Q. Have you finished now? A. Yes, thank you.

Q. Now, during the period when you were not cooperative with the agents, was that not the period where you feared prosecution because of your returns? A. Sir, I have never feared prosecution for my returns. The only thing I have ever feared, sir, about my returns, if Uncle Sam comes to me and says, "You owe me money," all right, for one period of time, sir, that my income tax wasn't paid.

I wrote the Government; I told them in a letter. I attached a copy of the dissolution agreement.

Sir, what more can I do?

Mr. Stryker: Well, I am not permitted to (606) answer you. I would like to answer, but I am not allowed.

Now, let me see, what was my question? I have forgotten.

The Court: Whether he was afraid of income tax prosecution.

By Mr. Stryker:

Q. Even at the start, during the period of your uncooperation, you weren't afraid of a prosecution for your own returns; is that right? A. I can't explain——

Q. Mr. Lubben, pardon me a minute. I don't want to interrupt you. Isn't my question clear? If it isn't, tell me and I will try to make it clearer. A. Well, sir, you ask a question and I open my mouth. I said two words, and you say, "Isn't my question clear?"

You don't even give me a chance to answer. I am trying to tell the truth. If I have to go to jail, if I have done something wrong, I will go to jail and I won't be in here trying to bull out of it. I'll go.

I have had—for ten years I have had this stuff, sir; it's getting just too much for me.

(607)

Q. Are you telling the truth in the same way that you told the truth in the College Town case? A. I told you, sir, I lied in the College Town Candy Company. I told the attorney I lied. I told my priest I lied. God knows I lied. What more do you want? Blood?

Q. No, I'd like the truth. A. Yes, sir, you are getting it.

Q. I don't care about your blood. A. You don't want the truth.

Pardon me, sir, I didn't mean to say that. Excuse me.

Mr. Stryker: Don't you think that calls for an admonition?

Mr. Wessel: It certainly calls for an admonition, but I suggest counsel withdraw his remark or I will make mine.

Mr. Stryker: Let me finish, will you. I am talking to the Judge. I am asking at this point for a stern rebuke of this witness for that comment. If not stern, a rebuke.

Mr. Wessel: I ask the same stern rebuke to another party in this court.

The Court: I will give my decision in this way:

(608)

I am not rebuking anybody. If people get into an interchange of comments, I will let them stand.

Now, as I remember this, there was an interchange of comments, and I think we will let it stand just as it is. I will let it stand.

We will proceed with the next question.

Mr. Stryker: All right.

By Mr. Stryker:

Q. By the way, you have testified that you wanted to join—it is a paraphrase; I think it is right—the partnership because they had a large sugar ration quota, or in substance that; isn't that true? A. No, sir, I didn't say that.

Q. Well, did Mr. Giglio or any of the defendants ever give you or sell you one single bit of the sugar under their

large sugar ration; yes or no? A. No, sir, but I believe Mr. Giglio sold me a certificate——

Q. I don't want your belief. That is that? A. I believe, sir, if I recall correctly, sometime or other Mr. Giglio, I think, sold me a certificate.

Q. A sugar certificate? A. Or some kind of piece of paper that I got.

(609)

Q. Haven't you sworn under oath that you did not get enough sugar to sweeten your coffee with? A. Now, just a minute, sir. I am talking about the sugar out of the Tavern Fruit Juice Company. Out of the Tavern Fruit Juice Company, sir, I never got so much as a grain of sugar.

Q. That is what I am talking about, too. All right.

Now, did you ever buy from anyone forged ration checks or counterfeit sugar ration stamps? A. I think you have asked the question, sir. For when, sir, what period of time?

Q. Any time during your proprietorship or General Confections or—well, General Confections covers it and the proprietorship, did you ever during those periods—— A. Sir, let's take one at a time.

Q. Let's take the proprietorship. Did you during that time? A. I have already stated, sir, I bought some certificates, sir. You have asked the question, sir, and I have answered it.

Q. I was asking about ration stamps, I think was the word I used. Did you buy those?

Mr. Wessel: I object. That was not the word

(610)

used.

Mr. Stryker: Wait a minute, Mr. Wessel. I am going to ask the recorder to read it back, because you are wrong.

Mr. Wessel: I will be very happy to have it read back.

The Court: If you want it that way, all right. Read it back. Read the question back.

(The reporter read the question as follows:

"Q. Now, did you ever buy from anyone forged ration checks or counterfeit sugar ration stamps?")

Mr. Wessel: I suggest the last question be read. There was a question about forged ration checks and——

Mr. Stryker: The recorder has read it. Let's not have a debate. We will get along faster.

By Mr. Stryker:

Q. Now, did you ever buy forged ration checks or counterfeit sugar ration stamps from anyone during the General Confections period after you left the partnership? A. We haven't discussed the partnership. Don't you want to take them in order?

The Court: You answer the question.

(611)

The Witness: Pardon me.

The Court: Go ahead.

A. Sir, during General Confections?

Q. Yes. A. No, sir. I think we just bought the sugar. I don't recall buying any stamps or any certificates. We

may have bought certificates. I don't know. But I think that we just bought the sugar.

Q. Well, you asked me a moment ago if I wasn't going to ask you about the partnership. I will ask you now. Did you during that time buy any of the things I have mentioned? I hope I don't have to repeat them. A. We may have bought certificates, sir.

Q. I am asking, Mr. Lubben, not about "we." I am asking about you. A. All right, sir. Well, sir, when it was "we," it was a partnership.

Q. I am asking about you. Did you buy any of those things during the partnership? A. Well, sir, then I, as a partner, sir, I believe, sir, that we bought some certificates.

Q. I am asking about you. Did you? A. Well, sir, I say I, as a partner. That is the——

(612)

Q. I don't care what you say it as. A. That is the correct answer.

Q. I am asking you as a human being, just you, yourself, did you? A. Individually, for me or for the benefit of the partnership?

Q. I don't care what it was. Did you buy any? A. I do, sir. It was for the benefit of the partnership, sir. I, as a partner, I believe, have bought some certificates. I believe—some place, I believe, sir, I bought some certificates, not stamps. I can't recall stamps, but I remember, I am sure I bought certificates.

Q. Now, before I go on—— A. And I also bought black market sugar, sir, during the partnership.

Q. You bought it for your candy business? A. For our candy business, sir. It was a partnership.

Q. Well, now, before I go on, is that answer true? A. What do you mean, is that answer true?

Q. Are you telling the truth about that? A. About the certificates?

Q. Just what you just said. A. Sir—we had no sugar——

(613)

Q. Don't you know at that time——

Mr. Wessel: He hasn't answered the question yet.

A. We had no sugar in the proprietorship. When it was a proprietorship I had to buy black market sugar. I have testified to it. Whether I bought it with a certificate or I bought it by the load, I bought it. During the partnership, sir, I had no legitimate quota of sugar, sir, so I had to buy it by a certificate, by the truckload, but it was black market.

During General Confections, sir, I had no certificate. Later on I bought one, yes; I bought a company, and then I was legitimate, as far as sugar is concerned, but I bought black market sugar in all three of them.

Q. All right. Now you said you bought it as a partner. Don't you know that Mr. Giglio or the Tavern Fruit Company that he was operating then had a sugar ration of 14,000,000 pounds? Don't you know that? A. Yes, sir, I do.

Q. All right. And that is why you wanted to go in with it, isn't it? A. No, sir, no, sir, and I never testified to that at any time.

(614)

Q. All right. Well, now, are you telling the jury that despite the fact that Mr. Giglio's Tavern Fruit Company that he had before he went into the partnership had this 14,000,000 pound ration, that you went out on his behalf and bought forged checks? Just let me have the answer to that. A. On his behalf, sir, for what; the Tavern Fruit Juice or what?

Q. You said as a partner, that you went out and bought it for the partnership. A. We are talking about a partnership of Eatsum Food Products, sir, and Tavern Fruit Juice has nothing in any way to enter into it. I had never anything to do with Tavern Fruit Juice at any time, other than to—when they sold me the merchandise, I resold it and billed it to the National Biscuit.

Q. All right. Did you get any sugar from the Tavern Fruit Company? A. I said before I didn't get enough, a grain of sugar.

Q. I think one phrase you used somewhere in your testimony was that you didn't get enough to sweeten your coffee; is that right? A. We will get it a little finer and say I didn't get a grain out of Tavern Fruit Juice.

(615)

Mr. Stryker: Your Honor, my own personal schedule, which through no fault of the court, but as a result of the rules, has been thrown a little bit out.

It is almost time—could we take a recess here?

The Court: We will take a recess now for lunch. We will come back at 2:00 o'clock.

Don't discuss the case.

(Jury out.)

(Recess taken until 2:00 o'clock p.m.)

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AFTERNOON SESSION (2:00 p. m.)

DAVID GEORGE LUBBEN resumed.

Cross Examination Continued by Mr. Stryker:

Q. We were talking, Mr. Lubben, this morning about these two hundred thousand or three hundred thousand

ration certificates that you bought. Do you remember that? A. I didn't say I bought two or three hundred thousand ration certificates, sir.

Q. No, I think you are right. Ration certificates for two or three hundred thousand pounds. A. I don't think I said it was for two or three hundred thousand pounds.

Q. What did you say? A. You were talking about the certificate for the—were you talking about the certificate—in quite a few places, sir?

Q. You mentioned the figures. Just tell me what you said; I don't want to turn back to the book. A. We talked of certificates in many places. If you can be a little more specific and tie it in with one company, I will give you an answer, sir.

Q. Did you not say as a fact you bought ration certificates for two or three hundred thousand pounds of sugar? A. When, sir?

Q. Any time. A. I don't ever recall buying them for

(617)

that amount, sir; no, sir.

Q. In that amount or a similar amount? A. What do you mean by a similar amount, sir?

Q. I mean around that figure. The time I am asking about is during the Eatsum proprietorship. A. During the proprietorship, sir?

Q. Yes, that is it. A. I said I bought some certificates from Mr. Ronald Stone, and to my recollection it was from Ronald Stone, and they were certificates that I believe he said he got from the Devonshire Bakery.

Q. Can you tell me for how many pounds those certificates were? A. I haven't the least recollection, sir, but I don't think it was anything like that amount.

Q. Did you ever send during the proprietorship to one David Druckerman——A. Did I ever what, sir?

Mr. Stryker: Read my question.

(Uncompleted question read by reporter.)

The Witness: What did I do with it, sir?

Q. During the proprietorship did you ever send ration certificates to one David Druckerman, which ration certificates you had bought illegally? A. I don't recall, sir. I may have and may not; I don't know, sir.

(618)

Q. What is your best recollection on that? A. You are saying the partnership, sir, I don't know the——

Q. I did not say the partnership. A. You did say the partnership.

Q. I said the proprietorship. A. The proprietorship; I beg your pardon, sir. I do not recall whether I did or I didn't.

Q. You won't deny that you did? A. And I won't admit it, either.

Q. Did you after sending the ration certificates—I will strike that out. On a forged sugar ration check to Druckerman did you or your company Eatsum, the proprietorship, receive two or three hundred thousand pounds of sugar by railroad freight from the Ames Grocery Company of Ames, Iowa? A. Would you repeat the whole question?

Q. (Question read.) A. There is something before that, sir, about a forged certificate. It was all in the same question, sir.

Q. Suppose we leave that out for the moment and I will come back to it. Did you ever send a ration check to Druckerman during the Eatsum proprietorship for two or

(619)

three hundred thousand pounds of sugar? A. I don't recall the two or three hundred thousand pounds, sir.

Q. Regardless of the exact amount—— A. Now just a minute, sir. I don't recall, sir, two or three hundred thousand pounds. We did have, sir, at that particular time a wholesale sugar certificate, a wholesale—the Government gave us some wholesale sugar certificate which we could not use the sugar, though, and we had talked about going in the wholesale sugar business, and it may have been, sir, that I sent Mr. Druckerman a ration certificate on that wholesale account. Now I don't say that I did and I don't say that I didn't, but there is something I can remember, something about something with Mr. Druckerman; whether we ever got the sugar or not, I don't know.

Q. Then my next question was whether or not you ever received an amount of sugar somewhere in the neighborhood of two or three hundred thousand pounds by railroad freight from the Ames Grocery Company of Ames, Iowa? A. I don't ever recall, sir, receiving that amount of sugar.

Q. Whether it was that amount, did you receive any amount? A. I can't recall that either, sir. That is back

(620)

—I mean that was the proprietorship transaction, sir, back in 1944.

Q. You could not remember possibly anything about 1944? A. Well, sir, I can remember some things in '44, but I can't remember that specific thing.

Q. Do you remember being investigated by the OPA and coming down to this building and being interrogated by an assistant United States attorney in 1945 or '46? A. Yes, sir; I don't remember whether it was this building; some building around here, sir.

Q. It was one of the assistant United States attorneys asked you, wasn't it? A. Yes, sir; some Government lawyer.

Q. About when was that? A. Sir, that was during the partnership.

Q. When you were being investigated? A. Yes, sir.

Q. Now give me the best date you can and I will pass along. Can you give me the best date as to when this inquiry was? A. I cannot give you a date, sir.

Q. I do not mean the exact day of the month, but was it '44 or '45? A. I said the partnership, sir, so it could not be in '44 or '45—it could be in '45, yes, sir, I beg your pardon. The partnership started around April and ended in March of 1946.

(621)

Q. Isn't it a fact you were then being interrogated with regard to your having sugar during the proprietorship? A. No, sir. Do you mean the time I came to this building?

Q. I did not say that.

Mr. Stryker: Read the question.

(Question read by reporter.)

A. In this building, sir?

Q. I did not say in this building, I asked about the inquiry, if you were not being interrogated regarding your transactions in sugar in the proprietorship. That is what I am asking. Isn't that clear to you, sir? A. But you get a little muddled up to me, sir.

Q. What is that? What did you say I did? A. It seems a little muddled up to me, sir. Now let me answer the question. I want to answer you, sir.

Q. If it seems muddled, I don't want it to be answered. A. I will answer you, sir.

Q. I will try to be a little more clear; I will try again. A. If you let me answer it, sir, I will answer it.

Q. You don't want to answer a muddled question. A. I can unmuddle this one.

Q. Suppose you do, and answer the question. A. Dur-

(622)

ing the partnership sir—this is in 1945—there came a time when the partnership or I as a member of the partnership, bought several hundred bags of sugar in the black market and this sugar, sir, was shipped over to a company called Puram. Puram is a candy manufacturer who was making Jordan almonds for us. They didn't have any sugar and we had a tremendous amount of orders for almonds.

Q. Mr. Lubben, I am sorry. A. I am trying to explain, sir.

Q. You are not answering my question, sir. A. Yes, sir. Your Honor, I am answering this man's question.

Q. I asked if you were not interrogated about a sugar transaction in the partnership. Either you remember or do not, I don't know which it is. Your answer is not responsive at all to my question. I think my question is clear.

Mr. Stryker: Won't you ask the witness to answer?

The Court: He wants to know what you were interrogated about. Can you answer that without disclosing what you were interrogated about?

A. I came over here with Mr. James Ronayne——

(623)

Q. I do not care whether you came with fifty people. But I ask you if it is not a fact that you were being interrogated about sugar transactions that you conducted at the proprietorship. That must be clear to you, and I would like an answer. A. Sir, I think most of the interrogation, sir, was, Mr. Ronayne was the man who interrogated me, sir, and when he came over here he did most of the talking to the Government lawyer.

Q. Were you not asked questions by the Government lawyer on the occasion we are talking about? A. A few, sir, yes, sir.

Q. Now what I am trying to get is, were you not asked questions about your sugar transactions during the proprietorship? Isn't that clear to you? A. No, I was not asked about my sugar transactions during the proprietorship. It was about a specific sugar transaction.

Q. That is enough. A. During the partnership.

Q. That is enough. Do you know a man by the name of Urban? I think his name is Eddie Urban.

Mr. Wessel: If that is the end of the prior line examination——

Mr. Stryker: It is.

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Mr. Wessel: I move to strike that entire line as totally irrelevant.

The Court: I will let it stand.

Q. Do you know a man by the name of Eddie Urban? A. I do, sir.

Q. How long have you known him? A. Probably, sir, from 1943.

Q. Was he a friend of yours? A. I have always considered him one, sir.

Q. Did you have black market transactions with Eddie Urban? A. I did, sir. I bought candy from him.

Q. Did you afterwards testify against him? A. No, sir, I have never testified against Mr. Urban.

Q. Never before the grand jury in any case that involved Eddie Urban? A. No, sir, I don't recall ever testifying against him.

Q. Let us see. Did you ever go out—where was he? A. In Chicago, sir.

Q. Did you ever have a talk with Eddie Urban before he was indicted? A. Well, I said I have known him since 1943, so, I have had many talks with him.

Q. All right, that is all right. Did you ever talk to Eddie Urban about getting money from him? A. Money for what, sir?

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Q. Just money, that is all? A. Sir, you will have to be a little more specific.

Q. I am asking you if you ever talked to him about getting any money from him. Now you ought to be able to answer that, I should think. A. Well, I have talked with Mr. Urban many, many times, hundreds of times.

Q. Well, that doesn't answer my question. A. There are some times I talked—I got money from Urban—sometimes I gave money to Mr. Urban.

Q. That is business transactions. Those are what you speak of? A. Well, sir, I think all my transactions with Mr. Urban were business.

Q. Did you get any money from Mr. Urban outside of your business transactions? A. No, sir; all my transactions were business.

Q. Did you ever ask him for any money in the way that you asked Morley Cramer for money?

Mr. Wessel: I object to the form of the question.

The Court: Sustained.

Mr. Stryker: Well, all right, I think the form is wrong.

Q. Did you ever talk with Eddie Urban after you had finished having black market transactions with him? A.

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Yes, sir, I have talked to Mr. Urban.

Q. When did you have your last black market transaction with Eddie Urban? A. I don't recall the date, sir.

Q. About when? A. I would say it was some time, sir, in '46, maybe '47.

Q. Did you tell the agents, the Government agents, that you had had black market transactions with Eddie Urban?

Mr. Wessel: I object to the question. It is immaterial.

Mr. Stryker: Totally immaterial.

Q. Did you ever tell the agents——

Mr. Wessel: I object to the question again. The Government investigation is not in issue in this case.

Mr. Stryker: Well, his credibility is in issue and it bears on that. Now, your Honor, I cannot question him all in one question and I have to come to these transactions question by question, and it may be my ineptitude but I seem to have difficulty in getting answers. Perhaps it is my fault.

Mr. Wessel: I don't think it is proper to inquire into how a law enforcement agent goes out doing things.

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Mr. Stryker: His candor, truthfulness, is all involved here.

The Court: Go ahead. I will overrule the objection.

Mr. Stryker: Read the question, Mr. Reporter.

(Question read.)

A. Sir, I believe the Government agents knew it long before they ever asked me any questions.

Q. I didn't ask you that. That doesn't answer my question, the question which has been allowed, which is, did you ever tell the agents—I am not asking what they knew, I don't know at all what they knew; I am not asking about that; I am asking about you; did you ever tell them about your black market transactions with Eddie Urban? A. Well, sir; when the Government had my books I answered whatever questions the Government asked me.

Q. That still doesn't answer my question. Did you ever tell the agents about your black market transactions with Eddie Urban? A. Sir, if the Government asked me questions about black market transactions with Eddie Urban, I answered.

Q. That is a hypothetical if. I am asking if you did. A. Well, the Government has been all over my books from

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one end to the other.

Q. I am asking you still, if you did? A. There probably is no question about it.

Q. You did do it? A. Yes, sir.

Q. All right. Now, did Eddie Urban ever become a stockholder in General Confections for a cash consideration? A. I think Mr. Urban bought stock in General Confections.

Q. About when would that be, Mr. Lubben? A. To the best of my recollection, sir; and this is only my recollection, I believe some time—well, I just can't name the month, but I remember him investing some money in the company.

Q. In the General Confections Company? A. Yes, sir.

Q. In this corporation that you ran after you left the partnership; that is what we are both talking about, isn't it? A. Yes, sir.

Q. About when was it that he put in cash into your corporation? A. You mean when he bought stock?

Q. Yes, that is what I mean. A. Well, not having any records here, sir, I would hesitate to hazard a guess.

Q. Was it in '46? A. Well, the partnership—I mean (629)

the corporation started, sir, in 1946, yes, sir, in March.

Q. All right. Well, now, was it soon or within a short time after that—you have got your mind down to the start of the General Confections Company—give me your best memory, your memory? A. Well, I would say, sir—I would only guess maybe within three or four months of the time. That is only a guess, sir.

Q. In other words, by that you mean that is your best recollection, isn't it? A. That is my best recollection.

Q. All right. Now, how much cash did he put into the General Confections? A. By "cash," what do you mean, sir?

Q. Well, cash or check, what amount did he invest? A. I believe $10,000, sir.

Q. Well, now, before he did that, did you have a little talk with him about the black market transactions you had been in with him? A. What kind of a talk, sir?

Q. I wouldn't know. I am just asking whether you had a talk about that. A. Well, sir, I was buying merchandise from Mr. Urban and paying him a premium and so forth. I mean, naturally, I guess we talked about some things. I borrowed money off of Mr. Urban several times, sir.

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Q. Did you suggest to him that it might be to his advantage to invest in this General Confections Company? A. No, sir, I did not. I naturally—yes, sir, I thought it would be a successful operation.

Q. All right. Did other members of Mr. Urban's family buy stock in the General Confections? A. Yes, sir.

Q. Well, can you remember the names of them? A. Mr.—his brother and his father.

Q. His brother. What was his brother's name? A. George.

Q. George Urban. How much stock did he buy? A. $10,000, if I remember correctly, sir.

Q. And his father, what was his name? A. I don't know, sir. We used to always call him Mr. Urban.

Q. All-right, the father, how much did he invest? A. I think the same amount, sir.

Q. So the Urbans put in $30,000 together? A. To the best of my recollection, yes, sir.

Q. Well, now, you had many black market transactions with other persons, didn't you? A. I did, black market, with a number of people, yes, sir. (631)

Q. Well, give me a few of them. A. Where I bought merchandise, sir?

Q. Black market——

Mr. Wessel: If your Honor please, I object to the question. I don't think it is necessary, unless counsel has some good reason, to bring in other names.

Mr. Stryker: You can be very sure I have, Mr. Wessel. Don't worry about my good reason.

By Mr. Stryker:

Q. Will you name some of the other people you dealt with in the black market?

Mr. Wessel: Wouldn't it be sufficient if the number of persons, without the names, were brought in, if your Honor please?

Mr. Stryker: No, it would not. I would like the answer. It is very material to what I want to ask about.

The Court: Well, frankly, its materiality escapes me—I mean the identity of the people. I will be glad to——

Mr. Stryker: Well, let me start it this way before your Honor passes on that.

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The Court: All right.

By Mr. Stryker:

Q. About how many other persons besides Urban and Morley Cramer and Shotwell did you say you had black market operations with? A. Well, sir, every time I would buy a load of sugar from somebody, sir, that was a black market transaction and I would say, sir, that ran into the hundreds of times.

Q. My question, I think, was—at least I—— A. Or bought dextrose, yes.

Q. My question was, how many people or concerns did you have those transactions with in the proprietorship? A. Oh, sir, I would say, and this is only a guess, maybe 20, 25 people. I mean now, you know I bought dextrose, and I bought sugar and so forth, and I can't remember all the names.

Q. At the moment I am not asking the names. I want you to give me the approximate number. A. Well, say——

Q. Just your best recollection. I don't expect the exact number. A. Twenty or 25. If I could examine my books I could probably give you the exact number, sir.

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Q. I don't care about the exact number? A. You are talking about the proprietorship?

Q. That's right, that's right. A. I mean, you are talking now about the General Confections; right, sir?

Q. That's right. A. That's right.

Q. All right. Now, did you, after you ceased having black market operations with those persons, whoever they were, ever call upon any of those people and ask for money other than for your sugar deals? A. I asked—yes, sir.

Q. How many? A. Oh, I don't know, sir. Two or three.

Q. Would that be your best recollection, two or three? A. Yes, sir.

Mr. Stryker: Well, now, at this point I would like to have those two or three. I believe I have established that. I believe your Honor will allow that.

The Court: All right.

By Mr. Stryker:

Q. Will you give me those two or three? A. Sir, I borrowed money off of Mr. Herman Hart.

Q. We have had that. That is the one you mentioned

the other day. A. Well, you are asking me again, sir——

Q. All right; go ahead. I think you are right. A. And Mr. Urban loaned me $15,000; his company loaned it to General Confections.

Q. All the others, if you remember. A. Oh, I don't know, sir. I think—I can't remember any others, sir.

Q. I think—you can correct me if I am wrong—I thought you said two or three others. I am asking for those names. A. I gave you two, sir.

Q. No, you gave me Mr. Morley Cramer and Hart. You said that Morley Cramer loaned you the $15,000. Do you mean that was over and above the fifteen you got

from Treasurer Hart? A. Sir, I said yesterday the loan did not come from Mr. Cramer. The loan came from Mr. Hart.

Q. That is what I am asking you. I am only a little confused whether the $15,000 from Cramer was the fifteen you got from his treasurer; is that what you mean? A. Well, sir, I got the $15,000, and if I recall it correctly, I got it from Mr. Hart, and I think it was his own personal check, sir.

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Q. All right. Well, now, what I am asking—I understood that—I did not know about the personal check, but I understood the fifteen thousand—did you get any money from Mr. Cramer? A. No, sir.

Q. Did the Urbans ever get their money back out of General Confections? A. No, sir, the company went broke.

Q. Then the answer is no, they never did get their money back; is that right? A. That is the answer, sir.

Q. Have you ever talked with any representative of the Government about informer's fees for you? A. You mean, sir, where I am supposed to get some money? I don't understand what an informer—what you mean by informer's fees.

Q. You don't? A. No.

Q. You wouldn't know what that meant? A. Well, sir, you might have a legal definition that I don't understand.

Q. All right. Then I will try to make it plain.

Did you ever get any money, ask for any money, or have a discussion about getting any money with any representa-

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tive of the Government as payment for informing against any of the people that you have done business with in the black market? A. Well, sir, what specific branch of the Government would you——

Q. Well, I don't care and I don't know. You tell me if you ever did it with anyone. A. Well, sir, I have never asked the United States Government for one single penny. I have never asked the United States Government, any department, for any consideration in any way, shape or form. I asked them for no favors and I want no favors, and I have never asked them for a dime.

Q. Why did you ask me a moment ago what department of the Government I was talking about? A. Well, sir, you are a very learned lawyer, sir, and I wouldn't want to be misquoted, sir, and I want to understand your questions very correctly.

Q. I see, all right.

Now, let me see if I can make that plainer——. A. And I sincerely resent that question.

Q. Well, let's see about your answer to it. A. Yes, sir.

Q. I am not saying that you did. I am asking you

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whether you did. Did you ever discuss with any of the agents of the Internal Revenue Department, in any way, shape, form or manner the manner in which you personally might profit by testifying against persons that you had had black market transactions with? A. Sir, the United States Government or any of its agents in any division of the Government have never promised me one single thing, nor have I ever asked for anything.

Q. Have you ever discussed it? A. I never even had the most remotest thought about it.

Q. Did you ever discuss it? A. Discuss what—where I am going to profit by something from the Government?

Q. That's right. A. No, sir.

Q. All right, that is an answer.

Mr. Stryker: Now, at this point, your Honor, in order to conduct this cross examination—oh, I will ask one or two questions more.

By Mr. Stryker:

Q. Did you file a tax return, income tax return, for the year 1946? A. Did I file it, sir?

Q. Yes. A. I am sure I did, yes, sir.

Q. And that was the return that Sproul & Scholz pre-

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pared for you, wasn't it? A. To the best of my recollection, some accountant prepared it, sir. I think it was Sproul-Scholz.

Q. I showed you the other day a paper, I forget the exhibit number. Was that a copy, a working copy—I know it wasn't the original—of the income tax return for 1946? A. You never showed me any copy of any 1946 income tax return.

Q. Didn't I? A. No, sir, you didn't.

Q. I showed you one for General Confections, I think. A. Sir, you never showed me—I am talking about the United States income tax. That is the income tax we all know.

Q. Yes. A. No, you never showed me any papers, sir, to my knowledge, about my income tax for 1946.

Q. You might be right about that. Let me see.

Mr. Wessel: It was a state franchise tax.

By Mr. Stryker:

Q. What I showed you—I think you are right about that—I showed you a New York State franchise tax return. That is what I showed you, wasn't it? A. Yes, sir, you did.

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Q. All right. Now, was that gotten up or prepared along with other returns by Sproul & Scholz? A. Sir, there was a great many erasures on that page that you showed me——

Q. I know it was a working paper. A. Let me answer; let me answer. You showed me six or seven pages attached to it. Now I have a right to answer that question.

Q. I want you to. A. You bet your—yes, sir. Now, sir, there was a great many erasures on the first page, in pencil.

Q. All right. A. I don't know if that is the page that was prepared by Sproul-Scholz or not.

Q. All right, that is all.

Now, did you file an income tax return with the Federal Government for your 1946 income? A. I am sure I did, sir.

Mr. Stryker: At this time, your Honor, I would request the production, to me, of this witness' income tax returns, specified in more detail in my subpoena upon the United States Attorney.

I think I have laid the foundation, and I think at this point, at least this is my humble submission to you, I think I am entitled to examine them in

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order to conduct a further cross examination.

The Court: I don't think there has been any foundation for it. I will deny the application.

Mr. Stryker: Let me proceed.

The Court: Yes.

Mr. Stryker: Well, I hate to bother your Honor during recess, but it is quite detailed, and I think maybe I had better do it with you and Mr. Wessel in your chambers.

The Court: All right. We will take a five-minute recess now. Don't discuss the case.

(Jury out.)

(Short recess.)

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(Motions and discussion in chambers.)

Mr. Stryker: Now, one of the returns, Lubben's returns, that I am asking about, is a return which he filed for the year 1946. Now the copy, the work copy, which is all I have, shows a letter explanatory of the return.

I think in those days the returns were sworn to. That's right, isn't it, in '46? Well, anyhow, I think so. Now statements made in that return, several statements, in my view—and I hope to show—are totally false. They are returns in which the Eatsum Company is mentioned, and they are returns which are involved, I think, in some of the details of the bill of particulars.

Now, I can't do my job adequately unless I have that return and am able to question him about it.

Now that is the first point.

The Court: That is the '46 return and that is the return in which he put the dissolution agreement when he submitted it, is that it?

Mr. Stryker: Yes, sir, that is the one exactly.

The Court: And that hasn't been introduced yet.

Mr. Wessel: The dissolution agreement, yes.

The Court: No, the return with the dissolution

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agreement on it.

Mr. Wessel: His tax return is not in evidence.

The Court: No.

Mr. Stryker: That is one of the things I have asked for. Now, it directly affects his credibility, incidentally, in relation to some aspects of the Eatsum partnership, and also, if I succeed, as I hope to do in showing that his returns are false, it bears directly upon one aspect of my theory of the defense, which is that having filed false returns, and the inquiry having been begun by the Government as to his returns, that he then made up this story, or much of it, about the defendants, and that his motive for doing so, which bears on credibility, was to get out of his own income tax troubles.

Do you want to add to that, Mr. Wolfram?

Mr. Wolfram: No.

Mr. Wessel: I feel I must respond to these statements because this is being made a matter of record.

In the first place, I think your Honor knows—Mr. Stryker does—that income tax returns more so than other documents, although perhaps not more so than grand jury testimony, are protected not only by privilege but by statute, Title 26, U. S. Code, Section 55, I believe is correct.

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That is not an absolute privilege. I think the courts have said it is a conditional privilege. Good, really good sound foundation must be laid as distinguished from a somewhat lesser foundation with regard to other documents.

Mr. Fraiman: May I interrupt for a moment?

The Court: No, don't interrupt.

Mr. Wessel: In any event, that is the first point, and the second point, with regard to any document, a foundation must be laid by counsel in examination for the production of that document. With all due respect to Mr. Stryker, he has testified here, and many of the statements he makes are not in evidence—I don't say they are true or not true, but they are not in evidence.

The proper way to lay the foundation, as I understand it, for the production of documents is to inquire of the witness about certain things, to ask the witness what the fact is and if counsel feels something may be inconsistent with the document, to ask the Court to review the document with regard to that particular matter.

Now if counsel wishes to ask a question about a certain fact, the dissolution agreement, for example, which I might say is already in evidence——

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Mr. Stryker: That is.

Mr. Wessel: ——and if the witness said something which counsel believes is not true or is impeached in some way by prior documents, then counsel may request the Court to examine that document, and the Court can do so, and if the Court feels there is an inconsistency it can order its production in its discretion.

The Court: My recollection is not clear. How did we get into the discussion of that conference with Mr. Ronayne, in which he said he called on them to pay his 1946 income tax?

Mr. Wessel: I think I can explain that if your Honor please.

The Court: And then said, "I am going to put the dissolution agreement on my return and take it down."

Mr. Stryker: That was direct testimony.

Mr. Wessel: It was on direct. A question was asked as to threats, I believe, and fear. I believe it was something with regard to—my recollection is a little hazy—with regard to what Mr. Giglio and Mr. Roth said.

Mr. Lubben said, I believe, on direct examination, that he went—he had a meeting with Mr. Ronayne and Mr. Giglio; Mr. Roth was present. I am not sure whether Mr. Lawn was there or not. And at that time he said, "I need my $25,000 to pay

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my taxes. You promised me in the dissolution agreement that you would pay the taxes for my earnings from Eatsum. I don't even know what they are, but as near as I can compute they are for $25,000 or for $22,000."

Mr. Ronayne said, "What are you talking about, 22 or 25 thousand? It is a hundred thousand dollars."

And Mr. Lubben said, "What are you talking about?" And Mr. Ronayne pulled out the tax return, and he said, "You are down here for $100,000."

Mr. Stryker: What tax return?

Mr. Wessel: The Eatsum tax return. "You are down for a hundred thousand-dollar part of the distribution," and Mr. Lubben looked at it and said, "I didn't get any $100,000, and Ronald Stone didn't get $60,000, and Frank Loperfido didn't get $45,000. What do you mean, I am down here for $100,000?"

And Mr. Ronayne then turned to Mr. Roth and Mr. Giglio and said, "I thought you said this distri-

bution was correct?" And then, as I recall it, Mr. Lubben said, Mr. Giglio and Mr. Roth—and I am not sure whether Mr. Lawn was there or not—mumbled among themselves, and I couldn't find out what the mumbling was because he didn't know, and at that time he said, "Well, now, I am sick and tired.

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I am going to 253. I want my money. I have got to pay my taxes. The Government is hounding me."

Now that, as I recall it, is exactly what, or within a reasonable limit, what he testified to.

Mr. Stryker: I think what you have said just about accords with my recollection of the testimony. That is true. Now I think it is quite accurate, your recollection. You make a good witness.

Judge, this is a vital part——

The Court: Where was the return mentioned on direct?

Mr. Wessel: On direct examination he said he saw——

Mr. Stryker: I don't care how, if somebody will instruct me how to lay a foundation, maybe I will learn some evidence, but I know what I will be up against if I start reading from what I believe is a copy. I don't know.

Mr. Wessel: I think if counsel—and you haven't inquired as to that, Mr. Stryker—if counsel is inquiring as to the distribution——

Mr. Stryker: Let me finish.

Mr. Wessel: Excuse me.

Mr. Stryker: If I do, the first thing I will be met with is an objection that I am reading from a document which indeed will be true. True, it's only

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a copy, and I am going to be met with that. You can't read from a document which is——

Mr. Wessel: But it isn't the return, you see, if your Honor please. It is not the return which is in issue. It is what the witness is testifying that is in issue. What he said to the Government and what he didn't say to the Government, of course, is immaterial, except in so far as it reflects upon the fact. The mere fact of filing a tax return cannot in any way ever be relevant to this proceeding except if it should impeach the witness.

Mr. Stryker: Well, that is the point.

Mr. Wessel: If it should impeach the witness I grant, assuming it is strong enough to overcome the privilege of secrecy as to tax returns, I grant counsel would be entitled to look at it. I don't think there is any foundation that it does impeach the witness.

At this time I don't think counsel has asked the proper questions. Counsel should not read from the tax return or the copy that he thinks he has. I don't know whether it is a copy or not.

Mr. Stryker: I can't read from the original.

Mr. Wessel: Counsel should ask the witness the

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question, "How much did you say, how much did you owe the Government, how much was the Government asking you for. You said $25,000 on direct, or $22,000, or what have you." And if the figure is substantially that, it is all right. Then if counsel believes that is not what the witness in fact owed the Government, then maybe he can ask the Court, "Well, look at it and see if that is correct."

Now, as I understand it, if your Honor please, that is the proper way to lay a foundation for an ordinary document. Now we are dealing with a tax return. I don't think it makes a great deal of difference, and I am not sure, quite honestly, what the figure on the tax return is as to taxes owed, but if the figure should be not 25 or 22, but 17 or 15, I don't think it would make enough difference to overcome the privilege surrounding tax returns.

If it were $200 or maybe $2000, maybe it would overcome the privilege and, of course, that is a matter solely for the discretion of the trial court.

Mr. Stryker: Aren't we really talking extreme technicalities? If I ask those questions that Mr. Wessel outlines for me, he thinks I am entitled to that return. Now, of course, I can go back and follow his suggestion.

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Mr. Wessel: I think the rule, as laid down by Wigmore, and as followed for many years, is in order to give the witness a chance before you impeach him you ask the questions.

The Court: My own feeling is that it is not admissible as a matter of impeachment.

I am trying to think what its value is as a matter of defense here.

Mr. Stryker: Well, the question is enormously valuable in that if it be true, as I think it is, that he deliberately lied in this statement contained in his report, in his return, particularly with regard to a matter that to some extent mentions the partnership here, I can't imagine any more important way

of attacking what I am trying to attack, the veracity and the credibility of this witness.

The Court: Well, that I don't think is——

Mr. Stryker: And also, Judge, let me repeat, because if I didn't say it the first time, it goes right to the additional vital point in this case, his motive for giving what I think is false testimony before you. His motive. Now that is the important thing.

The Court: I don't see how the contents of the return is going to show me that, Mr. Stryker; unless

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I go ahead and try a tax case now.

Mr. Stryker: No, no, no.

The Court: Against him.

Mr. Stryker: If I show that he deliberately lied in that return we have it, I think, sufficient of the evidence, that the Government had the returns, talked to him about it, that would furnish a motive —not the only one—a motive for——

Mr. Wessel: I wasn't addressing myself to that. I am sorry.

Mr. Stryker: —for laying off, getting out of the prosecution, his own difficulties himself, by putting it on the defendants.

Mr. Wessel: I wasn't addressing myself to that point at all. I was addressing myself to a specific inconsistency between—in other words, if the return showed you don't owe any taxes, and he said on direct examination "I owe $25,000" that is one question, but if Mr. Stryker is referring to another subject entirely, which is if he can find something wrong with the tax return, perhaps go fish through it, maybe find that he made some misstatement, then he has a misstatement. As to that I think the law

is perfectly clear. Mr. Fraiman has reminded me that there is no case that he has been able to find,

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and I think this is correct, that has ever produced a tax return under those circumstances. There is no limit—Mr. Stryker might go to '43, '44, '45, '47, '48 and so on, returns, hoping to find some misstatement.

I hope I am never subjected to that, although I think my tax returns are all right, but Lord knows what might be, and what can happen ten years after.

Mr. Stryker: Judge, let me get this before you, and I want to say as clearly as I can that in my view, at least, to deny me an opportunity to interrogate him—I am now speaking specifically of his tax return—especially with regard to not only the figures in it but the statements which he makes, according to my copy accompanying that, if I can't do that I am deprived of what, in my opinion, is a vital opportunity to impeach this witness.

This, I really think, is vital, and I couldn't feel more strongly about it.

Now, have I made myself plain to your Honor?

The Court: I think you have made yourself plain, Mr. Stryker, that you want to look at the question of motive and something else which might bear on the credibility and on both of those grounds I will deny your application.

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I am troubled on another ground and I am not sure I have it through my head and that is this, that if this is the return that was the subject of that conversation, why as a matter of completeness aren't they entitled to it?

Mr. Wessel: I am sorry, I have not made myself clear.

Mr. Wolfram: If your Honor please——

Mr. Wessel: Excuse me, Mr. Wolfram. The return which Mr. Ronayne showed to Mr. Lubben, in that conference, is already in evidence. That is the Eatsum partnership return, and it shows the distribution of the partnership——

The Court: Didn't he have his return?

Mr. Wessel: No, no. Mr. Lubben walked in there and said "Pay me the money you owe me to pay my taxes because the Government is hounding me. I owe taxes."

That is his own tax return. That is the one we are talking about now.

Mr. Wolfram: Your Honor has the key to that problem, I think, because your Honor is referring to a different point in Lubben's testimony, and I believe he said that when the time came for him to file his own return he didn't have the information,

(641-12)

so he had to file a return to which he annexed either a copy of the dissolution agreement or a paraphrase of it, or excerpts from it, and that he directed his accountant, Sproul & Scholz, to do that.

That is what your Honor is referring to, I believe, and that was brought out on direct.

Mr. Wessel: That is correct. There is no question about that.

The Court: There you see the contents of the return, I don't think, is really relevant in this examination.

Mr. Wessel: The only relevant fact about that return that is in evidence is that he owed the Govern-

ment some money, and the Government, as he said, was hounding him. That is the only relevant fact.

Mr. Wolfram: That is the Ronayne conference.

Mr. Wessel: That is the only thing relevant.

The Court: I was under the misapprehension that this return was actually shown at the Ronayne conference.

Mr. Stryker: Mr. Wessel is right about that.

Mr. Wolfram: Your Honor, we are faced with this situation, that the witness has already testified

(641-13)

that when Sproul & Scholz came to make his '40 return he didn't have, as he claims, sufficient information to make the return; and that Sproul & Scholz got up this return—now he has described the return, in effect. He said, "I filed a return. I didn't have sufficient information, so I annexed a copy or a paraphrase of the dissolution agreement." And he has testified to that on direct.

Now on cross-examination I think we should be permitted the fullest scope of going into the question of whether that return was or was not false, whether he didn't know at the time he filed it that it was false, and I respectfully submit that we can't do it unless we have the return.

That return should have been offered, I say, in my humble opinion, as part of the Government's case.

Mr. Wessel: Oh, my goodness.

The Court: I tend to disagree with you on that, Mr. Wolfram, because if it wasn't—in other words, I mean I don't see how the contents of that return at this point are material to the issues of this case, and I don't think its bearing or, really, its hypotheti

cal bearing on the credibility of this witness is enough to break through the privilege.

That is my own feeling.

(641-14)

Mr. Stryker: Before you finally rule, let me, if I can put my fingers on it, read to you from what I know was the accountant's work report.

The Court: Work sheets?

Mr. Stryker: Well, it is not only that, it is the accountant's, you know, preliminary return. I don't mean preliminary return—working return.

The Court: All right.

Mr. Stryker: I want to say to you that I don't know——

Mr. Wolfram: Excuse me, it is not the accountant's, it is a photostat of a return.

Mr. Stryker: Isn't that statement in there?

Mr. Wolfram: Of the '40 return. Yes.

Mr. Wessel: Let me say this——

Mr. Stryker: Let me finish, if you don't mind, Mr. Wessel.

Mr. Wessel: I am sorry.

Mr. Stryker: Now, I have that, and I have read it, and here is a photostat of it—let's say of the working return. I don't know whether this paper was filed or not. I think so; but I don't know.

Mr. Wessel: I frankly——

Mr. Stryker: Just a minute.

Mr. Wessel: I don't think your Honor should

(641-15)

be a party—the Court should be a party to a violation, in my opinion, of a privilege which I think has always surrounded—yes, your Honor, I don't think that document which is not authenticated——

The Court: That is a working copy.

Mr. Wessel: That came from the certified public accountant who prepared Mr. Lubben's tax returns and turned it over, so far as I know, without, so far as I know, without a subpoena to the defendants.

Mr. Wolfram: Don't say without a subpoena.

Mr. Wessel: I say so far as I know.

Mr. Stryker: Don't say it. Regardless of that, what I want to explain, the importance of what I am doing again—and whether that was filed, I don't know. I think so. I don't know.

The Court: Mr. Fraiman, I didn't want to shut you off: I will come back to you, but I didn't want to get off on that.

Mr. Wessel: While counsel is looking, I object to the reading even at this time of a document which is in no way authenticated.

Mr. Stryker: The thing I am reading from——

Mr. Wessel: Yes, sir.

Mr. Stryker: I couldn't make it more plain than (641-16) I have. Of course it is not. All I am reading is—it shows you why I want to know what the document, itself, was. Apparently it is scattered through this, but the point is that if he filed, if his return filed is what I think is a copy, it will show that he said, in effect, he couldn't get any information at all.

Now this morning the point of the cross examination—I doubt if it was clear to you then—about these monthly reports, these monthly Bercu reports, and you remember I asked him, "Well, did you show those to Sproul & Scholz," had a lot of trouble, and I think his final answer was he didn't know whether he did or not.

All right, now I will prove that he did not show those reports to Sproul & Scholz. They were never told about them. They were not reported, so that his statement in the return that he was doing this because he couldn't get any information is—if what I said before is correct—a deliberate falsehood.

Now that seems to me, since it relates—even if it didn't relate, but does relate directly to this business, if he, to the Government, made what I believe I can show is a falsehood, that is not a collateral or

(641-17)

immaterial thing; it is always relevant to show that the man has lied in regard to some important matter. It becomes doubly relevant if the lie directly or indirectly relates to the case on trial.

I think that is the law. Mr. Wolfram may add to that.

Mr. Wolfram: Your Honor, I should like to crystallize one thing for your Honor, and I think it is one thing we have all lost sight of.

Mr. Wessel: I just want to answer what Mr. Stryker is saying. Apparently Mr. Stryker wishes to get this return in order to establish that this witness said in the return that he was not able to get the information to file a return. That is precisely what this witness testified to so the document doesn't impeach. With regard to the Bercu——

The Court: And also it is merely cumulative from your point of view. You have already that statement in the record, that he said that.

Mr. Wessel: That I concede.

Mr. Stryker: But as it stands it is valueless to me, that he doesn't know whether he did or not.

Mr. Wessel: He said he did.

The Court: No, he doesn't know whether he
(641-18)
used—whether they got the Bercu reports or not, but he did say, he testified orally, as I recall it—my recollection is that he said that he put the dissolution——

Mr. Wessel: Absolutely.

The Court: —agreement on the return because he couldn't get any information. So if that is all you want the return for, to show that he claimed lack of information, he has already testified to that here.

Mr. Wolfram: If your Honor please, may I add this: I don't think this has been mentioned before and I think it is crucial here. The issue—one of the issues in the indictment, and certainly raised by the bill, is the fact that Mr. Lubben says that he did not receive $70,000 out of that corn box.

Mr. Stryker: He has sworn to that before you.

Mr. Wolfram: He said there was $140,000 in the corn box; he didn't get a cent of it. Now, if he received $70,000 out of the corn box, this is the return, the 1946 return is the one in which that should have been reported.

The Court: He said he never got it?

Mr. Wessel: He said it wasn't——
(641-19)

Mr. Stryker: No.

Mr. Wolfram: I know that, I know that, but we are not bound by what he said. We are entitled to go behind that. We are entitled to show he never reported it and that may be one reason why he is now saying that he didn't get it.

The Court: That is getting too remote.

Colloquy

The Wessel: May I say something about the Bercu papers?

The Court: Yes.

Mr. Wessel: The last Bercu report was as of January 31. It is not as of the date of the end of the partnership or the end of the fiscal year which is May 31, which is a big difference.

The Bercu papers, which are in evidence, do not disclose——

The Court: I realize that.

Mr. Wessel: So that wouldn't have helped Sproul Scholz at all.

The Court: That is related, but it is not exactly in point.

Now, Mr. Fraiman, you have some research you want to give us the benefit of. I didn't mean to cut you off, but I didn't want to lose Mr. Wessel's other

(641-20)

thought here.

Mr. Fraiman: The only point I wanted to make I think you have already made; that is, that the defendants have indicated they want these papers for the purpose of impeaching the credibility of the witness.

Now, as far as I have been able to determine, certainly not in this circuit and in any other circuit that I have been able to find, has a court allowed the defendants to see the tax returns of a witness for the purpose of impeaching his credibility.

The Court: That is my own feeling, that is what the law should be.

Mr. Stryker: I know no case where they said they couldn't in a case like this, and these papers are far less sacred than grand jury minutes, and I have

had in at least one case, and not this one, although you know the story about this one, it arose in the Hiss case, on Chambers' testimony, what he had sworn to before the grand jury, and I asked him about that, and I asked for the minutes. The judge sent for the minutes, examined the minutes, and gave me certain portions which he allowed me to cross-examine on, and I thereby established that he had lied and perjured himself before the grand

(641-21)

jury.

Now my only argument on that is—of course I know the general rule about income tax returns. It is a good rule, but when you come to the liberty of three people which may be involved on the testimony of a particular witness who, in my view, is an arrant liar here as well as elsewhere, I should think that I should have a right to probe his story and his motives for his story very fully, and I don't see how I can do my job very well if I can't, if you don't let me.

The Court: I don't think we are at a point here where this return has enough materiality to the issues of this case to justify invading the privilege. If it was part of that conversation and it was necessary to a complete and full picture of that conversation with Ronayne and the defendants, I would have been—at least my present disposition would be to give it to you unless somebody showed me authority to the contrary, but it is not.

My recollection of the facts was wrong and——

Mr. Stryker: You are right, it is not, and I am not dissenting at all from Mr. Wessel's version of the story.

Then with your permission, since Mr. Wessel has (641-22)
outlined the way I should do it, I am going to take an excellent tutor and follow that. Maybe when I get through you will see, I think, or you will agree with me that it ought to be in.

The Court: I wouldn't want to confuse the teachings of an excellent tutor, but my own feeling is that you are going to have a, call it a lagged student to deal with if you are going to get off into trial of issues as to whether this man filed an accurate tax return or not, because to me that is entirely collateral and I am not going to get into it.

Mr. Stryker: With all submission, will you let me say to you I think you are wrong about saying it is entirely collateral. I don't think it is even a little bit collateral. I think it is right down in the issues of this case as tendered by the bill of particulars and a plea of not guilty, and I don't see how I can probe this man as I should——

Mr. Wolfram: Also the charge that we took $70,000 of his, which he didn't report.

Mr. Wessel: Ask him whether he reported it.

The Court: Mr. Wolfram, you have too many steps on that, and at least as of the moment I view it as a collateral issue. (641-23)

Mr. Stryker: Then you won't get mad at me if I follow brother Wessel's advice?

Mr. Wessel: Mr. Stryker, I never suggested that he can inquire as to whether a return was or was not a true return. What I was talking about was whether there was an inconsistent statement in the return, inconsistent with his testimony. That is a different matter.

The Court: Yes, I see.

Mr. Wessel: For example, if he said he didn't file $70,000, and the return showed he did, I wouldn't think that Mr. Stryker could be precluded there.

The Court: I think that is the view of the law that I would be more likely to go along with. In other words, if he has given testimony, and you think you can shown an inconsistency by comparing it with his return, I don't gather that anyone claims that——

Mr. Stryker: The only way I can get at that is by interrogating him fr a the only thing I have.

Mr. Wolfram: Maybe we can do it.

Mr. Stryker: You think we can? Well, maybe we can.

Mr. Wolfram: It is hard, but we will try.

Mr. Stryker: It is difficult. You take it, you tell him.

(641-24)

The Court: I don't want to mislead you and get you into a blind alley. I regard his tax return as pretty remote from the issues, and I don't want you to spend a lot of effort and time trying to get at them from any careless statement I may have made. That is about all. I can't anticipate how you are going to get at it. Go ahead and try. I am all for that, but I don't want to be party to misleading you.

Mr. Stryker: All I want to know is that you won't get mad at me if I try.

The Court: No, I won't. Maybe I will see some new point.

Mr. Stryker: Go ahead, you have something here.

Mr. Wolfram: Your Honor, that brings up the second item on the subpoena, and I think this has been before you several times now.

The Court: That is the information on the informer's fees?

Mr. Wolfram: Yes, sir. No, I am sorry, it isn't. It is the second item, which is the investigations of the Alcohol Tax Unit and the fourth or fifth item, investigations of the OPA—the fifth item is investigations of the OPA.

The Court: I don't see the relevance of those, no. (641-25)

Now, if Mr. Wessel has anything to the contrary of what the witness said on informer's fees, I think he should bring it out.

Mr. Wessel: I will be very happy to answer the question on informer's fees which I could not the other day.

This man is not an informer, and is not entitled to have informer's fees, has never in any case been paid informer's fees, has never discussed the subject, to my knowledge.

The Court: If there is any error in what he said I would look to you to pick it up.

Mr. Wessel: If your Honor please, I have inquired of it long before Mr. Stryker raised it. I think I know who the informer was. Of course I don't think it is material, and I think it would be improper to disclose it, but I think that should conclude the matter.

The Court: All right.

Mr. Wessel: With regard to the other matters Mr. Wolfram mentioned, as I recall your Honor's ruling, it was in regard to a search, to find out where

those things are——

The Court: Yes. I don't see any need for them. (641-26)

This man has conceded—he admitted on the stand——

Mr. Stryker: Will you hear Mr. Wolfram?

The Court: Yes, surely.

Mr. Stryker: He knows more about this than I do, as you have seen.

The Court: All of you look so learned to me.

Mr. Wolfram: If your Honor please, we submitted a memorandum to you sometime ago on that question, and I think we called all the authorities to your attention. I don't know if there is any point to repeating them now.

The Court: I think at this point I am ready to deal with it pretty much on the question of materiality, and I am not going into it. It is not as though he has denied being investigated. He said from 1948 on he has, I guess, been investigated in all phases of these things, and if by any change anything he forgot, if there is anything he forgot it would certainly be cumulative at this point.

Mr. Wolfram: Well, the only thing I want to add is that we are relying on United States v. Beekman and United States v. Grayson.

The Court: I think now having heard the witness's testimony I will deny, I will quash the subpoena on those records. (641-27)

Mr. Wessel: Off the record.

(Discussion off the record.)

Mr. Stryker: Also, I think it is somewhere in this.

Mr. Wolfram: No, it isn't in the subpoena.

Mr. Stryker: Oh, no? Well, at this time I should like to have your Honor direct that the grand jury minutes of this witness be turned over to you, which I believe is the first step, and if any inconsistencies are found by your Honor that you permit me to see the minutes with respect to those matters, and also the statements to the agents.

I have interrogated about that. I don't know whether that is in the subpoena, but at any rate I think at this stage of the trial that I should have those documents, or rather you should have them and make up your mind whether I have a right to see them or not in order to conduct a proper cross examination.

The Court: I don't see any basis for it now, Mr. Stryker. I have listened to his testimony very carefully. If I thought there was any spot where an inconsistency was likely, I would be glad to check that over, but I don't think that there is any duty on the

(641-28)

court to check the grand jury minutes of prosecution witnesses, and frankly——

Mr. Stryker: I am only asking for this one.

The Court: —this man with all of his background has not impressed me as a witness I need to check so far as grand jury minutes are concerned.

I realize you perhaps have a different view.

Mr. Wessel: May I add something for the record and for your Honor's information? What Mr. Stryker talks about, is talking about now, is extremely voluminous.

The Court: I have no doubt of that.

Mr. Wessel: In addition to the fact there is no foundation, it would be a burden on the court to have to review those matters.

Mr. Stryker: I say it would be a burden on the Court, but I have the liberties of three people.

The Court: I may ultimately be more concerned with that than you are right now, and I certainly don't want the liberty of anybody in my hands that doesn't belong there, and so if I had any thought that the grand jury minutes would prevent a miscarriage of justice I would examine it, but I don't have any such feelings at this point.

(641-29)

Mr. Stryker: Well, I would also request that there be turned over to me the return of General Confections for the year 1946, which was filed in '47 I think.

Now, I will name one of many points. In this return, I believe, and again I am telling you only what I have information about, I believe it was denominated a consolidated return. Now that seems to be one of the great criticisms of my client about this consolidated return.

Now here is the same kind of thing with Lubben's company. I can't conduct—even according to my poor ability—any kind of a cross examination on that subject unless I have the return.

Also I believe the return will show that the joint incomes of Reserve Trading and General Confections were something over—I don't say income—joint receipts were something over five million dollars, and that he reported his drawing from that corporation at approximately one per cent; is that right?

Colloquy

Now I don't know much about the Department's rules, but I am told that they look over a return prima facie; is it ten per cent; if it is not then they go a little further.

Now that contrasts very importantly with our (641-30)

returns, and we are the ones that are supposed to file false returns, in which you will see that the drawings—am I stating this right—drawings of the stockholders are approximately or more than ten per cent, that the profit was more than ten per cent.

Now, here is a man who files a return that I think prima facie would cause the Government to investigate him, and I think the evidence shows that they did investigate him first, and a return which on its face would raise doubt.

Now, how am I going to make what I believe is a legitimate point, that he has turned on these defendants because of his own faulty return? How am I ever going to make that, and certainly if it is true, if my theory were substantially, it certainly bears heavily on the credibility of this man, and for three or four days I have been sort of attacking that.

The Court: Well, I don't know—I am not going to attempt to answer your question, Mr. Stryker, but I don't think the starting place is with releasing the return. At this point I don't feel that you are entitled to that. I mean, I am certainly not going to get into a situation where we have a matter of comparative fault, comparing Lebben's return with the defendants' here.

(641-31)

Mr. Wessel: Let me say I know of no fault.

Mr. Stryker: Well then with your permission—in other words, I don't want to run afoul of your

rulings—I am going to ask a few questions on the subject of these returns, and to get my point before you, or to get the question before the witness so that he can answer it. I am going to go on such information as I have, and I don't want to be met with an objection, "You are reading from a document not in evidence."

Mr. Wessel: I am afraid counsel will be met with that objection.

Mr. Stryker: I thought you just told me a few minutes ago that that was the way to do it.

Mr. Wessel: No, I don't think I ever said that. I said that you should inquire of the fact.

Mr. Stryker: Well, then, all right.

Let me try my poor feeble way to see if I can't.

The Court: All right, we will see.

Mr. Wessel: I do not know whether these subpoenas marked for identification should be marked in evidence.

The Court: I think they are just for identification, and they do not go to the merits.

They would be part of the record if marked for

(641-32)

identification.

Mr. Wessel: I would not want them to go to the jury.

Mr. Wolfram: May they be marked in evidence and go to the jury?

Mr. Wessel: Anything for identification does not, and those in evidence do go to the jury.

The Court: They are for identification so you may make any reference to them.

Mr. Wolfram: In other words, your Honor quashes them?

The Court: Yes.

Mr. Wolfram: And the records called for need not be produced?

The Court: Yes, that is right, as of this moment anyway.

Mr. Wolfram: So we do not ask that they be sealed.

(641-33)

(Jury in box.)

By Mr. Stryker:

Q. What was your total income from Eatsum during the partnership period? A. I don't know, sir.

Q. Can't you give me an approximation? A. No, sir; I couldn't. I was never allowed to see the books; they would not give me the books; they would not give me the books when it came time to pay my tax.

Q. You could not tell me at all what your income was; is that right? A. Well, the only way we paid my income that year, sir, was the accountant went over it and reconstructed it from what I could remember and what records were available.

Q. What did you report your income as in your return?

Mr. Wessel: I object, if your Honor please, as immaterial.

The Court: I think I will take it.

Mr. Stryker: I think his Honor rules I may ask that. Would you be good enough to answer, Mr. Lubben.

A. Yes, sir; I believe that the accountant prepared a statement from what records that I had of my bank balance

and so forth, and what I could remember. I think I reported twenty-two or twenty-five or twenty-six—I think (642)

it was something like $25,000.

Q. During the period covered by the Eatsum partnership, did you spend $79,502.78? A. Sir, if you can show me the books I would be glad to answer the question. I have been trying to get them for years.

Q. You cannot tell me whether that is so or not? A. I do not know, sir.

Q. Didn't I say out of the partnership? I mean, what did you draw out of the partnership yourself? A. I have no way of knowing, sir. I have always wanted to answer that question.

Q. Didn't you spend $79,000 that you got out of the partnership? A. Sir, I would not know what I spent out of the partnership. When I asked, the time to file my income tax——

Q. Yes, I know. Do you know what you spent during that time on furnishings for your home, construction and repairs to your house and cottages on your farm, and on your chicken houses, in Hillsdale? A. Whatever I spent, sir—you mean out of the partnership. Whatever I spent, sir, there must be some record in the partnership of what I spent. If I drew a nickel out of it, sir, you can rest assured it was charged against me.

(643)

Q. Let me put it this way: in your Kefauver testimony you said that you gave them everything, meaning these defendants, and that all you got were a few lousy pieces of machinery and a lease that you had already in the proprietorship, and I think that is all you said you had gotten. Is that right? A. Sir, I corrected it yesterday. I

told you first of all my use of English down there was not correct. I should not say "lousy."

Q. Leaving that aside and not referring to that for the moment, other than that, is that all you got out of the partnership? A. The dissolution agreement stated I was to get the lease on the plant in the Bronx and I was to get the machinery that was there, and I was to get my income tax paid as shown on the books of the company. Now those were the points I said. Now there was another agreement where I was supposed to get several hundred dollars per week, but I didn't get a dime; nor did I get the money for the income tax. Nor did I even get the information so I could file the return from what is on those books.

Q. Are you through? I did not want to interrupt you. A. Yes, I am, sir.

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Q. Is what you have told us now all you got out of the partnership? A. What do you mean, what did I get out of the partnership? Do you mean other than that?

Q. Yes. A. And a lot of headaches.

Q. You got the things that you got and you got the headaches, and that is all you got; is that right? A. To the best of my recollection, sir, I don't know anything else I ever got.

Q. Let us see; I want to see that I am clear and that we understand each other. You got nothing else out of the partnership other than what you have just testified here during the past few minutes; is that right? A. I got the lease and the plant——

Q. I don't want to go over it again. A. All right, that is all I can remember I ever got, sir.

Q. Have you now told us all you ever got out of the partnership? A. Yes, sir.

Q. You understand my question? A. I can't think of anything else.

Q. I mean my question is not confusing to you? A. No, it is not.

Q. It is clear, and that is your answer, is that right? A. Yes, sir.

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Q. I show you this paper——

Mr. Stryker: I will get an identification number on it.

(Marked Defendants' Exhibit S for identification.)

Q. And ask you if that paper bears your signature (handing to witness)? A. Yes, sir.

Q. And you issued that check yourself under the date that it bears, on the check; is that right? A. The 23rd day of November, sir.

Q. What year? A. 1945.

Q. That is while you were a partner? A. Yes, sir.

Q. Was this a check to the Cheel Construction Company? That is the payee, isn't it, of the check? A. Yes, sir.

Q. And the Cheel Construction Company, I think you told me this morning, was doing alteration or construction work on your farm; is that right? A. Yes, sir.

Q. And this check was written and issued by you and paid to the Cheel Construction Company; that is right, isn't it? A. That is right, sir.

Mr. Stryker: All right, I offer it in evidence.

Mr. Wessel: No objection.

(Defendants' Exhibit S for identification

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received in evidence.)

Q. The check is drawn on the partnership account, isn't it? A. Yes, sir. The bookkeeping procedure would have charged it to me, sir, or whateyer account it was supposed to be charged to.

Mr. Stryker: I guess I better now show it to the jury. Mr. Foreman, this is the check just identified by the witness. I wish you would all look at it (handing to jury).

Q. The check was for work done on your farm, wasn't it? A. Yes, sir.

Mr. Stryker: I will mark this paper for identification.

(Marked Defendants' Exhibit T for identification.)

Q. I show you Defendants' Exhibit T for identification (handing) and without repeating them, I will ask you the same questions I did about the other paper. Are your answers the same? A. Yes, sir. This is a check drawn by me, sir.

Q. On the Eatsum partnership account? A. Yes, sir.

Q. That was to Cheel for work done on your farm? A. Yes, sir.

Mr. Stryker: I offer this in evidence.

(647)

Mr. Wessel: No objection.

(Defendants' Exhibit T for identification received in evidence.)

Q. The figure on that was $9,732.13. I think I have read it right. See if I have. A. Yes, sir.

(Defendants' Exhibit U marked for identification.)

Q. I show you this paper marked Defendants' Exhibit U for identification (handing), and ask you, without repeating them, the same questions about this check that I asked about the others, and are your answers the same? A. Yes, sir; this is a check drawn on the pratnership account, signed by me.

Q. To Cheel Construction Company for work done on your farm? A. Yes, sir; that is correct.

Q. In the partnership; and the date is January 9th, or June 9th, which is it? A. I don't know.

Q. Jantuary, I guess. A. January 9th.

Q. January 9th, 1945, in the amount of $8,000; is that correct? A. Yes; that is correct.

Mr. Stryker: I offer this in evidence.

Mr. Wessel: No objection.

(Defendants' Exhibit U for identification received in evidence.)

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Mr. Stryker: I believe I said 1946. I misspoke myself. It is 1945, isn't it, Mr. Lubben?

The Court: You said 1945, Mr. Stryker.

Mr. Stryker: Then I will blame Mr. Wolfram for that.

Ladies and gentlemen, this is a check signed by Mr. Lubben for the partnership account to the Cheel Construction, $8,000. Would you be kind enough to look at that (handing to jury).

(Defendants' Exhibit V marked for identification.)

Q. I show you Defendants' Exhibit V for identification (handing), and ask you without repeating them the same questions that I asked you about the first check, and ask

you if your answers are the same? A. Yes, sir. This is one for $6,500.

Q. To the Cheel Construction Company, is that right? A. Yes, the name is Cheel.

Q. How do you pronounce it—C-h-i-e-l? A. It is C-h-e-e-l, Cheel; yes, sir.

Q. Anyway, this is the construction company did the construction work on your farm? A. Yes, sir.

Mr. Stryker: I offer this in evidence.

Mr. Wessel: No objection.

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(Defendant's Exhibit V for identification received in evidence.)

Mr. Stryker: Subject to correction, I am not going to ask the witness about it, the total of those checks is $29,704.12. If you find my addition wrong, correct me, but I would like to have that in evidence subject to correction.

This is Defendants' Exhibit V in evidence, a check to the Cheel Company for $6,500 (handing to jury).

(Defendants' Exhibit W marked for identification.)

Q. I show you this paper (handing) and ask you, except as to the name of the payee, to assume my same questions, and if your answers are the same? It is Exhibit W for identification. A. Yes, sir; it is a check drawn by me, sir.

Q. Who is the payee? A. B. Altman & Company.

Q. Did they sell you certain household furnishings? A. They did, sir.

Q. For your own farm in Hillsdale; is that right? A. That is correct, sir.

Mr. Stryker: I offer it in evidence. The amount is $2,118. Is that right?

The Witness: That appears to be correct, sir.

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Mr. Stryker: And 89 cents, isn't it?

The Witness: Eighty-nine cents, yes, sir.

Mr. Stryker: I offer this in evidence.

Mr. Wessel: No objection.

(Defendants' Exhibit W for identification received in evidence.)

Mr. Stryker: I will mark this one for identification.

(Marked Defendants' Exhibit X for identification.)

Mr. Stryker: Ladies and gentlemen, this is a check drawn on the account in the Eatsum Food Products Company, December 12, 1945, for $2,118.89, to the order of B. Altman & Company (handing to jury).

Q. I show you this Defendants' Exhibit X for identification (handing), a check to B. Altman & Company, and ask you the same questions. Would you give the same answers with respect to that? A. Yes, sir. This is a check to B. Altman & Company, sir.

Q. Signed by you? A. No, sir; this is not signed by me. It is signed by Mr. Hankermeyer.

Q. That is your uncle, on your side of the partnership, you told us? A. Yes, but I owned fifty per cent of the partnership.

(651)

Mr. Stryker: I offer it in evidence.

Mr. Wessel: No objection.

(Defendants' Exhibit X for identification received in evidence.)

Mr. Stryker: This, ladies and gentlemen, is a check to B. Altman & Company, on the Eatsum partnership account, signed by Roy Hankermeyer, the witness's uncle (handing to jury). The total of those two checks to Altman I will state subject to correction, and I hope I add them right, is $7,135, to Altman, in addition to the $29,000 to Cheel.

Q. In addition to the checks now in evidence, the Cheel checks totaling $29,704.12, those checks now being in evidence, did you draw any other moneys from the partnership to pay Cheel Construction Company for work on your farm? A. Sir, that is a question I tried to get the answer to when my income tax came due. I do not understand how they find the checks now and could not then.

Q. I asked did you draw any other moneys from the partnership? A. Did I draw any other money? Sir, if you bring me the books I would be glad to answer.

Q. Wouldn't you know generally? A. Sir, I don't know, but I will say these checks were kept in the normal course

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of business.

Q. Mr. Lubben, I do not want to interrupt you, but I do not think that answers at all my question, which I think is simple. If you would answer it I would appreciate it. Do you know? If not, we will pass along. A. Do I know what, sir?

(Question read at Mr. Stryker's request, as follows:

"Q. In addition to the checks now in evidence, the Cheel checks totaling $29,704.12, those checks now being in evidence, did you draw any other moneys from the partnership to pay Cheel

Construction Company for work on your farm?")

A. I would not know, sir. If you——

Q. All right. Did you ever pay Cheel for his construction work on the farm from any other source by the partnership? A. Yes, sir, I believe I paid him money, sir. I would think I paid him from my own personal bank account. I believe we paid him a substantial amount during the time of the General Confections, General Confection checks.

Q. I won't stop you, but I am only interested at the moment in payments during the partnership. A. No, sir, I would not know.

Q. Either with respect to the partnership or General

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Confections, for the moneys, if any, that you paid Cheel, did you draw checks to your own order or to cash for those payments? A. For what payments, sir?

Q. To Cheel? A. Sir, if I did, they would be on the books and records of the company.

Q. If you do not remember, I cannot pursue it any further. You do not remember? A. I do not remember whether I did or did not. If you give me the books and records, I will be glad to identify them.

Q. Will you give me, other than the checks that are now in evidence, all the sources of the money which you paid Cheel for the work on your farm? A. To the best of my recollection, sir, it came from the—it came from my personal account.

Q. Well, I suppose we have to go into your personal account.

Mr. Wessel: It is a responsive answer and I think he should be permitted to answer the question.

The Court: Continue your answer.

A. It came from the partnership account, which would be charged to me.

Mr. Stryker: I am sorry, I was talking to my associate. Could I have that read?

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(Answer read.)

A. It came from the——

Q. The Eatsum partnership? A. Yes, sir, the Eatsum partnership, and it came from General Confections.

Mr. Stryker: I am sorry, Mr. Lubben. Sometimes when I am back here, I don't know about the jurors, but when I am back here your do—I am not saying you do it intentionally at all, but you do drop your voice.

Could I politely ask you to keep it up a bit?

A. (Continuing) And it came from the General Confections account which would be charged to me.

Q. Either one or the other? A. What do you mean, one or the other?

Q. Are the sources you have named the only three sources from which you got checks other than the ones in evidence to pay Cheel? Is my question clear to you? If it isn't, please tell me. It may not be. A. The question is clear. Do you want it answered?

Q. Yes. A. All right, sir. That is what I was trying to do. I don't know for sure, but there may have been a check that I borrowed from my factor, that is, the man I borrowed money from. There may have been money from him. I don't know whether that is true or whether it is not

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true.

Q. All right. A. But there is something in my mind that makes me think I borrowed some money from him for

something on the farm. I think there is something there, yes, sir.

Q. Do you happen to have checkbooks, the check stubs for the checks you are talking about? A. What checks I am talking about?

Q. I think you said you got some money from your factor, is that right? A. I said I think. It is something in there (indicating); it is just a memory. This is back in 1945.

Q. Yes. A. It is more than—it is ten years ago.

Q. That's right. A. I don't have any books and records of any shape or sort, sir.

Q. Well, if that were so, you gave Cheel checks of the factor. Would that be right? A. I didn't say checks now, sir. I think I borrowed some money, and whether I gave it to Mr. Cheel or not, I don't know, but I am inclined to believe that I did. Now I could be wrong. It is just a guess on my part. You are asking me; I am trying to answer.

Q. I know. Did you ever get a bill from Cheel for the full amount of the work that he did on your farm?

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A. You mean a statement?

Q. Well, a bill is something I understand. Well, a statement, yes, of what he had done. A. A bill for all the work that he did from the very day that we got it? Now you say a farm. Let's clarify that a little bit, sir.

Q. I will use any words you want. I am talking about this Hillsdale property that we have been talking about. A. Yes, sir.

Q. That is what I am talking about. A. Originally he did some remodeling work on the house, and then he did some work on the back, on the barns, and the barns were converted to a candy factory. He did some very extensive work there for quite some time.

Then he did some remodeling work on some houses, and all of this would take from the time that I bought the place which, I believe, sir, was shortly after that I became a partner of Mr. Giglio's, and it continued, sir, I mean, the construction work continued until shortly before we went broke.

Q. All right. Now I am not interrupting you now; you have finished? A. Yes, sir.

Q. What I am asking is: did you ever get a bill or any words you want to call it, statement, I don't care what it is, from Cheel, billing you for the amount of work that

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he had done? A. I may have, sir. I know I used to get bills very frequently.

Q. Mr. Lubben, when you prepared or assisted in preparing your 1946 tax and income return, did you have before you or available your personal checks? A. Yes, sir, I am sure we did, sir.

Q. And did you also have the checks on General Confections? A. Yes, sir.

Q. Now, if you deducted from Cheel the total amount of Cheel's bill, the amount of the checks which I have put in evidence——

Mr. Stryker: Mr. Wolfram, you ask that question; I am too tired.

Mr. Wolfram: May I do that, your Honor?

The Court: Yes.

By Mr. Wolfram:

Q. Mr. Lubben, if you deducted from your Cheel's bill or statement the amount of your personal checks, and the amount of your checks on General Confections, drawn to Cheel, would you not have had the amount of the checks

that you drew on the Eatsum Partnership, in payment to Cheel?

Mr. Wessel: I object to the form of the question.

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The Court: I will sustain the objection.

Q. Did you, Mr. Lubben, in preparing your 1946 tax return, compare the bill or statement that you received from Cheel and offset against that bill the checks drawn on your personal accounts to Cheel and the checks drawn on your General Confections account to Cheel? A. Sir, I would kind of have to figure that one out with a pencil. There is a lot of questions in there.

Q. Would you care to figure it out?

Mr. Wessel: Well, if your Honor please, we are talking about—perhaps I shouldn't comment. I object to the question.

The Court: You object?

Mr. Wessel: Yes, your Honor.

The Court: Well, I think it is objectionable, too. Now, maybe I missed a step along the way here.

Mr. Wolfram: May I state it?

The Court: Yes. Could I talk to you for just a second. Maybe I am wrong.

(Counsel approach the bench; discussion not recorded.)

By Mr. Wolfram:

Q. When you prepared your 1946 tax return, Mr.

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Lubben, you knew you had paid moneys to Cheel Construction for work done on your farm, is that correct? A. Sir,

number one, I didn't prepare my 1946 return. Number two, any bills that were there, whether they were the bills of the company, whether that work was chargeable to General Confections, I don't know. There was a time later, sir, when the factory was transferred to General Confections and some property and some houses, I don't know, sometime, whether it was done, but all of these books, records and everything else, so far as General Confections, that were there, they were there and they were available to the accountants who made statements. So I wouldn't know, sir. I mean, I didn't prepare any statement.

Q. When was your 1946 tax return prepared, Mr. Lubben? A. Sir, I don't know when you are supposed to file it, but whenever it was, it was prepared, and I believe it is March 15th or something like that. I don't know when it was filed.

Q. Your 1946 tax return covered your entire period in the Eatsum partnership, did it not? A. My 1946 tax return covered the entire period in the Eatsum partnership? How could it cover my entire period in the Eatsum partnership? I was only a partner there from May, in 1945, until March of 1946, so how could the 1946 have covered that?

(660)

Q. Did it cover your entire income from Eatsum or did it purport to cover your entire income from the Eatsum partnership? A. Sir, you would have to ask that of my accountant. I don't know.

Q. You wouldn't know. And when that return was prepared you knew, or had the means of obtaining the amount of money that you had spent on construction with Cheel Construction Company; is that correct? A. That seems a little bit vague. I had the means, the knowledge of what, what return?

Q. Of how much money you had spent with the Cheel Construction Company? A. How could I, sir. Mr. Giglio wouldn't give me the books. They give you a flippant answer, "what books? We don't have any books. The books are lost."

Q. Did Mr. Giglio have Mr. Cheel's books? A. Well, he had the books of the corporation—of the partnership. You showed me some checks here today.

Q. Did the partnership books reflect all of your dealings with Cheel? A. Sir, if it was anything that was written on a partnership account, that was on the books.

Q. When Mr. Cheel did work on your farm in New

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Jersey, that was a transaction between you and Mr. Cheel, was it not? A. Yes, sir, when he worked on my farm was between me and Mr. Cheel, yes, sir.

Q. And the fact that the partnership paid some of that, some of those bills was just coincidental, wasn't it? A. No, but, sir, if you will bring up the books and bring some statements or something and get my accountant here, I think you will find that I was drawing my own money out. I don't know, something in there (indicating)—but, sir, let me say this: regardless of how much money I drew out of the partnership or how many checks were taken out by me of the partnership, I have a letter, a statement there, that anything that was drawn, that was out of the partnership, the partner was to pay, the money was there to pay it. There was provisions for that, and why wasn't I getting my money back?

Mr. Wolfram: I ask that the latter part of the answer be stricken. I don't think it is responsive.

The Witness: That is an answer.

Pardon me.

The Court: As a matter of fact, I have lost track of what the question was. What was it? You asked (662) him whether—What is the question?

(Question read.)

Mr. Wessel: I am afraid the word "coincidental" isn't just.

The Court: I don't see anything wrong with that. Well, we will let it stand. We ordinarily break now. If you want to pursue this for a few more questions I won't break it off.

Mr. Wolfram: May I do that, your Honor?

The Court: Surely, go ahead.

By Mr. Wolfram:

Q. Mr. Lubben, did you know when that 1946 tax return was prepared, whether you prepared it or not, it was prepared——

Mr. Wolfram: I will withdraw that.

Q. Your 1946 tax return was prepared by someone, was it not? A. Yes, sir.

Q. You knew when that tax return was prepared that you had made certain expenditures to the Cheel Construction Company, didn't you? A. No. But, sir, it seems to me——

Mr. Wolfram: Your Honor, I think that calls for a yes or no answer.

The Court: Well, I won't make you give a yes (663) or no answer. Can you answer it?

A. Sir, it seems to me, sir, that there was some kind of a form that was attached, that was made, showing my

time in the partnership, and I know we tried very hard, and I believe there were several extensions made on that one there because they would not give—just a moment, sir, you wanted an answer—they would not give me the books, sir, and, sir, attached to that form was a copy of the dissolution agreement and, I think, a copy of some return receipt showing we had made request, and so forth, and a letter to the Treasurer and so forth, or to the man that collects the money, and whether that was on the 1940 return or whether it was on the one previous, I don't know which, sir.

You would have to ask my accountant. I don't know.

Q. Does that answer have any relation to the Cheel Construction Company?

The Court: I think we will strike the answer.

Mr. Lubben, don't jump ahead to what you think the next question is going to be.

What was the question? The last question.

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(Question read.)

A. Sir, when my income tax report was prepared, we have books and records of our expenditures and receipts in the office, sir, and I certainly didn't remember if I spent something in January, to have to tell about it here. If it was there, it was on my books and my accountants, and so forth, would pick it up. My bookkeeper would enter it in the normal procedure of business.

Q. I gather from that answer that you did not tell your accountants about your expenditures with the Cheel Construction Company. A. I don't see how you could get that from that answer at all, sir. I say the information was there. If I specifically stated something about the Cheel, I can't recall it, because there was nothing about the Cheel

situation that I would have to sit down and make a special disclosure about.

Q. Didn't the Cheel Construction item represent income to you from the Eatsum partnership? A. I don't recall whether—how would I know what the Cheel Construction—because I wouldn't have the copy of the bills, because if that bill was paid by the partnership, the invoice would be in their records. How would I have a copy of it?

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Mr. Wolfram: Your Honor, he is just not answering the question.

Mr. Wessel: That is not so at all, if your Honor please.

The Court: Well, I think in a broadside sort of way he is. I won't go along with your characterization.

Go ahead, you can pursue it further if you want.

By Mr. Wolfram:

Q. Did your payments to Cheel represent income or moneys which you had taken, at least, in part, from the Eatsum partnership?

Mr. Wessel: Now, I object to the use of the words "income or moneys."

Mr. Wolfram: Well, let's have it "moneys" then.

Q. Did your payments to Cheel represent moneys that you had taken from the Eatsum partnership, in part? A. Did my payment to Cheel represent moneys I had taken from the Eatsum partnership? That doesn't seem to make much sense.

The Court: In other words, was the payment

(666)

to the Cheel Construction Company entered on the partnership books as though it were a payment to you personally? Is that what you wanted, Mr. Wolfram?

Mr. Wolfram: Yes, sir.

The Witness: Sir, that is a question that I wanted to know a long time ago. How can I answer? I never saw the books.

The Court: He isn't asking how much.

Mr. Wessel: If your Honor please——

The Court: Maybe I am getting it wrong.

Mr. Wessel: Everybody is, with all due respect. I think there is quite a difference between income and moneys received, and I think that is what the witness is saying.

The Court: All right.

By Mr. Wolfram:

Q. Did you draw moneys from the Eatsum partnership with which you paid the Cheel Construction Company for work done on your farm or your place in Hillsdale? A. Did I draw moneys from the partnership that were paid to the Cheel Construction Company for work done on my farm? The answer is yes.

Mr. Wolfram: Mr. Stryker advises me to stop now.

(667)

Mr. Stryker: No, I don't. I thought the judge was going to do it, and I bear the judge to it.

The Court: No, I don't like to interrupt if you are going to lose something with this break.

Mr. Wessel: I think this line should be completed now, because the record is not at all clear in this. I think it would be better if it were.

The Court: Well, I think we'll break now.

I have a reorganization proceeding tomorrow in the morning. It was fixed a long time ago and we can't do anything about it. So we will adjourn this case until one p.m. tomorrow; in other words, if you came in at 1:00 p.m. we will get a three-hour day by working through until 4:00.

Is that all right with everybody? It won't upset any plans. All right, don't discuss the case.

(Adjourned to January 21, 1955, at 1:00 p.m.)

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New York, January 21, 1955,
1:00 o'clock p.m.

Trial resumed.

DAVID GEORGE LUBBEN, resumed.

Cross Examination by Mr. Stryker (Continued):

Q. Yesterday I put in evidence, I think it was two checks, which you signed and paid B. Altman; you remember those, don't you, Mr. Lubben? A. Yes, sir; I believe there were two, yes, sir.

Q. I show you this paper——

Mr. Stryker: First, mark it for identification.

(Marked Defendants' Exhibit Y for identification.)

Q. (Continuing) —and I ask you whether or not you did not pay additional sums to B. Altman for your house over and beyond the two checks I placed in evidence. A.

You said you show me this paper, and then you ask me—you haven't shown me the paper.

Q. That's right, I haven't. Now will you tell me that?

Mr. Wessel: Let the record disclose that the question said "I show you this paper," and counsel (669) is standing way from the witness with the paper in his hand.

The Court: Do you want to test his recollection without the paper, Mr. Stryker?

Mr. Stryker: I thought I would start that way if Mr. Wessel would let me.

The Court: All right.

Q. Did you pay additional sums to B. Altman for your house, for furnishings, what not, for your house over and beyond the two checks that I showed you yesterday? A. Yes, sir.

Q. How much more? A. I don't recall, sir.

Q. I now show you Defendants' Exhibit Y for identification and ask you if that will refresh your recollection? A. Yes, sir.

Q. Your recollection being refreshed, will you testify to the additional sums that you paid B. Altman over and beyond the two checks that I showed you yesterday? A. Which two checks did you show me yesterday, sir? Where are they on this here?

Q. That is a fair question. I will get them for you. The two checks yesterday, here, Defendants' Exhibits W and X in evidence were the two checks I showed you. One is for, I read it, $4,816.47, I think, and the other is for (670) $2.118, and I am not sure if it is 30 or 50 cents. It is over

and beyond those. Take them; that is all right. A. Yes, sir, I have identified the payments here.

Q. Can you be good enough, having refreshed your recollection, to state the payments over and beyond these? You might want these two checks before you. A. Yes, sir. There was a payment here of $69.28.

Q. Let us take it slowly; $69.28. Go ahead. A. One of $257.15; one of $268.82; one of—well, sir, now let me correct myself. You said "for furnishings and things that went into your house?"

Q. Yes. A. Well, these are—some of these are long before I ever bought the house, sir.

Q. Well, I don't care when you bought it. They were for your house, weren't they? A. I wouldn't know, sir. I mean, how could they be for the house if I didn't have a house?

Q. Well, they were for your account? A. Yes, sir. It is a statement of my account, what I bought.

Q. All right, go ahead. A. One for $14.57; one for $17.26; one for $84.39; one for $72; one for $2,058.12; one for $255.04; one for $2,052.89; one for $592.77; one for $130.72; one for $6.95.

(671)

Q. $6.95? A. Yes, sir. One for $427.92; and one for $550.27.

Q. Those were all during the partnership period, weren't they? A. Oh, no, sir, they certainly weren't, sir.

(671a)

Q. They were not? A. No, sir.

Q. Well, now, let's see. Well, February 7th was not during the partnership. March 8th, that was when you started with Mr. Giglio? When did you begin the partnership? A. Sometime, sir, it was officially signed in, I think, about June the 15th.

Q. Well, you told us, I think, that you were already operating. A. About a month previous, yes, sir.

Q. So it would be about, what date, did you say? A. I would say in May, sir, May of 1945.

Q. Now, would it be before or after May 17th? A. I don't know. If you have some records to refresh my memory——

Q. I am not asking about records. I am just asking your recollection. A. It was a month; we started negotiating in April and May.

Q. Let's take all the checks on the paper that you have refreshed your recollection from, beginning with June 8th. You were then in the partnership, weren't you? A. Yes, sir.

Q. All those checks from June 8 down through December, down through—let's see, down to April—— A. No,

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we will take it to February 28th.

Q. Through February 28th? A. Yes, sir.

Q. Were during the partnership period? A. Yes, sir.

Q. Well, now, just for clarity, see if I state this right—if I don't please correct me: The checks that you have just mentioned during the partnership period were June 8, $14.57? A. Just—well, this was merchandise I bought during the partnership period, sir, but this don't mean that this money came from the partnership, because, sir, you have only showed me two checks during the partnership.

Q. That is all I have showed you, you are quite right. A. The other may have come from my personal account or from—that I had, sir.

Q. Well, of course, anything might have happened. I am only asking you if these checks that I am now calling your attention——

Mr. Stryker: Strike that.

Q. These payments that I am now calling your attention to occurred during the partnership period. Now, is that clear to you? A. The payments did, sir, but it don't mean it

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came from the partnership account.

Q. I understand. Did the payments come? A. Yes, sir.

Q. Now, will you follow me and tell me if I am reading it right. Let's start June 8th. That was the partnership then, wasn't it? A. Yes, sir.

Q. Let me read along because I want to——

Mr. Wessel: I think this is irrelevant. I object to it.

By Mr. Stryker:

Q. $14——

Mr. Wessel: If anything, it is cumulative.

Mr. Stryker: It is not cumulative.

The Court: No. As a matter of fact, if you are going to raise the question of relevance, I would like to talk to counsel for a second.

Mr. Stryker: Very well, sir.

(Discussion at bench not transcribed.)

The Court: Let's go into chambers.

(Discussion in chambers.)

(674)

The Court: Mr. Wessel objected to that first check yesterday. I haven't attempted to sustain him. I don't see how you can ask a man his income which I regard as a non-material point, and then go around and show that his statement on that non-material point is wrong, if that is what this is supposed to show.

Mr. Wessel: I didn't object for this reason: as I understand, if your Honor please, they are trying to show that this man drew a lot of money.

The Court: Is that it?

Mr. Stryker: Certainly.

The Court: Well, go along with that.

Mr. Wessel: I have no objection on that ground. However——.

The Court: Here this doesn't tie into that.

Mr. Wessel: It doesn't tie into it. These figures are all in evidence. Although it is somehow in his refreshed recollection, it is so minor and so cumulative I think we are wasting time.

Mr. Stryker: I don't think we are wasting time.

The Court: This doesn't tie back to the partnership.

(674-1)

Mr. Wolfram: Obviously, your Honor, we have to start some place. We have to start with the expenditures, and we have to try to tie it in without Altman being involved in it. We are starting with Altman.

Mr. Stryker: We are going into many others.

The Court: First of all, I don't see what materiality his income from the partnership has.

Mr. Stryker: I will tell you one among many reasons, your Honor. He has testified under careful questioning, I hope, as to what he got from the partnership.

The Court: No, he didn't testify what he got. He said he never knew, they would never give the records.

Mr. Stryker: No, he has testified to what he said he got from the partnership. That is clear.

Mr. Wessel: There is a difference.

Mr. Stryker: Pardon me.

The Court: Let's get on to the next point.

Mr. Stryker: Now I am going to show, among other things, that that statement is false, and I am going to prove it right out of his own mouth. He makes a statement here——

The Court: He never made any statement.

Mr. Wessel: If your Honor please, we are talking about money——

(674-2)

The Court: Let's go into chambers.

(Discussion in chambers:)

Mr. Wessel: If I may state my general objection, Mr. Stryker, I think this is the basis of all my objection: this man drew money out of the partnership-money. Whether money is income depends upon whether it is money that he put in to start with or whether it is profitable to the partnership. For example, if I put $100,000 into the partnership and then drew twenty thousand and ten thousand and fifteen, I haven't made any money.

The Court: Before we get to that, I don't see the materiality of what his income was, in fact, or what he drew from the partnership.

Now, if I could get that elementary question——

Mr. Stryker: Let's see if I can't answer that.

Mr. Wolfram: Excuse me.

Mr. Wessel: I can see its materiality.

The Court: Let me get the point. Go ahead, Mr. Stryker.

Mr. Stryker: In the bill of particulars the Government charges the defendants with receiving——

Mr. Wolfram: Unreported income of $140,000 (674-3) out of the corn syrup box or transactions, and then there is a further charge of some other, unidentified as far as the bill of particulars is concerned.

The Court: This will go, then, to the net income of the partnership; is that what you are going into?

Mr. Stryker: It bears right on the indictment.

Mr. Wolfram: And how it was distributed.

The Court: All right. In other words, that there was an expense here beyond which the Government had made allowance. All right.

Mr. Wessel: And there is really no question in my mind that it is relevant and material to that subject. The only question is, and we are dealing now with what is essentially a net worth theory, proving what this man had, and in order to avoid the very complex proof in this field we must tie it into what income is, what period we are talking about, whether, as your Honor has pointed it out, it came from his own personal account, partnership account or a loan or something like that, because otherwise we get into all this man's expenses and all of his income for quite a long period, and since he spent a lot of money, I am sure, it is going to be a very complicated matter.

(674-4)

Here we have just one store, B. Altman. I have no doubt he had fifty other charge accounts.

Mr. Wolfram: If your Honor please, there are any number of checks drawn to cash by this witness, and you just can't start to prove what he drew from the partnership unless you show that during that

partnership period he used some of that money for these purposes, for personal purposes.

Now we have started to do that, and that is at the very——

Mr. Stryker: It merely supplements the two checks that I put in evidence that were partnership checks.

Mr. Wessel: Let me say this, if I may, and I think we are all playing with words here. Downstairs—and Mr. Stryker's accountants as well as my own have it—is the general ledger of the Eatsum Food Products Company which, of course, they can use now if they wanted to.

That general ledger I believe shows drawings. Now I am not talking about income, but drawings by this man out of the partnership during that period, and I am quite wrong about my figure, but it is somewhere over a hundred thousand dollars.

If it is going to be reconstructed by this kind of evidence, when it is right in the books, we are going to be here an awfully long time.

(674-5)

Mr. Stryker: I don't think so, unless I have to respond to a lot of objections. I don't think it will be very long. I started showing disbursements made for his account by checks. You remember that yesterday?

The Court: Yes.

Mr. Stryker: Two of them to B. Altman and a number of them to the Cheel Construction Company which were for his account.

Now I think it was only right to finish out that B. Altman story by what I found where additional payments were made to B. Altman, and in case you

are interested—and I will show it to Mr. Wessel, although it is not in evidence—that is a letter written by B. Altman to one of our accountants, and those are the figures I am looking for.

The Court: Yes.

Mr. Wessel: Let me say this, if it is just B. Altman, your Honor, it is a trivial matter and it is probably another fifteen minutes. If it is each store then I must make my objection.

Now, for example, this document, the witness is testifying from this as though it refreshes his recollection. I think everybody knows that it doesn't

(674-6)

refresh his recollection.

Mr. Stryker: He said so.

Mr. Wessel: So I would have a proper objection on that ground. I won't make it if we are not going into all these other areas.

Mr. Stryker: Well, these checks, they are, most of them, small. What do you suggest?

Mr. Wolfram: I have a suggestion that might cover the situation. If we got an answer from the witness concerning substantial expenditure in other accounts without going through the detail——

Mr. Wessel: I think that is an excellent question if counsel wishes to ask it. I don't know what the witness knows about the amount of money he received.

The Court: As I understand his testimony, he said whatever those books showed he wouldn't dispute if you just showed him the books.

Mr. Wolfram: Of course he won't, but there are a lot of cash checks and he won't dispute the books because the checks are just drawn to cash

by David Lubben. We don't know what happened to it. He does.

The Court: He says the ones that he spent were charged to his personal account.

(674-7)

Mr. Wessel: Ask him. You can show him the checks and say, "Well, now, isn't it a fact that you drew more than what is in these books?"

If he says "Yes," that is fine. If he says "No," I don't know what you can do about it.

Mr. Tilzer: I don't quite see the relevancy of this, if I may say so, your Honor. If you can conceive of a situation in which the partnership had no net income at all as a result of its operations, no matter what he draws it has absolutely no bearing upon the problem.

Mr. Stryker: There is a dispute between counsel.

Mr. Wessel: It is relevant. I don't want to cut counsel off on this line of examination on that ground because I think it would be improper for us to do it.

Mr. Stryker: Let's go ahead then.

The Court: I have started enough confusion to now anyhow.

(674-8)

By Mr. Stryker:

Q. Now, let me go along with that. Mr. Lubben, will you look over this and see if I am reading it right, which

(674)

will refresh your recollection.

Well, June 8th you certainly were in the partnership then, weren't you? A. Yes, sir. I would say yes, sir.

Q. All right. Now let me read these figures, and will someone there be kind enough to add these when I get through:

June 8, $14.57;
July 12, $17.26;
July 26, $8,439;
September 9, $72.50;
October 2, $5,058——

A. Where are you reading from sir—$2,058.12?

Q. Isn't that what I said? A. You said five thousand, sir.

Q. Well, if I did—— A. You are looking right at it, sir.

Mr. Stryker: What did I say? Did I say five or two?

(Figure read.)

Q. You are right, it is not five thousand, it is $2,058.12; is that right? A. Yes.

Q. November 8, $255.04? A. Yes, sir.

Q. December 14, $2,118.89? A. Yes, sir.

(675)

Q. January 15, five thousand—— A. This $2,118.89 ——.

Q. Didn't I read that? A. Yes, sir, but that is the one that we had the check from; that came from the partnership.

Q. You are quite right. A. That was drawn with a partnership check.

Q. I wish you would do that. If any of these include these checks, I want you to tell me. A. Yes, sir.

Q. Then we will strike out—what was that? A. That is one over here, the next one.

Q. That is, five thousand, you are quite right. A. No, we leave out the two thousand one hundred eighteen——

Q. Yes, I will leave it out. $2,118.89 is eliminated because that is embodied in the check that I showed you; that is right, isn't it? A. Yes, sir.

Q. Now, I don't know whether this next one is in the check or not. You had better help me.

It looks to me as though it were. A. Yes, sir.

Q. $5,017.17; that is in the check, isn't it? A. Yes, sir.

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Q. All right, we will leave that out.

February 28, $2,052.89; is that right? A. Yes, sir.

Q. The rest you were out of the partnership? A. Yes, sir.

Mr. Stryker: All right, will you give me the addition of that somebody, of those figures?

(676a)

I am putting in just the figures read to the witness. I will stop a minute and get that. I want just the ones I read to the witness, and exclude the two checks.

The figure I have, your Honor, and I have it subject, of course, to correction, for the items that I read over and beyond the two checks, comes to $12,909.38. You have some accountants there, if that is not right, tell me. Subject to correction I will state that with the two checks, that is the items that he has refreshed his recollection upon, adding the two checks to those items, it comes to $20,044.44. Subject to correction I think that is true.

Q. Did you have other personal charge accounts, in which you gave partnership checks?

Mr. Wessel: I object to the form of the question and to the use of the word "other."

Mr. Stryker: How do you want it, "additional"? Over and beyond Altman.

A. I may have, sir.

Q. Additional accounts, wherein you bought merchandise and paid in partnership checks?

Mr. Wessel: I object to the use of the word "additional", as improper in form. It assumes a fact

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not in evidence, if your Honor please.

Mr. Stryker: What do you mean? It is in addition to what I have already proved.

Mr. Wessel: I do not think counsel has proved that the funds expended by the witness at B. Altman were partnership funds.

Mr. Stryker: Certainly the two checks were.

Mr. Wessel: If counsel limits it to that I have no objection.

Mr. Stryker: I will limit it to that.

Q. Over and beyond the purchases for your account in B. Altman of the amount of the two checks, about $7,000, did you have in addition to that other charge accounts in which you used partnership funds? A. Well, sir, I do not concede for the two checks that I haven't used partnership funds. There was some money, sir, I cannot explain it, but there was some money, sir, that I believe was due me.

Q. Just let us settle that. These two checks in evidence, Defendants' Exhibits W and X, they were drawn on—the check reads, Eatsum Food Products Company, doesn't it? A. Yes, sir.

Q. We have already had the payee, Altman. The signer of this Exhibit X was Roy Hankermeyer, and it says

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"Authorized signature," doesn't it? A. Yes, sir.

Q. You say that was not a check drawn on the partnership? A. I say, sir, that I——

Q. If you can, would you mind saying if that was not drawn on the partnership? A. But the ultimate bookkeeping of it, sir——

Q. I am not asking that, Mr. Lubben. Do you say that check was not drawn on the partnership? A. It was drawn on the partnership bank account, sir, but where it was charged I would like to see, sir, in the books.

Q. I am not asking you a thing about the books at the moment. A. Well, sir, I have been asking—well, pardon me, Mr. Stryker.

Q. I am asking you, if it is not a fact that this check, Defendants' Exhibit X, was not drawn on the partnership account? A. Yes, sir; but I still say it may not have been partnership money.

Q. Is the same true, that it is drawn on the partnership account, the check signed by David Lubben, you, Defendants' Exhibit W? A. Well, it was drawn on the account, but I still say the bookkeeping, it may not have been partnership money. There was something in that book some place where I know there was my money in there,

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and the account would have to explain it, sir.

Q. I am afraid it would, I cannot help you. All I ask is, those were partnership checks? A. Yes, sir.

Q. All right. During the partnership period have you any recollection of the moneys spent by you at Cheel & Company, over and above the checks drawn to Cheel & Company; that were put in evidence yesterday? A. You asked me that question yesterday, sir, and I said I don't have anything to refresh my memory.

Q. Now I show you this paper——

Mr. Stryker: I will in a moment, but first I will have it marked for identification.

(Marked Defendants' Exhibit Z for identification.)

Q. Mr. Lubben, I am going to show you at once Exhibit Z for identification. I am stating it out loud, but I ask you to look at the name; it looks to me as though it were engraved on there in the upper lefthand corner. My question is going to be, or is, does this refresh your recollection as to payments you made to Cheel & Company during the partnership? And I am referring to the 9th of—or is it 8th? Eight-nine, that is August, isn't it? 8-9-45 to 3-2-46. Just between those periods would you be kind enough to

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examine it and answer my question? A. Yes, sir; it appears to be a statement of account.

Q. I cannot put it in evidence so I am not asking what is in it. My question was, does it refresh your recollection of the transactions between the dates I indicated? A. Well, I can't remember. I can't specifically remember the incident attached with them in making these payments, but I——

Q. Would it refresh your recollection? I think the paper shows such payments. A. Yesterday, sir, you showed me several checks.

Q. Regardless of that, would you answer my question? In case I have not made it plain, my question relates to the items between 8-9-45 and 3-2-46. My only question is, Mr. Lubben, having examined it, would you tell us if that refreshes your recollection? A. Somewhat, sir; yes, sir.

Q. Your recollection being refreshed, it is a fact then, isn't it, that on the 9th of August; 8-9- August, that is right, isn't it—8-9-45, you paid Cheel $3,608.32? A. No, sir; I did not.

Q. Didn't you pay that? A. No, sir.

Q. I withdraw it. Did you pay $5,000 to Cheel—let (681)
me see if I get this right this time—7-10, is that right, Mr. Lubben, 7-10-45? Correct me if I am wrong. A. Yes, sir; it is July 10, 1945. Put it down a little closer and I can see it.

Q. That is right, isn't it? A. $5,000 it says here; yes, sir.

Q. 10-10, is August 10, 1945? A. No, you are missing one, August 3, 1945, which shows payment of $5,000 made.

Q. You are absolutely right. Well, now, refreshing yourself from the paper so that—just tell us now with your refreshed recollection the payments you made. Maybe you can read it yourself better than me. A. It says here on the paper, July 10, 1945, I paid Cheel Construction Company $5,000; on August 3, 1945, it says I paid them $5,000; it also states here on September 17th——

Mr. Wessel: If I may interpose, sir, the witness says "It says here on the paper." I have no objection to the paper going into evidence.

Mr. Stryker: It might be easier.

Mr. Wessel: It is refreshing his recollection.

Mr. Stryker: I did not read from the paper. (682)
I am not criticizing the witness. I think that is the best suggestion, your Honor. I will put it in evidence with your permission.

Mr. Wessel: May I just ask one question: (To witness) Have you any doubt as to the accuracy of the figures, Mr. Lubben?

The Witness: I have no way to prove or disprove them.

Mr. Wessel: Do they sound correct to you?

The Witness: I have no way of knowing, sir.

Mr. Wessel: Then I must object.

Mr. Stryker: I will show the paper to the Court.

The Witness: There is the signature on it, sir.

Mr. Stryker: If your Honor will look in the upper lefthand corner of that (handing to Court).

I will ask to have this group of papers marked for identification. Without stamping every one, we could put a staple through them. There are nine of them. Will you check my count there and do something so that I can read them and put them together, and then mark the whole batch for identification.

(Marked Defendants' Exhibits AA-1 to AA-9 for identification.)

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Mr. Stryker: Your Honor, I am only interested in the figures I spoke about. In fact I would be willing to limit the offer to that. Those are the only ones I am interested in.

The Court: Mr. Lubben, will you look at the paper and tell us whether in rough over-all amount that refreshes your recollection? If it does not, say so, but I mean just see whether it helps you——

Mr. Stryker: If your Honor please, may I hand to the witness before he answers your question a group of exhibits for identification.

The Court: Maybe that will help him.

Mr. Stryker: Which might help him. I am handing the witness Defendants' Exhibits AA-1 for identification, AA-2 for identification, AA-3 for identification, and a couple more—AA-4 and AA-5 for identification (handing to witness). Look at

those and see if that will assist you to answer his Honor's question.

The Court: Do you want the amount for the period of the partnership?

Mr. Stryker: That is all I am interested in, your Honor.

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The Court: The total payments to this particular concern.

Mr. Stryker: To Cheel, that is right.

The Witness: Mr. Stryker, attached to this original bill—I mean this is supposed to be a photostatic copy of something, I don't know. I mean there is no heading up here. Just a minute, Mr. Stryker. There is no heading here that it belongs to the Cheel Construction Company, and there is no signature here, sir. But the items, sir, they look—there was work done. Now just a minute, sir. Now attached to this bill, and this is dated August 9, 1945, and you must have had the original bill to make the photostat—I mean—now just a minute, that would be sort of academic. Now attached to that would be a piece of paper that would be signed by me, and the bookkeeper, as to what account it was charged in, whether I was drawing my own money out or whether it is charged to me, so if you had part of it you must have had the rest of it, sir, and if you bring the rest of it you would get a good answer.

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Q. Well, this is a copy of a paper that was sent to you, isn't it? I wouldn't have the original. A. Well, how did you get a photostat if I got the original? How could you get a photostat of my original?

Q. You don't have to understand. I have it, and I am only asking you whether—it is a photostat, admittedly, if a paper. A. Sir———

Q. Let me see what it says on there, Cheel or B. Altman. A. It doesn't say Cheel.

Q. It is Cheel, isn't it? A. It is for work and so forth. It appears to be Cheel.

Q. Regardless of whether that is a photostat or an original, and granted it is a photostat, did you not receive from Cheel the original of which that is a photostat?

Mr. Wessel: I think I must object, if your Honor please, not only to this question but now to the line. I think it is cumulative, I think it is immaterial, it proves nothing. This witness has been on the stand long enough. I had hoped he would get off today. If this continues, he will not, nor likely in the near future.

Mr. Stryker: The only reason I asked the ques-

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tion, your Honor, is because of what the witness said himself. I am not particularly interested in that.

I think I will withdraw the question.

The Court: All right.

By Mr. Stryker:

Q. And I will ask you if you cannot—if those papers, all those photostats I have shown you, do not refresh your recollection? You can just tell me yes or no. A. If the photostats don't refresh my recollection?

Q. Yes. A. Recollection about what?

Q. About the items mentioned in the paper. A. Well, the figures appear the same, sir, but it don't say where the

money was charged or whether I am spending my money or what.

Q. I think you are quite right about that. I am just asking now if that refreshes your recollection as to the payments to Cheel. I can't prove this case in one question. A. Well, sir, I think the original might refresh it much better.

Q. Well, does the photostat refresh your recollection? A. Well, it has a lot of writing here. It says for——

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Q. All right, go ahead. A. And it appears for—looks like building material, labor and so forth, so it may be a copy of the original, sir.

Q. You got the original, didn't you? A. Sir, as I have stated before, how could I have the original when you got the photostat? Where did you get the photostat? I don't have any original. Sir, this here——

Q. I am only asking you, Mr. Lubben, did you get the original of which that is a photostat? A. Did I get it?

Q. Receive it. A. If it was addressed to me, sir, if the bill was addressed to me, in care of the Eatsum Food Products at 1841 Broadway, I would assume, sir, that I——

Q. Got it? A. —that I got the original. But now, sir, this doesn't say Cheel Construction Company, so if you made a photostat, this man, he would make a photostat, sir, on some stationery, but this, there is no name of no company on here.

Q. Your name is on there, isn't it? A. That's right.

Q. And your name is David G. Lubben? A. That's right.

Q. Addressed to you at Eatsum Food Products? A.

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Yes, sir.

Mr. Wessel: I make the same objection, if your Honor please.

Mr. Stryker: The only reason I am in this tedious and boring matter is it relates to the—let's see if I can remember—to the document that I offered in evidence and a question arose about it and I said I will show the supporting document. That is why I am there.

Mr. Wessel: There is a very simple way to prove how much this man did or did not pay to Cheel Construction Company during that period and obviously this witness' recollection cannot be refreshed. It seems perfectly clear from all this testimony.

Mr. Stryker: I must say, your Honor, with all deference to my friend, that is another illustration, I think, of an unintentional statement to the witness.

The Court: I don't know. The thing has approached a new range in subtlety if any statement can add anything to the possible confusion at this point.

I mean, we are in a position where I think if there is a simpler way of doing this, we ought to do it.

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Mr. Stryker: If you will tell me, your Honor, what it is, I will be glad to be instructed.

The Court: Well, you and Mr. Wessel might want to talk that over. I don't want in any way to lead it. At the same time I am not going to take a document in evidence which—I mean, if the witness can't say that he remembers that that was the amount, and I don't see any reason why we should guess at it or assume it or jump to the conclusion that it was.

Mr. Stryker: My question was directed to the very point your Honor makes.

By Mr. Stryker:

Q. Do those photostats I have showed you—I am tired of stating the exhibit numbers—the ones I have showed you, do they or do they not refresh your recollection as to——

The Court: Excuse me, but he says they do not refresh his recollection; that he doesn't know what they are a photostat of. Now, at least that is as I understand it.

Mr. Stryker: Well, you can refresh your recollection from the morning paper. There is no limitation to the kind of documents that may be used to refresh his recollection.

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The Court: Let me say this: Mr. Lubben, after looking at these documents, photostatic and otherwise, are you able to tell us from your own memory the approximate amount of the payments to Cheel between June 1, 1945, and February 28, 1946?

The Witness: From my own memory, sir?

The Court: Yes, that is what you have to rely on, because, you see, those books are not in evidence——

The Witness: No, sir.

The Court: —and if that brings it back to your mind, and you can now say, "I remember that is what the amount was," why, tell us. If you can't do that, just tell us.

The Witness: Sir, I honestly can't remember what was paid during that period.

The Court: All right. Well, then, we will go on.

Mr. Stryker: Now, can I bother the Court—

I am sure it is a bother to speak to you at the bench with Mr. Wessel.

The Court: Oh, certainly, go ahead.

(Discussion at bench.)

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Mr. Wolfram: This witness started to testify from the document which is Defendants' Exhibit Z for identification. He was reading the figures off as figures representing his payments to Cheel during the partnership period. Mr. Wessel then said, instead of doing it that way, why don't you offer that paper in evidence.

The Court: As far as I can see, both the Government and the witness are glad to go along, but neither of them is sure of accuracy here. Now I can understand why they are reluctant——

Mr. Stryker: Judge, this is on the Cheel paper.

The Court: I mean, the witness says, this is ten years ago, and if he can say that that refreshes his recollection as to the approximate amount now——

Mr. Wolfram: He did originally when he started to read these. He said so.

Mr. Wessel: That is why I didn't put it in. I assumed——

The Court: I think to this minute he didn't know what refreshing his recollection was. He thought he could read this thing and that's it.

Mr. Wolfram: He knows what refreshing his

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recollection is. Here we are in a position now, after Mr. Wessel breaks into the testimony——

The Court: Is there any way you can get a stipulation on this amount?

Mr. Wessel: I am sure if we check it in the books—I don't know whether it is accurate—if I have one of the agents check it I will be glad to stipulate it.

The Court: Why don't you let it go for a while?

Mr. Wolfram: This has nothing to do with the books.

Mr. Wessel: I am talking about the Cheel books.

Mr. Stryker: This is Cheel's statement.

The Court: It is not signed.

Mr. Wessel: Even so, I will be glad to have it checked.

Mr. Stryker: It wouldn't be on the books. It is a private transaction.

Mr. Wessel: Cheel's books I am talking about.

Mr. Stryker: Have you got Cheel's books?

Mr. Wessel: I say we will have someone go down. Is it in New York?

Mr. Wolfram: Why don't you take it subject to correction?

(691-2)

Mr. Wessel: Not subject to correction. We will take it and if it is correct we will put it in.

The Court: Let's go down—we are down to the red line.

Mr. Stryker: I offered it.

Mr. Wessel: I say, once I have determined it is accurate, then I will withdraw my objection.

The Court: You don't want to take it subject?

Mr. Wessel: No.

Mr. Wolfram: This witness won't be here.

Mr. Wessel: You can't examine the witness on this. I can't do it right now.

The Court: You don't want any more from him on this point?

Mr. Stryker: Judge, I want these figures in. I haven't succeeded. Mr. Wessel suggested that I offer it in evidence. I did so.

Mr. Wolfram: Then we come back after he objects to it and we can't even get the thing from the witness, that the witness started to say.

The Court: Mr. Wessel is in a position where the witness can't say it looks about right. As a matter of fact that was his question, does it look about right. He says, "I can't tell you." How can

(691-3)

you put the thing in?

Mr. Stryker: Let me do it this way, put it in evidence, ask him just the question you said, does it look about right.

The Court: He asked him that and he said he can't say. He honestly can't say whether it is or not.

Mr. Wolfram: Go back to the original thing and have him read off these figures.

Mr. Wessel: I won't let him read off the figures now. He was reading them off. He was reading the figures.

The Court: Any other item we can go on to and leave this thing?

Mr. Wolfram: Can you check it in the next couple of minutes?

Mr. Stryker: Put some man on the phone, read this to Cheel and ask them if it is correct. They can tell you in two minutes.

Mr. Wessel: If your Honor please, I am not going to be a party to this kind of strategy before a jury. Let counsel put it in any way he wants to.

The Court: You don't mean that.

Mr. Wessel: I mean let him try to do it.

The Court: All right.

(691-4)

By Mr. Stryker:

Q. A few moments ago I showed you Defendants' Exhibit Z for identification, and I think you told me—you can correct me if my memory is wrong—that those figures—I am not asking you at the moment what they are—lo d approximately correct to you. A. I don't recall saying that, sir.

Q. Well, I will ask you now; isn't that so? A. No. You give me a piece of paper, sir, and state certain figures, and I am not going to say that it is correct or not correct.

Q. Does it look approximately correct to you? A. Well, sir, if I could see the original invoices and so forth, sir, then it would refresh my memory much better.

Q. Even without that, doesn't it refresh your recollection as to whether they are at least approximately correct? A. Sir, you told me you weren't interested in me guessing, so how can I——

The Court: He is now.

Q. Suppose you answer my question, Mr. Lubben, and not instruct me? I no doubt need instruction, but——

The Court: In other words, what he would like

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you to do is total the debit column.

The Witness: What's a debit, sir?

The Court: This "DR" column.

The Witness: This is the payments. This is what I am supposed to have paid.

The Court: All right, you are right. Does that, in total, seem right, and, as I say, if you can look at that, total it, and that seems to you to bring it back to your own mind, say so. If it doesn't, say so.

By Mr. Stryker:

Q. Would you care to have a pencil and paper and go over it? A. To add up this column of figures, sir, it would take me a long time.

Q. All right, then don't. A. Sir, I don't say it is wrong and I don't say it is right, and I can't refresh my memory. This is for a payment of a specific bill on a certain day in 1945. I can't remember.

The Court: I think that is an answer and that is as far as we are going with that document.

Mr. Stryker: All right. Then my offer is rejected?

The Court: It is rejected.

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Mr. Stryker: And I respectfully except. All right.

By Mr. Stryker:

Q. Now, will you enumerate by name the personal charge accounts that you had during the partnership, I mean partnership period, during the period when you were in the partnership? A. You mean like a department store charge account?

Q. Any charge account, department stores or anything else. A. You mean personally?

Q. That's right. A. I can't remember, sir.

Q. Can't remember anything? A. Well, I know I was doing business with—I was building, remodeling or fixing the place in New Jersey.

Q. That was Cheel. A. I suppose you would call that a charge account.

Q. You are speaking of the Cheel Company, or some other company? A. No, Cheel. I mean there was some work done; I suppose you would call that a charge account.

Q. Beyond that and B. Altman—I don't want to spend much time on it—do you remember whether you had other large—charge accounts, I mean? I said "large." I meant

(694)

"charge." A. I had charge accounts in some of the hotels. I think I had charge accounts where I would buy theatre tickets when customers came to town.

Q. Not other merchants? A. I may have. I may not. If you can refresh my memory, sir, that is back in——

(694a)

Q. Can't you remember just right offhand? I wouldn't, perhaps, expect you to remember them all. Can't you remember several of the charge accounts you had with merchants? A. Well, I think I paid cash for my groceries, and I may have charged them once in a while, but I can't think of any, sir. I don't—the only department store that I can think of was B. Altman.

Q. Now, what was your salary during the time you were a partner?

Mr. Wessel: I object to the form of the question.

Q. Well, do you know what your salary was during the——

Mr. Wessel: I object to the form of the question.

Mr. Stryker: I don't know how to ask it otherwise.

Mr. Wessel: I don't think partners draw salaries.

Mr. Stryker: What?

Q. Well, did you have a drawing account then, from Eatsum while you were a partner? A. Yes, sir. I don't know whether it was a drawing account. I got a check every week.

(695)

Q. That is what I mean. How much was that check every week for? A. I believe it was $500 a week, sir.

Q. I show you—how many weeks were you there, approximately, three-quarters of 5, wouldn't it be? Say 35 or 40 weeks, something likes that? A. Well, I am not going to put any number of weeks on it, sir. All I know from the time I started my partnership until the time I quit, so——

Q. And you quit on March 9th, '46, and you started—— A. Eighth or 9th.

Q. And you started in June, didn't you? A. Yes, sir. We started before June, sir. The partnership was in effect before June, but the papers weren't signed until some time in June.

Mr. Stryker: Let's have this paper marked for identification.

(Marked Defendants' Exhibit BB-1 for identification.)

Mr. Stryker: And each one of those (indicating).

Mr. Wessel: This appears to be a group of checks. I don't know how many. I think it is one a week. It is cumulative to put them in evidence.

Mr. Stryker: I haven't tried to put them in yet. I will in a minute.

(696)

Q. I show you this paper, Defendants' Exhibit BB-1 for identification——

Mr. Stryker: Mr. Dilberian, is that correct?

The Clerk: BB-1 for identification.

Q. Do you recognize that check, your signature on it, and the name of the payee?

Mr. Wessel: I make an objection based upon the cumulative nature of this evidence.

The Court: Let's see how we get along on the first one, then maybe we can save time on the others.

Mr. Stryker: I should be delighted if I could.

Q. Will you tell me that first? A. Tell you what, sir.

Q. What I just asked you. A. What did you ask?

Mr. Stryker: Read it back, please.

(Question read.)

A. The signature on it? Yes, sir, it appears to be the signature of Beatrice Feldmann, who is my office manager, sir.

Q. The payee? A. The payee. It says David Lubben, sir. The amount is $250.

Q. Did you receive that check? A. I think so, yes.

(697)

Q. And cashed the check? I think it says so on the back; I am not sure. A. Well, over here, it says—this is not my endorsement.

Q. I understand. That is probably Miss Feldmann's or some secretary's. A. And I believe, sir, that it was deposited in my——

Q. Account? A. My account, sir, yes, sir.

Mr. Stryker: All right, I offer it in evidence.

Mr. Wessel: My only objection is based on the cumulative nature of the exhibit.

The Court: All right, we will take this one.

(Defendants' Exhibit BB-1 for identification received in evidence.)

Mr. Stryker: Mr. Foreman, ladies and gentlemen of the jury, this is the check I have just shown the witness. Kindly glance at it.

Couldn't I do this, your Honor, have them stapled together or kept together, and have them all labeled one exhibit for identification? Wouldn't that save time?

The Court: I think you could do that. In other words, have an exhibit, so many checks.

The Clerk: That's right.

Mr. Stryker: This is a little tedious. Can I (698)

have five minutes to get this in shape while they are being marked and so on? I mean, will you take a short recess?

The Court: Fine: The witness will have to look at them anyhow.

Mr. Stryker: Certainly he will. I will get them marked, so I won't have any confusion about that.

The Court: Well, ——

Mr. Stryker: I mean when the jury is finished.

The Court: I will worry about the jury. You worry about the checks now. Go ahead. As a matter of fact there is no reason why the jury has to look at that check all by itself, is there? There is nothing peculiar or interesting in it by itself? It is just one of this batch?

Mr. Stryker: That is one of the batch, one that the witness just identified. I should like to have them glance at it. I agree with you, there is nothing peculiar about that.

The Court: I mean, they can look at them all together.

Mr. Stryker: That is right, they can do that. Let's take a short recess and get this thing marked. (699)

The Court: All right, I think we will take a five-minute recess now, and maybe we won't have to take any more. Don't discuss the case.

(Short recess.)

(Discussion in chambers.)

* * *

(Jury in box.)

(Defendants' Exhibits BB-2 to BB-41 marked for indentification.)

Mr. Stryker: Is that 42 checks? Will you tell me if I am right?

The Clerk: Forty-one checks.

Mr. Stryker: Your Honor, I think I have devised a way of shortening this a great deal.

By Mr. Stryker:

Q. I show you a group of 40 checks (handing) and ask you to examine them and tell me if they were, those checks received by you and payments made to you? Take your time and look them over. I am doing it all at once rather than tediously one by one. A. Is this first one, sir, the check I have already seen?

Q. I think you are mistaken about that, Mr. Lubben. I think the one you saw is this one here (indicating). A. Is that prior to this one, sir?

* * *

(700)

Q. I don't know: let us look at the date. This is June 8. What is that? A. June 1st.

Q. You can see it all you want. A. That is right. Does it make any difference if these are not in sequence, sir?

Q. I haven't got them in sequence. A. All right, sir.

Q. You can put them in sequence if you want? A. I just wanted to know if it made any difference.

Q. Mr. Lubben, while you are looking at them, bear in mind the next question is who the payee is on all the checks. Will you keep the one that is in evidence apart from the ones I showed you—the one we had already.

Mr. Wessel: I think the record should show several minutes have gone by during the examination of the documents by the witness.

Mr. Stryker: I am delighted to have that shown.

Q. Are you through? A. Yes, sir.

Q. Those are checks drawn on the Eatsum partnership account, are they not? A. Well, sir, some of them say Eatsum Food Products account, new account, and I show you, sir, some of them say "N. A.", new account.

(701)

Q. Regardless of what account it was, they are all checks, so labeled at the top, Eatsum Food Products Company, aren't they? A. Yes, sir.

Q. And they are signed either by you or one of your nominees, I think one by Mr. Hankermeyer and one by your secretary? A. I do not think the word "nominees" is correct for them, but they had power to sign checks, sir.

Q. I won't stop to count, but most of them are signed by you, one or two by your secretary, and one by Mr. Hankermeyer? A. I didn't count them.

Q. They were signed mostly by you? A. Yes, sir.

Q. You received those checks, did you not? A. Well, sir, either the money was deposited in my account or I received the money.

Q. All right. A. And some of those checks say $300, some $250, and some $500.

Q. I am aware of that.

Mr. Stryker: I offer them in evidence (handing to Mr. Wessel).

Mr. Wessel: You made a reference, Mr. Lubben, to two different accounts. Could you select the checks you were referring to in your answer to Mr. Stryker, that were on one account or the other? A. There is one, sir, says new—that means new ac-

(702)

count. That is another one, sir, and this (indicating).

Mr. Wessel: The witness has handed me Exhibits BB-5, BB-4 and BB-3. Was that a different account, the three exhibits you have referred to, than the other exhibits?

The Witness: Sir, when we dissolved—when we went into the partnership there was another account opened, and I don't know whether some of these are drawn on the old account or some on the new account, but there was—I couldn't explain it, sir, but the accountants would have to explain that.

Mr. Wessel: I object to the exhibit, and specifically also object to Exhibit BB-1, which is already in evidence, on the ground that it appears unclear from the testimony now what account we have been talking about.

Mr. Stryker: Let me ask a question or two there.

By Mr. Stryker:

Q. Are all these checks drawn on the Eatsum partnership account, regardless of whether "N. A.", new account, or some other account? A. I cannot say all of them are, sir. I don't know.

(703)

Q. Would you point out any that are not? Are not they all of the check of Eatsum Food Products payable to you signed by you or Mr. Hankermeyer, or your secretary? Isn't that a fact? A. The checks are all payable to me; yes, sir.

Q. And all signed either by you or the other two persons I mentioned? A. Yes, sir.

Q. And they are in the period between June 22, '45—have you them in order? A. No, sir: they are all mixed up.

Q. They are all checks during the time you were a partnership; is that right? A. Yes, sir; they are.

Q. And you either received the checks or the money, or the checks were deposited to your account? A. To the best of my recollection, sir.

Mr. Stryker: I should not think I would have to be heard on that, but if you have any doubt I will be glad to tell you.

Mr. Wessel: I object on the ground that they are completely immaterial so far as this witness's testimony now is concerned, to any issue in the litigation, and no reference to the partnership.

Mr. Stryker: I would rather not have to do this again, your Honor.

(704)

The Court: I will take them.

Mr. Stryker: I will mark them all in evidence.

(Defendants' Exhibits BB-2 to BB-41 for identification received in evidence.)

Mr. Stryker: Ladies and gentlemen, I show you the checks just marked in evidence, 40 checks which I have shown to the witness and he has identified. To facilitate your looking through them, these are

the checks payable to the order of David Lubben. I am afraid I haven't them in chronological order. They are all checks of the Eatsum Food Products Company, many of them signed by David Lubben, some signed by Mr. Hankermeyer, his uncle, and others by his secretary.

The Witness: Office manager, sir.

Mr. Stryker: Office manager, I am sorry. While the jury is looking at them, I won't interrupt them if I state——

Mr. Wessel: I object to counsel's statement because this is not the time for summation.

Mr. Stryker: I will just take a half hour if I do not state it. The checks total $18,400, subject to correction of my addition.

Mr. Wessel: I cannot be called upon to correct

(705)

counsel's addition.

Mr. Stryker: I believe it is a correct statement.

Mr. Wessel: If counsel wishes to be subjected to cross examination I have no objection.

The Court: We will get along with that total.

Mr. Stryker: I would like to have the jury get an idea of them before I ask the next question. I hate to hold the Court up. How would you suggest I do it?

The Court: There is nothing unusual about the checks. I do not see why they would hold us up.

Mr. Stryker: Maybe they can look at them while I am talking, and save time.

By Mr. Stryker:

Q. I show you this check and ask you if you identify the maker and the payee, and the account on which it is drawn (handing). A. Yes, sir.

Q. It bears your signature, doesn't it? A. Yes, sir.

Q. What is the name of the payee? A. Ronald Stone.

Q. Ronald Stone, on October 24, 1945, was with you there in this partnership, wasn't he? A. To the best of my recollection, yes, sir.

(706)

Q. I think you have told us, correct me if I am wrong, that you owned the whole fifty per cent of your side and Ronald Stone, although he appears on the partnership articles, was not actually a partner. Isn't that what you said? A. I do not know what appears in the partnership articles, but as I stated, sir, as far as I was concerned it was fifty per cent, and the other names were supposed to be in there as something to eliminate taxes.

Q. Was Ronald Stone a partner or not? A. My answer, sir, is he would appear to be a limited partner, sir, but——

Q. You did not regard him that way? A. No, sir.

Mr. Stryker: I offer the check in evidence. Didn't I mark it for identification? I do not believe I did.

Mr. Wessel: I have no serious objection to the checks, or anything like it, but this witness has been on the stand a long time, and I think objections to the cumulative nature of the examination are in order. I have counted the number of pages of the cross-examination to date—I do not want to burden your Honor with it, but I thought this witness might be allowed to go home after today's session.

(707)

Mr. Stryker: I am not going to waste a moment of these ladies and gentlemen's time.

The Court: Let us not get into further discussion.

Mr. Stryker: There is no objection to that.

(Marked Defendants' Exhibit CC.)

Q. That exhibit is a check for $10,000, drawn by you and paid to Ronald Stone; that is right, isn't it? A. Yes, sir.

Q. And Ronald Stone was not a partner? A. As far as I was concerned.

Mr. Stryker: This is in evidence (handing to the jury).

I would like it of record that the checks thus far received in evidence, including the last one, aggregate according to Mr. Wolfram's calculation $65,239.

I am confident the addition is right, and if not I will correct it.

I will mark these checks for identification.

(Marked Defendants' Exhibits DD-1 to DD-18 for identification.)

(708)

Q. While I am waiting for that, Mr. Lubben, since you tell me Mr. Stone was not a partner, will you tell me, please, what that $10,000 check payment to him was for? A. Sir, as I stated before, I don't know whether Ronald Stone ever gave me the $10,000. I remember he gave me a check, sir, and I think the check bounced. Whether he made good the check later on I don't know. So——

Q. Mr. Lubben, my question—am I interrupting; I am sorry. A. I am trying to answer your question, sir.

Q. My question, if you will recall, was whether that check—not that check—your check to Stone——

Mr. Wessel: This is a responsive answer, if your Honor please.

Mr. Stryker: I object to this characterization. In my opinion, it is very unresponsive so——

The Court: Let's finish it now. We got half way through. Let's go ahead.

By Mr. Stryker:

Q. I have asked you what that check that you gave and paid to Donald—Ronald Stone was for. That is the only check I am talking about at the moment. Will you (709) tell me that? A. Sir, I am trying to answer you. As I stated, I remember the check that Stone gave me, or a part of a check, or something; a check came back from the bank. Now, whether Stone ever made the check good or not, I don't know, but if he did make it good, I don't know what the check for $10,000 was for, sir; I really don't.

Q. Couldn't you tell me that before, Mr. Lubben, you don't know? A. Sir, I am going back to 1945, ten years ago.

Q. Well, you were going back quite a bit to 1945 in your direct examination, weren't you, Mr. Lubben? A. I have been just as fair as I possibly can with both of you lawyers, sir. I am only a witness.

Q. Is that all? A. Yes, sir.

Q. I say, in your direct examination you were narrating conversations, who said what, in this very period that you say is difficult to remember, namely, 1945, isn't that so? A. Sir, yes, sir, I—I——

Q. All right, now. Your answer is you don't know what that $10,000 payment to Mr. Stone was for; is that your answer? A. I don't know, sir.

Q. All right. Well, even if you don't know what it (710)

is for, in any event you know that it was a payment by you to Stone, don't you? A. Yes, sir, I see that.

Q. All right. I show you the checks, or, rather, the papers, DD-1 to 18 for identification, and ask you if those checks are drawn on the Eatsum partnership account, and signed either by you or by Roy Hankermeyer?

Mr. Stryker: Are you ladies and gentlemen through with these?

Thank you.

A. I have examined the checks, sir. One of these checks has that notation "NA" up on the top.

Q. Whether it has or not, are they drawn on the Eatsum partnership account, all of them? A. I don't know what account it is drawn on. It appears to be the Eatsum partnership account, sir, but I think it appears to be in payment of materials.

Q. It is drawn on Eatsum Food Products Company, is it not? A. Yes, sir.

Q. That account—and they are signed either by you or, I think in one or two instances, by Mr. Hankermeyer; is that correct? A. Yes, sir.

Q. And did you receive those checks and were the pro-

(711)

ceeds deposited to your account? A. Sir, this can't be answered yes or no, but, sir——

Q. One moment; just a minute.

Mr. Stryker: Your Honor, for the record, I submit that that is a typical instance of where the question can and should be answered yes or no, and it is not an occasion for a long dissertation. I submit it is a typical case.

The Court: What's the question?

Mr. Wessel: The question is duplicitous. I wouldn't have objected, but I am trying to save time. I suggest it be read. There are two questions in that.

Mr. Stryker: I withdraw it.

The Court: No, let's hear the question.

(Question read.)

Mr. Stryker: That certainly admits of a yes or no answer.

Mr. Wessel: No, sir, there are two questions.

The Court: No, there are two questions.

Mr. Stryker: I will strike the question.

The Court: All right.

(712)

By Mr. Stryker:

Q. Did you receive those checks? A. You mean did I ultimately get the money?

Q. Now, I have been criticized because I had two questions in one, and now I am putting it in one. Can you answer that one? A. I can't answer that question.

Q. You mean you don't know whether you got these checks?

The Court: I am not going to have any more fiddling around. The word "received" can mean any number of things.

Now go ahead and answer the question. You don't have to answer it yes or no.

The Witness: All right, sir.

A. Every time we drew any money out of the Eatsum Food Products, we had a cash disbursement slip which told what the money was for. If that check was drawn to me, maybe it was in payment of sugar, maybe it was in payment

of a purchase, maybe it was in payment of a number of different things at that particular time. That was the way I had to pay it.

Now, on that cash disbursement slip it stated what it was for. There are some kind of notations down at the

(713)

bottom, I remember, where it would say, where the bookkeepers would put down, line number so and so, charge to this, charge to this, and everything else.

I don't know what it is for, sir, but I think those checks, because the numbers are there, look like purchases of material.

Now, sir, if you have the checks, answer something I asked for a long time ago: why wasn't I given these things when I wanted to pay my income tax?

The Court: No, we will stop right there.

The Witness: I am sorry.

The Court: If you have those checks, strike out the rest.

Now, what is the next question?

Mr. Stryker: All right.

Q. Now, I am asking you if those checks were not endorsed by you, David Lubben? A. Most of them have no endorsement.

Q. Well, let's take them one at a time. The check of March 4, 1946, is endorsed D. G. Lubben and David Lubben, isn't it? A. That is not my signature.

Q. I understand that.

(714)

You recognize the signatures, don't you? A. I don't recognize that one, sir.

Q. You authorized your office manager, or Mr. Hankermeyer, to sign them for you, didn't you? A. I don't

recall whether I did or not, sir, I mean, on my checks. On pay checks, sir, I may have endorsed them and put it in my bank.

Q. All right. Now, this check here is endorsed—what's the date of that, June 12th or January? January 14. A. January 14, 1946.

Q. January 14, 1946. That is endorsed Blue Ribbon Trucking Company, isn't it? A. Yes, sir, Irving Carrey, but you don't see my name above it, do you, sir?

Q. No, I don't; you are quite right. A. How can a bank cash a check, then——

Q. All right, all right.

This check dated October 23, 1945, is marked for deposit, David Lubben, isn't it? A. That's right, sir, and this is probably in payment of some merchandise, sir. I don't know, but there is a piece of paper that tells it.

Q. Was it endorsed for deposit: David Lubben? A. Yes, it is for deposit, yes, sir.

(715)

Q. All right. This check here, October 24, 1945, appears not to have an endorsement. Did you have an account in the Bankers Trust Company or the Manufacturers Trust Company? A. That is a big bank. They got 80 branches, sir. What branch is it?

Q. I don't know. A. I don't know either.

Q. Did you have one in any branch? A. The Company had an account in Manufacturers Trust.

Q. Did you have one? A. Yes, sir.

Q. All right. A. But it don't say any endorsement on there.

Q. That's right, you are right. A. Let's take this one, sir.

Q. That hasn't either. A. Well, let's take them—and this one don't have any endorsement.

Q. I have told you that it didn't. A. You didn't tell anybody else—and that don't have any endorsement.

Q. Does this check, dated November 9, 1945, bear your endorsement, David G. Lubben or endorsement of your— A. It's not my endorsement.

Q. I mean it isn't your handwriting. A. No, sir.

(716)

Q. But you recognize it? A. I don't recognize the handwriting, sir.

Q. At any rate, it bears your name? A. Yes, sir.

Q. And does this check, dated November 24, 1945, bear the name David Lubben as the endorser? A. Yes, but it is not my signature, sir.

Q. You can't identify that? A. No, sir.

Q. You don't know Miss Feldmann's handwriting or your uncle, Mr. Hankermeyer; is that right? A. Yes, sir, but I——

Mr. Wessel: I object to the form of the question.

A. I know his handwriting, but I don't recall how his handwriting would look on my signature. It's a little different than that, sir.

Q. You just can't identify it? A. I can't identify it.

Q. But at any rate, it is your name there? A. It is my name on the back, yes, sir.

Q. All right. And they—I show you this check, dated November 27, 1945. Does that bear the name David

(717)

Lubben as the endorser on the back? A. Yes, sir, that is my signature.

Q. That is your signature? A. Yes, sir.

Q. All right. Do you want to look at them more? A. Yes, sir. There is some more here, sir.

Q. I am sorry, you are right. Here is another one. Put the ones that don't bear any endorsement there.

October 5, 1945, does that bear your own personal endorsement? A. That is my personal name, sir, my personal endorsement.

Q. And this one was too, wasn't it? A. Yes, sir.

Q. I will put them in one pile, shall I? A. I don't care what you do, sir. It's your business.

Q. All right. I show you a check dated October 5, 1945. Does that bear your endorsement with a name David Lubben? A. It bears the name, but it is not my endorsement.

Q. I understand. You recognize that handwriting? A. Let me see.

Q. Surely. A. No, sir, I can't identify it.

(718)

Q. Don't know whether that is Miss Feldmann's? A. Now, sir, I don't say it is not Miss Feldmann's. I know Miss Feldmann's signature and I know some of her handwriting on her work, but how her signature would look on my name, it's a little bit different.

Q. Now, here is a check, September 12, 1945. Do I read that right? A. Yes, sir.

Q. And that bears your name on the back, whoever wrote it? A. Yes, sir, but not my endorsement, sir.

Q. You didn't sign it yourself. Do you recognize that handwriting? A. No, sir, I don't.

Q. Well, you have seen a good deal of the handwriting of your secretary, Miss Feldmann, and also of your uncle, Hankermeyer? A. As I have stated before, sir, and I think it is a very logical thing, sir, you can see somebody's handwriting on their own signature, and your name, and when somebody else puts their name on your signature, sir, there

is something, you can see your signature, but you can't tell from—I am not a handwriting expert. I can't tell who that would be.

Now, it might be Miss Feldmann, it might not. I don't know, and I am not here to guess.

(719)

Q. All right, that is right. I show you check, August 21, 1945. Does that bear the endorsement—what's that, "D" or "O"? A. "D", sir.

Q. D. Lubben, and under it David G. Lubben, whatever hand actually wrote it? A. Yes, sir, but it's not my name. I mean, it's my name, sir, but I didn't endorse that check.

Q. You wouldn't suggest that these were endorsed by someone without authority, would you? A. I wouldn't suggest anything, sir. I don't think you want my suggestions here. You are conducting the case.

Q. I have gotten some of them, but, however—this check dated July 31, 1945, does that bear the name David Lubben on the back? A. Yes, sir. But it doesn't have my signature.

Q. I mean, that isn't your handwriting? A. No, sir, it is not my handwriting.

Q. I show you check dated July 17, 1945. Do I have that date right? Yes, I think so. Date, July 17, 1945, right? A. Yes, sir.

Q. And look at the back. Does that bear your endorsement? A. My personal endorsement, no, sir.

Mr. Wessel: If your Honor please, I want to

(720)

object to these questions as they now continue, again on the ground that they are cumulative.

The Court: I will tell you right now, I am not going to take much more. If there are records that will complete this showing, let's have them, other-

wise I am not going to take these checks in this piecemeal fashion.

Mr. Stryker: I am trying to lay a foundation. I only have three more to mention.

The Court: For instance, the fact that his name appears on there, and he can't recognize the handwriting, to me that is a waste of time. We are getting nowhere with that.

Mr. Stryker: Well, some of them are; two of them are, at least. I have three more, your Honor.

The Court: You are not going to fill this record with a whole lot of checks that we don't know what they are about.

Mr. Stryker: I am going to try to find out, your Honor. Three more only.

The Court: All right.

By Mr. Stryker:

Q. This check dated July 5, 1945, does that bear your endorsement, your name—I guess it is not your signature, (721)

is it? A. No, sir, it is not my signature.

Q. And the same would be true of these two checks, one dated July 3, 1945, and the other June 30, 1945, the same answer would be true, wouldn't it? A. Yes, sir.

Q. Can you tell me of the checks that do not bear your personal handwritten endorsement, which were deposited in your personal bank account? A. Can I tell you which of the checks that don't bear my personal endorsement, which were deposited in my personal bank account?

Q. Yes, that is the question, that is right. A. I don't have any records, sir. How am I going——

Q. Doesn't the back of the check enable you to answer that? A. You said the checks that don't bear my endorsement.

Q. That is what I said exactly. A. There is no way of telling what bank that went into, or this, or this, or this, or this, or this, or this, or this, or this, or this, or this, or this.

Q. Don't you see the name of the bank on the back of it?

(722)

A. The bank—that is only because the bank paid the check. That is where they punch the hole in it and took the money out of the account, but it doesn't say where the money went to.

Q. Can't you tell us whether these were deposited in your account in the bank mentioned on the back of the check? A. No, how can I tell that, sir?

Q. All right. A. Nobody can tell that.

Q. All right, all right.

Mr. Stryker: Well, I first offer, your Honor, Defendants' Exhibit DD for identification, and also DD-3 for identification, being the checks that the witness says bears his actual endorsement.

The Court: I don't see the relevancy if they do bear his actual endorsement.

Mr. Stryker: Well, will your Honor permit me to state the relevancy?

The Court: No. Does he recall—has he told you what those checks were for?

Mr. Stryker: No, he does not say.

The Court: Until I see the records that do show what they are for, I am not going to take it.

Mr. Stryker: I respectfully except, and I offer also in evidence all of the other checks in this group

(723)

that have been marked for identification.

The Court: I won't take them either.

Mr. Wessel: Objection.

Mr. Stryker: All right, I respectfully except.

The Court: I will entertain a motion to strike those already in.

Mr. Wessel: I make such a motion, if your Honor please, with regard to Exhibits BB-1 through the last group marked for identification.

The Court: Have you completed your proof on this score, Mr. Stryker?

Mr. Stryker: On this line?

The Court: As to what those checks are for.

Mr. Stryker: As to those particular checks, yes, sir.

The Court: I will strike them.

Mr. Stryker: You didn't take these in evidence, Judge.

The Court: No, this is the previous group. All we have is the previous group of checks—was that previous group deposited in Mr. Lubben's account, that previous——

Mr. Stryker: I think you are referring to those

(724)

checks, most of them are $500 checks.

The Court: There was a group passed around to the jury.

Mr. Stryker: There is a group of checks, mostly for $500, to his account. I think those have been identified.

The Witness: No, sir, no, sir, they were not all deposited in my account. The only way I know where it says deposit in my account, if it says for deposit, and there is no way I can tell whether or not—some were and some were not.

Mr. Wessel: I was referring to BB-1, BB-2 through 41, and CC for the purpose of this discussion.

Mr. Stryker: It has been established, your Honor, that these checks were signed by David Lubben.

The Court: That doesn't make any difference.

Mr. Stryker: And he is the payee. I am just asking if he did not get the money on those checks.

The Court: I don't see that that has any relevancy to the issues of this case.

Mr. Stryker: Your Honor, the only way—I don't think you want me to state that in the presence of the jury; I would like to state it before you rule.

(725)

The Court: I will withhold my ruling on the motion to strike. Go ahead.

Mr. Stryker: All right.

By Mr. Stryker:

Q. I show you this group of checks—I will give you the exhibit number in a minute.

Mr. Stryker: Mark them.

Q. Were these checks which I am about to show you issued for your account?

Mr. Wessel: If your Honor please, before this time has been spent, I make an objection to that question. It is going to take time to mark the exhibits, to show them to the witness, to have testimony about them.

The Court: He can have anything he wants marked for identification. Go ahead.

Mr. Stryker: Your Honor, these comments about my taking time, I hope I don't have to reply to that?

The Court: No, you don't have to, sir.

Mr. Stryker: All right.

(Marked Defendants' Exhibits EE-1 to EE-7 for identification.)

Q. I show you those exhibits, and maybe the recorder will read my question which you might well have forgotten in the meantime. Look at them, please. (726)

(Question read.)

Mr. Stryker: While the witness is looking at those, would you be kind enough to mark that.

(Marked Defendants' Exhibit FF for identification.)

A. My name as the payee,—that means the man who gets the money, sir—don't appear anywhere on any of these checks.

Q. That wasn't my question, Mr. Labben. I asked whether they were issued for your account? A. What do you mean by my account? My bank account?

Q. No, for something that you purchased yourself, outside of the partnership. A. Sir, if you will be good enough to show me the original books and records left there when I left, I will be glad to answer the question, sir.

Q. Can't you tell me yourself? A. No, sir. These are for—this is for cold storage places, and—I don't know what they are for, sir. I don't know. You mean were they ultimately charged to me?

Q. I don't know. A. Well, I don't know either. (727)

Q. I am asking you if you got them. That is all my question is. I will pass on to something else. A. Did I get the money?

Q. Were these checks paid to someone in your behalf, or for your account? A. Well, sir, if I could have the books and records of the partnership, sir, that were there when I left, I could answer the question.

Q. Would this paper, Defendants' Exhibit FF for identification, assist you to answer that question? A. Well, sir, yes, sir, this one would. That is very good, sir.

Q. Well, now, what is that? A. This is an acknowledgement of an order, and it says, "Miss Feldmann, this belongs to me, not to the factory," and there is my initials, so I would assume then she would make the necessary things and she would charge it to me.

Mr. Stryker: I think your Honor would allow that in evidence. I offer it.

Mr. Wessel: I have no objection. But let me see it.

The Court: Does that relate to those vouchers?

(728)

Mr. Stryker: I think so; definitely to one. It relates to the one I hold in my hand. Would you like to see it, Judge? I don't think it is in evidence. It is for identification.

A. Sir, I don't identify that check as in payment of that bill.

The Court: Then I don't know where we get.

Mr. Wessel: My failure to object was only to the bill. I think that is clear on the record, Exhibit FF.

The Court: I don't see that the bill has any relevance.

Mr. Stryker: Let me see if I can't lay a foundation for a minute or two; and if I can't, of course, you won't allow it.

The Court: All right.

Mr. Stryker: Did you allow this in evidence? I think you did.

The Court: I haven't.

Mr. Stryker: I will offer it in evidence as a supporting document.

The Court: No, I am not going to take it until I see its relevance. I don't see the relevance of a bill from some company to this man's charge account.

(729)

Mr. Stryker: I will see if I can explain that. If I can't, I will pass on to something else.

By Mr. Stryker:

Q. I show you this FF for identification and ask you if that is not a—what is it, a bill or a statement? A. No, sir, this is an acknowledgement of an order.

Q. Acknowledgement of an order? A. Yes, sir. And nowhere on here does it show the total amount of an invoice. It states for so many pounds of wax paper at a certain percentage a pound. Now, you notice it says "sheets" over here.

Q. That is right. A. There is nowhere on here it says the number of pounds. So it would be impossible to compute this until the invoice came and the delivery receiving ticket, which would be then attached to this file here.

Q. Let me ask you this: Is the name of the person, of the concern who issued the invoice, the same name as the name of the payee on the check, Defendants' Exhibit EE for identification? A. The name is the same, sir. However, they were regular suppliers of wax paper to the company, sir, so this may have been a payment of an invoice for wax

(730)

paper that was used in the factory. We used a considerable amount to line the candy boxes so I cannot say, sir, that this bill pays for this acknowledgement.

Q. But this invoice, you have already told us, does—you have read it, I am not reading it—you have read "this belongs to me, not to the factory," signed by your initials.

The Court: Can't we cut this? Unless you know the amount involved in that invoice, aren't we wasting a lot of time?

Mr. Stryker: I hope I am not. I will offer it.

The Court: I will exclude it.

Mr. Stryker: That is, I have offered FF for identification, and EE for identification, and your Honor excludes them; all right.

The Court: Yes.

By Mr. Stryker:

Q. Who is Bob Ishimoto? A. He was a man, sir, that worked for me in New Jersey.

Q. Was he a butler, house man or something, I don't know? A. No, sir, he was not a butler, sir. I never had any butler. I never had any house man.

Q. All right, was he an employee of yours? A. He

(731)

did some work on the farm, yes, sir.

Q. Worked for you for sometime, didn't he? A. Yes, sir.

Q. Now, is this check, EE-5 for identification, a check drawn to him, your man, Ishimoto? A. Yes, sir.

Mr. Stryker: I now offer this in evidence on that foundation.

The Court: Show it to counsel.

Mr. Wessel: Do you know what this check, EE-5, is for, Mr. Lubben?

The Witness: No, I do not.

Mr. Wessel: I object.

Mr. Stryker: I did not hear the question, I am sorry.

The Court: Read the question and answer back to Mr. Stryker.

(Question and answer read.)

By Mr. Stryker:

Q. Well, you know, don't you, that it was not for the partnership account or for work done for the partnership, but some work done or labor performed for you, personally; isn't that right? A. I don't know what the check is for, sir.

(732)

Q. Well, Ishimoto did not work for the partnership, did he? A. I don't think he did, no, sir.

Q. He worked for you, didn't he? A. Yes, sir.

Q. It was a personal transaction. I am not interested in what it was, but between you and Ishimoto; that is right, isn't it? A. You mean he was an employee of mine, sir?

Q. Yes. A. Yes, sir. But, sir, that check for Ishimoto, if it was for me, sir, if I was the ultimate man who got the money, it would be charged to my account. That is what I am telling you, sir.

Q. Mr. Lubben, I am not asking that. I don't claim that. I am asking if this check was paid to your man, who worked on the farm, a man by the name of Ishimoto; that is all. A. It would appear to be, yes.

Mr. Stryker: All right, now I think that is admissible, your Honor. Would you care to look at it?

The Court: I am raising the question now whether that is the best evidence. If you want to establish what this man received from the partnership—I mean, he has testified that there are other

records, and now we are speculating around, is this (733) check for this or is this check for that.

Mr. Stryker: This time I am not, your Honor. Bear with me, please. This time certainly I am not. He has identified the payee as an employee of his on the farm.

The Court: Mr. Lubben, you tell me that there were partnership records which would explain exactly what that check was for?

The Witness: Sir, if God will strike me dead——

The Court: Let's not——

The Witness: Sir, I say this, when I left the partnership, sir, the books and records of the Eatsum Food partnership were there.

The Court: I will exclude that check.

The Witness: Yes, sir, and——

Mr. Stryker: Let me ask one question I did not ask,—before your Honor definitely rules.

The Court: All right.

By Mr. Stryker:

Q. Was this check paid to Ishimoto for anything at all that he did for the partnership?

The Court: I will sustain an objection to that question.

(734)

Mr. Wessel: I object.

Mr. Stryker: I except. All right.

By Mr. Stryker:

Q. Did a man by the name of—a lady by the name of Pearl A. Beren work for you? I am talking about you as opposed to the partnership. A. What did she do, sir?

Q. Well, perform any labor for you, service or——

Mr. Wessel: I renew my objection to the cumulative nature of this examination.

The Court: In view of the testimony that there are partnership records that explain this transaction, I am not going along on secondary evidence any further.

Mr. Stryker: Can I identify it through the questions regardless of your Honor's ultimate determination?

The Court: I think you want to mark it for identification.

Mr. Stryker: I just want a record of what it is.

Q. Is that a check drawn on the partnership account by (735) you as the maker to a lady by the name of Pearl Bercu? A. Yes, sir, it is.

Q. Was that for some personal matter apart from the partnership? A. Sir, if you can produce the disbursement record, it would tell me what it is for. I have no——

Q. Can't you tell me yourself? If you can't, I can't go on. A. Sir, I cannot tell you what it was for.

Q. All right, all right.

Mr. Wessel: As I understand your Honor's ruling, in view of the length of the examination, in fact, that there are other records identified by this witness in existence, that this kind of examination at this time is improper.

The Court: I am not going to consume the time of this Court and jury speculating what checks were drawn for in view of the testimony that there are records which explain that.

Mr. Stryker: All right, I will not pursue that line according to your Honor's order. In view of your Honor's statement, I would ask the Government to produce the books and records of the Eatsum partnership, whatever they have.

(736)

Mr. Wessel: May I have the Eatsum general ledger?

The only book the Government has that I know of that relates to this subject is the Eatsum general ledger which will be produced in a moment.

I now produce for the inspection of the defendants—and it has long since been produced—the Eatsum general ledger for the fiscal year ending May 31, 1946.

Mr. Stryker: I don't understand what you meant by "long produced." You mean you handed me before?

Mr. Wessel: This document has been examined by counsel for defendants and accounts for defendants over a long period of time.

Mr. Stryker: You mean accountants, all right.

(737)

Q. Now, with this Eatsum general ledger that Mr. Wessel has kindly produced, can you tell from that whether or not any of these checks that I have—some are in evidence, some are not—— A. What is a general——

Q. Just a minute—were for—drawn to your account or for your—to your employee, or for your purposes as distinguished from the partnership?

Mr. Stryker: I think that was what your Honor asked me to do, as I recall it, wasn't it?

The Court: I am not quite sure that I have asked you to do anything, Mr. Stryker.

I have ruled on an offer of evidence.

Mr. Stryker: Well, I don't say that you did. I mean, that is what you meant, I think.

A. Sir, I don't know if the general ledger tells—what it tells. I mean, I don't know what is a general ledger. I know there are several kinds of books; one you put down when a customer owes you; another you put down when you owe a customer; and some other kinds of books; there are big ones, fat ones, little ones, all kinds of books, and those books, sir, whatever you have to keep, the accountants I would say, were kept. I cannot tell here. Here it says "Income taxes withheld, and social security taxes, payroll."

(738)

I don't know anything—but, if you ask an accountant, sir, or my bookkeeper, I am sure they can give you an answer.

Q. Mr. Lubben, a question about that. Am I not correct in recalling that when I showed you some of these checks you said you could not identify them without looking at the books of the company; didn't you say that? A. Yes, sir, but I mean in——

Q. Well, now, I have shown you the book that the Government has produced. A. I want to look at the books and records, but I want to have an accountant with me to show me where these checks are in these pages. That is what they always did, sir.

The Court: Is there anything in a general ledger that tells you what a particular cash check is for, or is a general ledger usually a total of other accounts?

The Witness: Warehouse expenses, selling expenses, factory expenses—that's what it says here.

The Court: Let me see that. I don't know what it says there.

Mr. Wessel: Can I assist your Honor?

The Court: Yes.

The Witness: We had lots and lots of books, and not that little bit of a book.

(739)

The Court: This is not a cash disbursement book as I see it, at all. What does it have, totals on cash disbursements?

(Mr. Wessel approached the bench; discussion, not recorded.)

Mr. Stryker: Just for the record, will you have the book that Mr. Wessel has produced, marked for identification? That is all I want.

(Marked Defendants' Exhibit GG for identification.)

Mr. Stryker: And may I see it, your Honor. Just a moment, your Honor.

The Court: All right.

Q. Now I show you Defendants' Exhibit GG for identification—I think it has been identified as the general ledger of the Eatsum partnership—and I draw your attention——

A. Will you come back here a little further, sir?

Q. Sure. A. It is hard for me to look.

Q. I draw your attention—I don't know if these pages are numbered—well, I draw your——

Mr. Stryker: Will you give me a clip or something that I can stick in there, so I will know what I talked about. Thank you.

(740)

Q. I draw your attention to two pages, on each of which I have put a clip. Can you identify those pages as being

a record of your drawings from Eatsum Food partnership? Look at that while I am putting this on. Thank you. No, it is the other side there. No, it is right here, right here. You can look at anything else you want, but look at those. A. No, I wasn't looking, sir.

Q. It is quite all right. No, no, just look at those two. A. What am I supposed to do with these?

Mr. Wessel: If counsel wishes to offer those two pages in evidence, I have no objection.

Mr. Stryker: All right, I will do that.

Mr. Wessel: Or the whole book.

Mr. Stryker: Well, for the moment I will offer the two pages we are talking about, not to confuse it. Pages—I don't know how I am going to identify it.

Mr. Wessel: No objection.

Mr. Stryker: I don't know how I am going to identify it. Perhaps with a clip on it. Two clips.

The Court: Mr. Dilberian probably has some ingenious way to do it.

(741)

Mr. Stryker: I am sure he has. I am not smart enough to do it.

The Court: I don't know about that.

(Marked Defendants' Exhibits GG-1 and GG-2 in evidence.)

Mr. Stryker: I am told there is another page. I think it will be less confusing. If there is another page, I will put it in. Let's see if I find another page. If not, I will proceed very rapidly.

I think only two. Am I right now, your Honor, that these are in evidence. I think so.

The Court: I think it is going in to the extent that you have offered it. The Government has consented to the whole book and you have offered only two pages.

Mr. Stryker: I have offered for the moment only two pages.

The Court: Very good.

Q. Mr. Lubben, showing you the page marked GG-1, as I read it, that is labeled David G. Lubben, Special, isn't it? A. Yes, sir.

Q. And the total footing of debits, according to this pencil mark—you can correct it if you think it is wrong—comes to—what is that, $45,529.15, is that right? A. On

(742)

the debit side, yes, sir.

Q. I mean, that is the amount that you are debited with? A. It is written—does debit mean charged?

Q. I think so, but don't ask me. I think that is what it means. Now this exhibit—go ahead if you want to see it again. A. No, sir.

Q. This Exhibit GG-2 in evidence is labeled G. Lubben drawing? A. That is supposed to be a "D" I would say.

Q. What would you say? A. My name is David G. not G. G.

Q. I think you are right. It is D. G. Lubben, Drawing, is that right? A. Yes, sir.

Q. And there, under the debit column, the footing is given—now I read it—you correct me if I am wrong—$84,894.40. Would you say that is right? A. That means I got it?

Q. I think so. A. And over here then credit would mean I paid something back, so over here I think it says sixty-some odd thousand, sixty-nine thousand I would pay back right?

Q. Well, really I don't know, to tell you the truth. A. You know as much as I.

Q. I think some people in the jury could tell you better

(743)

than I could. At any rate—— A. So if I took eighty-four, I paid sixty-nine—I mean, either I took sixty-nine or paid eighty-four—I don't know, sir.

Q. I would think that would be so. I would be inclined to agree with you but I'll find out.

On the GG-1 for identification, the credit only comes to $5.78, is that right? A. $5.78, yes, sir.

Q. All right. A. But you know I told you the other day there is some kind of a special account and some kind of another account, and there was some reason for it—the accountant can explain it to you. One, I think I was taking —I don't understand.

Q. At all events, you asked about the books, and I am doing the best I can. One of these accounts is labeled special account, isn't it? A. Yes, sir.

Mr. Stryker: Let me ask a question here before I ask the next one. All right, now I have got a little more education here.

Q. On GG-2 for identification—— A. That is a drawing account.

Q. Yes, that is right. A. Yes.

Q. And I read you the footing of the debits. I think those debits should be reduced by the credits on the other

(744)

column. I think that is right. And if you did that the balance would be—the pencil figure here—now let me see if I can read that, $15,738—is that right, $15,738—do I read it right? A. What does that mean?

Q. Well, the figures there—I think you will find that is the difference between the debits and the credits——

Mr. Wessel: I think I will object to this examination of a document not in evidence; not proper cross examination.

A. It says here drawing account——

Mr. Stryker: I have a right to explain it.

The Court: He asked Mr. Lubben for whatever explanation he can give.

Mr. Wessel: Mr. Lubben is not an expert. In fact he has disqualified himself several times.

Mr. Stryker: I am only asking for contents of the book; that is all right.

A. There is a figure here of $15,738. What it means, sir, I don't know.

Q. I am not asking you—— A. Maybe if you deducted this from this, you might get that.

Q. If you deduct the debits from the credits you would

(745)

get that? A. I didn't say so. I do see one thing here, sir—it says over here, some New York State tax, and then here is something for Internal Revenue for a check, and I don't know what—you will have to ask my bookkeeper or accountant, sir.

Q. All I am trying to do——

Mr. Stryker: Ladies and gentlemen, I offered two pages; they are in evidence. Each one has a clip on them. One is Exhibit GG-1 for identification; the other GG-2 for identification—rather, in evidence, I should say, than for identification. The one, the GG-1 is labeled—is labeled David G. Lubben, Special; and Exhibit GG-2 is labeled D. G. Lubben, Drawing. Perhaps you would care to glance at those. (Handed to jury.)

All right, now——

Mr. Wessel: May I at this time, if your Honor please, renew my objection to the checks which are no longer material in any respect; that is, Exhibits BB-1, BB-2 through 41, CC?

The Court: I am going to let that stand until we get all of this together and then we will see what we have got, and how much we will allow.

Mr. Stryker: All right. I don't believe I will interrupt the jury, but I should like to use the time (746)

if I am in order.

The Court: All right, Mr. Stryker.

Q. Mr. Lubben, you testified that you—I think you did; correct me if I am wrong—that you put some I. O. U.'s in the corn box, didn't you? A. I don't think that I testified that I did, sir; I said I may have and may not. I don't remember, sir.

Q. Page 211 of the record in this case, were you asked this question and did you give this answer:

"Were there any I. O. U.'s in this corn syrup cash box? A. Well, sir, there was from time to time."

It is quite long; I am not going to read it unless you want me to. Did you say that? A. Yes, sir. It says in the book I did.

Q. Have you not testified that there came a time, at the end of the corn syrup deal, when you saw a hundred forty or $144,000 in the corn box? A. No, I don't think, sir, that I ever testified I saw dollar-by-dollar a hundred forty thousand dollars in the corn box.

Q. I don't think you did, either, just that. Did you testify that there came a time when you knew there was a hundred and forty or $144,000 in the corn box; it was (747)

shown to you—whether you counted it dollar by dollar, I don't care. A. The money was shown to me, or what?

Q. Yes, yes. A. You mean $144,000 was shown to me in a pile?

Q. I don't know anything about a pile. Was a box shown to you, and you have already testified that there was $140,000 in it—I think that is correct—or $144,000. A. Well, sir, there was some——

Q. Pardon me. Do you remember when that happened? A. What happened, sir?

Q. When you saw this money, the one you are talking about? A. When I saw $144,000 in the box?

Q. That's right. A. Is that what you said?

Q. I think I did. A. I can't remember saying dollar for dollar, and I don't think I ever testified——

Q. I don't think you did. I am not asking you that. You testified—I haven't the exact page and I don't believe I want to take the time to go back to it, but didn't you testify on direct examination that you saw at the end of the corn deal—or it was shown you or you had an opportunity to look at it, in such a way that you knew that there was either $144,000 or $140,000 in the corn box, that is my recollection, correct me if I am wrong. A. You do not (748)

want my guess. You have the records there. If you can read it back to me I will be sure.

Q. Did you not testify at this trial that you saw $140,000 in the corn box? A. I don't recall seeing that, sir.

Q. Did you testify, whether you recall seeing it or not, is that what you swore to here? A. You have the records

here. If you refresh my memory I will be glad to tell you. Read back what I said.

Q. I am asking you about your memory. This is not ten years ago. This is the last few days.

Mr. Wessel: Objected to.

The Court: You have gone over a lot of ground. Sustained.

Q. Can't you recall whether you so testified in this trial? A. I don't believe I said it, sir.

Q. Have you just told me you did not see $140,000 in the box? A. I don't ever recall and I don't think I testified any place that I ever said I saw $140,000 in the box at one time.

Q. Did you at page 1119 of the Kefauver testimony say you saw $140,000 in the box; did you say that under oath?

(749)

A. If it says I said that, then I did, I don't know if there was $140,000 in it. I was told.

Q. You swore to that? A. There were some records that told how much money was in it. I was also told by Frank Loperfido that $140,000 was in the box.

Q. That is not my question. I am asking you if you didn't testify under oath in the Kefauver hearing, "I saw $140,000 in the box," didn't you so swear.

Mr. Wessel: Objected to as to the form of the question.

The Court: I will sustain the objection on the ground it has already been answered. He said if it is in there, he said it.

Mr. Stryker: Is there any dispute?

The Court: He said, "If it is in there, I said it."

Mr. Stryker: Can't we fix that it is in the record?

The Court: I think it is fixed. Let us go to the next question.

Q. How much of that $140,000 was in your I. O. U.s? A. Sir, we had a question.

Q. Isn't my question plain? I think it is.

The Court: Let him answer the question. A. (750)

I said "Sir," and you interrupted me.

The Court: Let us not get into any colloquy. Answer the question the best you can. You do not have to answer if you do not know.

A. Sir, we had Louis Roth in the office. Just a minute. If we took any money out of the box, there was time, sir, when I remember we took money out to pay the black market premium in the corn. There was a time when we used the box to take black market money out to pay for premiums on candies. There may have been other times we may have taken money out for various other things. But, sir, a slip of paper was put in the box at that time telling what it was for, so that Mr. Louis Roth could check it, and it would enter up or end up in the books or records of the company. Where it went, I don't know. Now, sir, if there were any I. O. U.s in the box for me—you are trying to infer there were I. O. U.s in the box, I don't know, but I would say this, if there were, for example, if I took X dollars out of the box and I put an I. O. U. in, and that I. O. U. would then be charged to my account, and it will be on some books and records some place, sir.

Q. Have you finished? A. Yes, sir.

Q. About when was it that you saw this $140,000 in (751)

the box, as you testified at the Kefauver hearings?

Mr. Wessel: Objected to as to the form of the question.

The Court: Sustained.

Mr. Stryker: The date he saw it.

Mr. Wessel: I am objecting to the form.

Mr. Stryker: Very well.

Q. When was it that you saw the $140,000 in the box?

Mr. Wessel: I object to the form of the question.

The Court: Sustained. You better ask him whether it is his present recollection that he did or not before you get to the question of when.

Mr. Stryker: I certainly want to make myself clear with the Court; I thought you ruled I should not pursue that because it has now been established he did say that.

The Court: I don't want you to pursue more than once that he testified to what he testified before Senator Kefauver. What his present recollection is—and I understood it was somewhat at variance with that—ask him what his present recollection is before you ask him when he saw it.

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Q. Is your present recollection, taking the Judge's words, at variance with the testimony you gave at the Kefauver investigation as to——

The Court: Do not take the judge's words. That was between you and me.

Mr. Stryker: Strike it out. I was just trying to use your suggestion.

The Court: I was not suggesting a question.

Mr. Stryker: All right, your Honor.

Q. Do you now say that you saw the $140,000 in the corn box?

Mr. Stryker: Is that all right, your Honor?

The Court: Yes.

A. Sir, this box, sir, had more than $400,000 going through it in a very short space of time. There may have been times, sir, that the box contained more than $140,000. There may have been times it contained less. My recollection at that time when I testified before the Kefauver Committee was the best of my recollection, and if I said it I was stating the truth.

Q. The $140,000, isn't that right? A. That happened in the Kefauver Committee, and that is back in 1950 or something.

Q. August 22, 1950. A. I will never forget the day.

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Sir, another four or five years have slipped by. So it is very possible, sir, that when I said it at that time that was the best of my recollection then. Maybe my recollection today is not what it was then.

Q. Would you say it was better in 1950 than it is now; it was nearer the event: A. If you could always answer something that happened yesterday better today, but a year from now you can't answer what happened yesterday. I am getting old, sir.

Q. I don't think so. Mr Lubben, will you please fix the time as well as you can when you say you saw this $140,000 in the corn box? A. No, sir, I can't fix the time.

Q. Was it in 1945 or 1946, or don't you know at all? A. It would be in 1945, sir.

Q. Would it be sometime in November or December 1945? A. It could also be in October, I don't know.

Q. Wouldn't it be somewhere around the time when you took over the corn box from Loperfido? A. Now, sir, let me

state this: when I say taking over the corn box from Loperfido, Frank Loperfido left for some place. I didn't physically take over the corn box, I took over the records. If somebody came in, there was some notations if somebody came in with some money, to the best of my recollection,

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sir, and I put it on a piece of paper and when Louis Roth would come in he would take the paper, and I believe, sir, I am almost sure that on many occasions—not many occasions, a number of occasions, I would give money to Louis Roth or to Mr. Giglio to put in the corn box, because Mr. Giglio had the corn box.

Q. What? A. Mr. Giglio had the corn box. Frank Loperfido told me Mr. Giglio had the corn box some time prior to that.

Q. Didn't Mr. Loperfido leave the partnership sometime around November 27, 1945? A. I wouldn't remember, sir.

Q. You remember the record. A. It might have been in October or November. I know he left the partnership.

Q. Didn't he leave about the time that you began keeping a record? You remember the record I mean, don't you, the corn box, taken over from Frankie, or something like that? A. No, sir. If you have anything to refresh my memory, sir, I would appreciate it very much.

Q. I have it this way, that you don't know when you saw that $140,000 in the corn box? A. The particular date, no, sir. But I tell you, sir——

Q. You probably would think it was November or De-

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cember? A. It might have been in October.

Q. And what is your best recollection? A. I don't think it could have been—I don't want to guess.

Q. There came a time before the end of the year when you chartered an airplane and took a group of friends to Cuba? A. When I what, sir?

Mr. Stryker: Read it.

(Question read.)

A. I didn't charter any plane, sir. There was a non-scheduled small airliner that took me in 1945 or maybe it was 1946, I think it was 1946, sir, right around New Year's or something.

Q. It was while you were in the partnership, wasn't it? A. Yes.

Q. It wouldn't—it was some time in 1945, then, wasn't it? A. The partnership ended on March 8, 1946.

Q. I realize that. I am talking about this plane trip to Cuba. About when was that? A. To the best of my recollection, my sister, my two sisters and a couple of kids, their children, and her husband, Mr. and Mrs. Urban, there may have been some other people, I don't know, we went to Miami, and then we went to Cuba. Now, sir, this was during the war. You couldn't get airplane tickets, sir, and

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it would be impossible to get—wait a minute. I just remembered something. Thank you, sir. I never took a plane, a chartered plane to go to Miami Beach or go to Cuba. We had somebody here, sir, that we bought some tickets on some non-scheduled plane, and then the plane never showed up. Later on they did refund some money, and they did bring us back. But I went on the train to Cuba or to Florida.

Q. You didn't go by plane at all? A. No, sir. I came back by it.

Q. By plane? A. Yes, sir.

Q. Was that a non-scheduled flight, chartered flight, or what? A. A non-scheduled plane.

Q. Your best estimate of the people that went with you—will you give that again, I am not sure I heard you

quite right. How many were there that you took with you? A. You mean that were in the party, sir?

Q. That is it. A. I don't think I took them with me. We all went together.

Q. Did you pay the bill? A. No, I think the various members of the party paid some parts.

Q. Did you pay the whole bill? A. You are asking me six questions and before I can answer one you throw

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another one at me. Do you want to know who was there at the time?

Q. Yes. A. My sister and her husband. My mother had just died and I had another sister who I believe at that time was nine.

Q. That is three. Go ahead. A. My sister had I think one child at the time. She has another one now.

Q. That would be four. A. Did we count her husband?

Q. I counted everyone who was there so far. A. You are doing the counting.

Q. I may make a mistake. A. One sister and her husband. My sister and another child. That would be four.

Q. The Urbans? A. Are you telling me or do you want me to answer it?

Q. That was meant as a question. A. Let me answer the questions. Then there was Mr. Urban.

Q. And Mrs. Urban? A. Mrs. Urban.

Q. That is six. A. Yes. I don't think they came to New York. I think we met those people in Florida.

Q. All right. A. They had a son, that would be seven in the party. Then there would be me in the party, which was eight, and Mr. Bookman was with me, nine. I think

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there were nine.

Q. Of course you yourself made ten. A. I think I counted myself. If I didn't, nine or ten. I don't think we

all came from New York. I think we met the Urbans in Miami, anyway.

Q. Didn't you pay for that whole trip and for the stay in Cuba? A. You mean for the Urbans, too?

Q. Yes. A. Oh, no, sir.

Q. Did you pay for the others, other than the Urbans? A. I believe I paid for my sisters and myself, yes, sir; anybody that was in my family I paid for.

Q. Give the jury your best recollection about what you spent on that trip? A. I couldn't remember, sir.

Q. Approximate it. A. Sir, we went to Cuba for two things. I didn't go to Cuba for a joy ride. I had been to Cuba several times, I think once more or twice more after that. You remember, sir, we did a considerable business in Cuban candy.

Q. Mr. Lubben——

The Court: He asked you for an amount.

Q. That has nothing to do with my question. A. I don't know how much we spent.

Q. I will ask you to give your best recollection. A. I

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don't have the hotel bills. I knew there were hotel bills and records, because I kept expense accounts.

Q. Was it $5,000 or $10,000, or $20,000, give me your best approximation. A. I know that your five and ten and twenty-thousand dollar figures, I think, are very excessive.

Q. I am asking you, I don't know. Please tell me. A. I don't remember, sir, whether we paid $39 or $59 to go on the train, each one to go on the train. I don't know. I think the hotel rooms in Miami, I think we spent two or three days, two days, probably, and I think they cost us $20 a day for a room. Then we went to Cuba. I think we spent two and three days in one hotel and another day in

another hotel, and I came back. I don't think I was gone more than—I don't know, ten days. I believe it was under two weeks, sir. That is the best of my recollection.

Q. Did you pay for all your trips in cash for your hotel expenses, or what? A. No, sir, I drew checks. I may have had cash in my pocket, but I remember having checks.

Q. How much cash would you say about? A. I can't say how much I had in my pocket in 1945, or 1946, rather,

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I believe, when the trip was.

Q. And you came back in January, didn't you, in 1946? A. Yes, sir. I believe it was January, sir. Yes, it would be January.

Q. The corn deal ended about the time of your return, didn't it? A. I think to the best of my recollection, sir, the corn deal had ended prior to that. Now when I say the corn deal had ended,——

Q. Take your time. A. I mean that the Penick & Ford Company, I believe, had shipped all their corn, but there was some due from the Hubinger Company.

Q. Other than that the corn deal had ended, is that right? A. To the best of my recollection, yes, sir.

Q. You have given the reasons in your direct examination for your leaving the partnership, haven't you? A. The reasons?

Q. Yes. You testified to that.

Mr. Wessel: I object.

A. Do you recall what I testified to?

Q. I haven't got that good a memory. But in substance isn't that what you said?

Mr. Wessel: I object.

A. I left the partnership when I came back.

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Q. Isn't it a fact that you left the partnership because when you came back from this Cuban trip Mr. Giglio asked you to explain certain drawings made by you which you could not explain, and when you could not explain didn't he call up and close the factory and say he wanted no more of you, or words in substance to that effect? A. Sir, that is pure unadulterated—it is a pure unadulterated lie, and if that was a fact, sir, I wouldn't be living here today.

Q. What? A. If that were a fact, I wouldn't be living here today.

Mr. Stryker: Does your Honor allow that?

The Court: The first part was responsive. I will let the second part go out.

Mr. Wessel: There were eighteen questions in that one question which counsel asked, your Honor.

Mr. Stryker: I know your Honor wants to stop at four o'clock.

The Court: I see you have a number of checks.

Mr. Stryker: I have a few checks, your Honor.

The Court: I won't prejudge the amount.

By Mr. Stryker:

Q. I show you these checks, fifteen or twenty, I don't know——

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The Court: Maybe we can weigh them.

Mr. Stryker: What, your Honor?

The Court: That is all right. Go ahead.

Q. Aren't those checks, which I am going to show you after they are marked for identification, the very checks that Mr. Giglio asked you to explain, and that you could not explain? A. Sir, if I could answer that question, I would

be pretty good. Aren't the checks you are going to show me——

Q. I think you are right. I really agree with you about that. I think you are absolutely right. I think you have made a point.

Mr. Stryker: I hate to hold you up, your Honor. I don't know any other way to do it.

The Court: The way I understood the answer before, the emphatic answer, it seemed to negate the premise you seemed to be pursuing. I was just wondering how much time we ought to spend on it.

Mr. Stryker: I am just attempting to probe his answer. I won't take very long.

By Mr. Stryker:

Q. Didn't Mr. Giglio on your return from this Cuban trip ask you to explain $182,317.55 of checks drawn to (763) cash? A. Sir, Mr. Giglio never asked me to explain it, and that is the first I ever heard of it today.

Q. At all events, the partnership in effect broke up about that time, did it not? A. About what time?

Q. Sometime in January, although some transactions occurred later. A. No, sir. It effectively, as far as I know, broke up March 8 or 9.

Q. Hadn't it really broken up before then? A. How could it be broken up, sir, I was still there.

Q. I know you were there. Hadn't you ceased doing business as a partnership substantially at or about that time? A. We ceased doing business as far as I was concerned in the partnership on March 8 or 9, 1946.

(Defendants' Exhibits HH-1 to HH-25 marked for identification.)

Q. I show you a group of checks which I am told, subject to correction, aggregate $182,317.55.

Mr. Stryker: Strike out my summary. I don't think it is correct.

Q. I show you these exhibits, HH, to numbers 1 to 25, and I ask you if those aren't the checks which Mr. Giglio asked you to explain on your return from Cuba (handing)? A. I will not look at the checks, sir, because

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there never was any explanation or conversation.

Q. You never had any conversation whatever about those checks that I have shown you? A. Sir, we never had any explanation about these checks. All we ever had, they didn't want me to draw checks, they wanted me to sell merchandise for cash and pay for merchandise out of the cash box. What is the use of looking at the checks. There was no conversation.

The Court: I think the record should show the witness did not look at the checks.

Mr. Stryker: That is right, he didn't. Your Honor, it is four o'clock, and another topic would get me into something else. I don't know about your Honor, but I am a little tired.

The Court: I think we will keep on our schedule as best we can. We will not hold any session on Monday. Our next session will be Tuesday at ten-fifteen. I will ask everybody to be on time.

Mr. Wessel: If your Honor please, I know the time of the jurors and the time of the Court and the time of counsel is of primary importance, but the witness has been here some time. If there is only a few minutes left for cross-examination, I would suggest staying fifteen minutes here and com-

pleting it. It would be much better if this witness (765)
could get back to his own activities rather than wait until Tuesday.

The Witness: I would appreciate it, your Honor.

Mr. Stryker: I am afraid I would irritate everybody if I cross-examined, if he says fifteen minutes. I don't know how long I would have to cross-examine.

The Court: Let us talk to each other at the bench for a second.

Mr. Wessel: If this witness's cross examination is only to take a short time——.

Mr. Stryker: I can't tell how long it will be. I hope it will be short. I don't know how long the cross-examination will be.

Mr. Wessel: I am talking about the remainder of Mr. Lubben's cross-examination.

Mr. Stryker: Then I was talking at cross purposes.

The Court: Is there any point in continuing now?

Mr. Stryker: I couldn't possibly finish in any time such as counsel suggests.

The Court: We will make it ten-fifteen on Tuesday morning. Do not discuss the case.

(Whereupon an adjournment was taken until 10:15 o'clock a.m., Tuesday, January 25, 1955.) (766)

New York, N. Y., January 25, 1955.
10.15 o'clock a.m.

Trial resumed.

The Court. I guess we are all here, Mr. Stryker.

Mr. Stryker: Thank you, sir.

DAVID GEORGE LUBBEN, resumed.

Cross Examination Continued by Mr. Stryker:

Q. Mr. Lubben, were you, during the negotiations, before you went into the partnership, led to believe that you were going to become a part of the Doughnut Corporation? A. No, sir, not a partner of the Doughnut Corporation.

Q. I said a part. A. Oh, a part. Yes, sir, I was.

Q. You were led to believe that you were to be associated with the Doughnut Corporation; is that right? A. Words to that effect, yes, sir.

Q. What's that? A. In words to that effect, yes, sir.

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Q. And that was one of the reasons why you joined the partnership? A. That, sir, and the fact that I would get a—yes, sir, that is correct.

Q. Did you ever talk with any officer of the Doughnut Corporation? A. Well, sir, I was introduced to a number of people that I assumed were officials of the concern because——

Q. My question was, did you ever talk with any officer of the Doughnut Corporation? A. Sir, I was introduced to a number of people.

Q. Can you name one? A. Sir, I am trying to answer the question, sir.

Q. What? A. I am trying to answer your question, sir.

Q. All right. A. I was introduced—taken through the offices of the Doughnut Corporation of America, and I remember on the Seventh Avenue side there was a number of executive officers, and I was introduced by Mr. Louis

Roth to a number of gentlemen, I don't recall their names, but he said, "I want you to meet Mr. Lubben, he is becoming part of the organization."

Q. Who said this? A. Mr. Roth, and he put his arm (768)
around me and introduced me to various people and so forth.

Q. Can you name one person whom you met who was an officer of the Doughnut Corporation? A. I don't recall their names, sir, but I met Mr. Goldhill, and Mr. Goldhill was something to do with the Doughnut Corporation.

Q. Mr. Goldhill was the counsel for the corporation, wasn't he, the Doughnut, you understood? A. I was told he had some connection with it, sir. I don't know what it was.

Q. And he had an office in or adjoining the company that he represented, the Doughnut Corporation; that is correct, isn't it? A. Yes, sir, he had an office on the same floor.

Q. Did you have any correspondence with any official of the Doughnut Corporation? A. In regard to what, sir?

Q. About your becoming associated in some way with that organization. A. No, sir, I did not.

Q. When was that occasion, that meeting in the Doughnut, what you have said was the Doughnut Corporation? A. Prior, sir, to signing the papers.

Q. Papers were signed, I think—was it the 1st, the (769)
9th of June? I forget. You told me. A. Somewhere in that neighborhood, sir, of 1945.

Q. 1945? A. Yes, sir.

Q. Well, now, fix the time as well as you can when you say that these people slapped you on the back and said you were coming with the organization; fix that time. A.

Sir, I didn't say these people slapped me on the back. I said I went through the office, sir, with Mr. Roth, and Mr. Roth introduced me to a number of people, and up in the front by those large offices, and said, "This is Mr. Lubben, and he is becoming part of the organization."

Q. All right. A. And so——

Q. Don't let me interrupt you. A. The time, sir?

Q. Give me the best—your best recollection of the time. I don't expect the exact day, but how long before the signing of the partnership agreement was it? A. Well, it was prior, sir, but I wouldn't know exactly the time.

Q. Was it several times before? A. No, sir; I think it was more than several. It was considerable.

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Q. What? A. I think it was more than several days before, sir.

Q. Maybe a week or two would be a fair statement? A. Well, it would only be a guess, sir. I don't recall. Probably a week or two, maybe——

Q. All right. A. Somewhere in that neighborhood. Maybe three weeks.

Q. Then there came a time when you signed the partnership articles, didn't you? A. Yes, sir.

Q. That was done in the office of Mr. Goldhill? A. Yes, sir. And Mr. Goldhill's office, sir, is in the Doughnut Corporation of America.

Q. Is it in or on the same floor with it? A. Well, sir, if I recall correctly, the Doughnut Corporation of America has the whole floor.

Q. Is his office on the same floor with that? A. Yes, sir.

Q. To enter his office, do you first have to go through the Doughnut Corporation office or is it adjoining on the same floor? A. No. It is, as you get off the elevator, sir, you turn to your left, but there is no way, sir, to know—I

mean, I think there is a big sign in the wall—I don't know—

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but there was no way, sir, you didn't know you weren't in the Doughnut Corporation. His name was on the door. I remember seeing his name.

Q. His name was on the door? A. Yes, sir.

Q. And there was a door directly opening on to the hall on which his name was; is that right? A. Yes, sir.

Q. And that is the room you went into? A. Yes, sir.

Q. Well, now, before you signed the partnership articles you read them, I suppose? A. I believe I did, yes, sir.

Q. Well, on reading them you found that there was no mention of any kind, in any way whatever, of the Doughnut Corporation, did you not? A. That is true, sir.

Q. Did you make any comment to Mr. Goldhill about that? A. No, sir.

Q. Did you say, why, here I have been led to think I am going to be a part of the Doughnut Corporation organization and I don't find anything in the articles about it? A. To the best of my recollection, sir, I mentioned that to Louis Roth sometime.

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Q. I am not asking you that. I am asking about the lawyer whose office you appeared at when you signed the articles. Having that in mind, would you be kind enough to answer my question? A. I don't recall asking the question, sir, I mean, asking anything about it.

Q. You made no comment about it? A. No, sir. I don't recall making any, sir.

Q. So you saw the articles without any mention of the Doughnut Corporation, you read them, and you signed them without making any comment about your expectation of becoming part of the Doughnut Corporation; that is

right, isn't it? A. No, sir. I don't recall whether I read the articles of incorporation or not, sir.

Q. What? A. I don't recall whether—we didn't incorporate.

Q. I misspoke, and unfortunately I do that sometimes. I know you didn't incorporate. I am talking about the partnership articles. You read those, didn't you, before you signed them? A. I probably did, sir.

Q. Is there any doubt about it? A. I mean I can't specifically remember now reading them directly.

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Q. Well, now, I am just asking you: here you are going into a new partnership, and the articles of partnership are presented to you. Are you telling me that you don't know whether you read them or not? A. No, I didn't say. I said I can't specifically put it in my mind that at the specific moment that I picked it and turned the pages and read it.

Q. Now, in this court you testified that Mr. Lawn was present in the Doughnut Corporation, did you not? A. I didn't say Mr. Lawn was present in the Doughnut Corporation.

Q. Was present at the meeting that you had, in what you have called the Doughnut Corporation offices, didn't you say that? A. You mean at the time, sir, that the partnership was signed?

Q. Well, I am not pinning you down to any particular time: to sometime when you were in the offices of Mr. Goldhill, either at the time of the signing of the articles, or prior to it, did you not say in this court that Mr. Lawn was present on one of those occasions? A. Well, sir, you are talking about two or three occasions. Why don't you get my testimony and then, sir, you will know what occasion we

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are talking about.

Q. I can do that easily, but I am asking you. Did you not say, in substance, that one of the persons present at one of the meetings in the Doughnut Corporation—I don't care which—that Mr. Lawn was present? A. Well, sir.

Q. Do you understand? Maybe I am—— A. No, let me answer the question, sir.

Q. I just want to be sure you understand. I am only asking you what you have sworn to in this court. A. Sir, I stated, and I believe this is my testimony, that at the time of the signing of the articles of partnership, that Mr. Lawn was present.

Q. Now, before the Kefauver Committee you testified at some length regarding your meeting at the, what you have called, the Doughnut offices, did you not? A. I don't know whether I testified at some length, sir. I mean, if you have the copy of the Kefauver Committee, sir, I would like to—I would appreciate your refreshing my memory. I don't recall any great detail down there. You have the copy, sir.

Q. Well, just at the moment—I will come to that—I am

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just asking your recollection as to whether or not you did not testify about the transactions in what you called the Doughnut Corporation. Just generally, I mean, you did testify. A. Well, sir, I would appreciate your refreshing my memory, sir.

Q. You don't remember whether you said that or not? A. I did not say I did say it and I did not say I did not. I made a request. I would like you to refresh my memory from the Kefauver testimony.

Mr. Stryker: All right, I will do that.

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Q. I will ask you if you testified as follows, accepting your request that I do so.

Mr. Stryker: Page 1090, Mr. Wessel, of the Kefauver hearing.

"Mr. Lubben: We went to the Doughnut Corporation of America with Mr. Roth. I was ushered through the offices and I met a great many people. I was slapped on the back, and said, 'Dave is coming in with us, becoming a part of the organization.'

"I met a number of people. I don't recall their names, but they were up in the front of the office on the Seventh Avenue side. They could have been the officials of the company. We went all around the office, and we went into an attorney's office called Max Goldhill.

"Mr. Halley: He was counsel for the Doughnut Corporation.

"Mr. Lubben: Yes, sir; this is all in the Doughnut Corporation's offices.

"So I discussed selling these people a fifty per cent interest in my business. In exchange, they were to see that I got some sugar. They were going to use their good graces, their connections, to get a sugar quota for Eatsum Food Products. That was the whole basis of selling a

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half interest in the first place."

Did you so testify? A. Yes, sir.

Q. Did you anywhere in that testimony mention Mr. Lawn's name? A. Well, I believe somewhere in that testimony, sir, you will find Mr. Lawn's name, sir. Maybe you won't find it in that paragraph, but I think you will find it somewhere in there.

Q. Well, I am asking you. I can only take up one topic at a time, and I am asking about this meeting in what you call the Doughnut Corporation. That is the one I am directing you to. A. No, sir.

Q. I am asking you whether in that connection and in testifying about that matter you mentioned Mr. Lawn's name? A. Well, sir, that break of Mr. Halley's in there doesn't necessarily mean it was a continuation, that the meeting was discussed on that day in Mr. Goldhill's office, sir, and you can't read it in a way from what you have read so far. Now, if you read it back, sir—I mean, I don't see any continuity there. I mean, I believe that Mr. Halley was off on an entirely new tack at that particular time. Maybe I am wrong, I don't know, but——

Q. At the moment I am not discussing, I am not much interested in Mr. Halley. What I am asking you is when

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you told the story under oath to the Kefauver Committee about your going to the Doughnut offices, did you or did you not say that Mr. Lawn was present? A. Well, sir, I don't recall. I can't—it must be in the conversation. It probably is. You will read it there somewhere, sir.

Q. I have read it. A. And in those few sentences you read there you don't mention Mr. Lawn's name.

Q. You think you mentioned Mr. Lawn's name in connection with the Doughnut Corporation at some other point in your testimony? A. One of these meetings I mentioned Mr. Lawn's name, whether it was one of the meetings upstairs that was private, in the building, that was private later on, sir; but to the best of my recollection—and I am trying very hard to—I am sure, sir, that Mr. Lawn was present, sir, at the time that the papers were signed.

Q. That was the time he was present? A. Yes, sir.

Q. In your testimony about the signing of the papers before the Kefauver Committee, did you say that he was present? A. Well, you didn't read my testimony about the signing of the papers before the Kefauver Committee. If you read it, sir, we will have the answer.

Q. Well, if there is such testimony, I will be very glad to read it. Well, Mr. Lubben, there were a great many

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pages to that testimony. If you can point out, or if Mr. Wessel can, any place where you mention Mr. Lawn as being present at the signing of the partnership papers, or being present anyway at the Doughnut Corporation—I am not going to take the time now to go through perhaps fifty pages—if you can point out any place, I wish you would. A. Sir, how can I point it out any place?

Mr. Wessel: If counsel wants my assistance in this connection, I will be glad to offer it.

Mr. Stryker: I didn't hear you, Mr. Wessel.

Mr. Wessel: I said if counsel wishes my assistance I will be glad to offer it.

Mr. Stryker: All right, I will be glad to take it. Go ahead. If you can point out any place, show it to me.

Mr. Wessel: May I point it out to the witness, Mr. Stryker?

Mr. Stryker: I am talking now about records, Mr. Wessel.

Mr. Wessel: If you are talking about the public Kefauver hearing, and if you are limiting your question to that, I can furnish no assistance.

Mr. Stryker: That was the point of my interrogation at the moment.

(780)

Mr. Wessel: Then I can furnish counsel no assistance.

Mr. Stryker: All right.

By Mr. Stryker:

Q. Mr. Lubben, I understood that at the end of the corn deal there was $140,000 in the box, and that you, being a half partner, claimed half of that sum; is that right? A. I certainly would believe that a fifty per cent partner would be entitled to it, if half the money was in the cash box.

Q. And you claimed it? A. Yes, sir; I asked him for it.

Q. When was that? A. About the—just about the time we moved uptown, sir, the 7th or the 8th or 9th of March, or a couple of days one way or the other, sir—in around there.

Q. That is somewhere—I don't expect the exact day—but around the time when you left the partnership and went up and continued with the General Confections; would that be about the time? A. Yes, sir.

Q. Did you ever ask for your half of the money in the corn box before this date that you have just mentioned? A. Did I ask for my money before the date——

(781)

Q. Before the date that you have just given me. A. No, sir; I didn't give you any date.

Q. You gave me an approximate date. A. That's right.

Q. You said around the 7th or 8th. At all events, at the time you went up and continued on with the General Confections. A. No, sir. I didn't ask for any money until that time.

Q. When did the corn deal end? A. Well, sir, I have testified here before; I believe you asked me that same question.

Q. Mr. Lubben, I don't want to interrupt you. Regardless of what I asked, I am just asking you a simple question: when did the corn deal end? A. You mean the big activity, sir? I told you, sir, that I believe the corn deal ended sometime in November. There may have been a few cars. That I don't know.

Q. All right. A. Just a minute, sir.

Q. I am not interrupting. A. I want to answer the whole question. I believe, sir, that the real big activity was in some time—ended maybe October, and there may have been some trickling in there in November, but there was still that corn that was due from one of those other re-

(782)

fineries, sir, so the corn deal really didn't end until we did it officially, completely.

Q. That was really winding up transactions in this interval while the corn deal was going on; am I not right about that? A. Yes, sir; I would say around October, a little bit in November, sir, to the best of my recollection, sir, without records.

Q. Would I have this right; that you did not ask for your share of the corn box in either October or November of '45? You have already told us you did not ask for it until about the time, March 7th, 8th or 9th, when you left the partnership; would that be correct? A. Yes, sir.

(783)

Q. Did there ever come a time when you took over the records of the corn box? A. What do you mean by that, "took over"?

Q. Well, when you—when Mr. Loperfido left somewhere in November, when you made the records from that time on, did you do that? A. There was a time, sir, that when Mr. Loperfido left, that I assumed keeping the records of the corn box. By that, I mean I would keep records of——

Q. I show you——

Mr. Stryker: Will you mark this, please.

Mr. Wessel: I don't know if the witness finished his answer. It sounded like he was in the middle of a sentence.

Mr. Stryker: If I interrupted, I am sorry. Finish. I am not sure.

By Mr. Stryker:

Q. Did you finish, Mr. Lubben?

The Witness: Would you mind repeating Mr. Stryker's question, sir?

(Question and answer read.)

A. (Continuing) I would keep records of money that was brought in, and the money that we had to pay out, or something, and I would give that money, to the best of my

(784)

recollection, I gave some money on several occasions to Mr. Giglio, but I think on most of the occasions I gave it to Mr. Roth. Mr. Roth would take the money and put it away.

(Marked Defendants' Exhibit H for identification.)

By Mr. Stryker:

Q. I show you Defendants' Exhibit H for identification and ask you whether you recognize that paper and whether or not it contains your handwriting? A. Some of it is my writing, yes, sir.

Q. Now, without saying what is in it, yet, if I can come there, is the first part of it your handwriting? A. Yes, sir.

Q. Down to about how far, would you say? A. I would say right——

Q. Just give me the place. A. (Witness indicated.)

Q. Let's take the date; down to January 12th, that is your handwriting; is that right? A. No, my handwriting, sir, is down to January 1st, sir.

Q. All right. And you kept this record in the ordinary course of business, did you not? A. Yes, sir, but I think

(785)

there was other records with it, sir.

Q. Well, my question was, did you keep this paper yourself in the ordinary course of business? A. Yes, sir, I believe I did.

Mr. Stryker: I offer it in evidence.

Mr. Wessel: May I inquire briefly with regard to this document, if your Honor please?

The Court: yes.

By Mr. Wessel:

Q. With regard to the first entry, Mr. Lubben, can you tell me whether that entry, standing by itself, has any meaning in any accounting or bookkeeping sense to you?

Mr. Stryker: I would think, your Honor, in all deference, that would be calling for a conclusion. We have a record kept in the ordinary course of business, a substantial part of which——

Mr. Wessel: I will rephrase my question.

The Court: All right.

By Mr. Wessel:

Q. Am I correct, Mr. Lubben, you stated a moment ago this was part of a group of records? A. Yes, sir.

(786)

Q. Do you know where the remaining part of that group of records is? A. No, sir, I don't, but there was other records, sir, that would—this wasn't all, sir.

Mr. Wessel: Well, I object to it on two grounds, if your Honor please. With regard to any items not identified by the witness as being entries made by him or identifiable by him I would object on the grounds of authenticity. With regard to the items which he has identified, I think examination of the document by itself would indicate that it means nothing, and might be misleading, and I therefore hand it to the Court.

The Court: I think I will receive it down through—I mean, you are offering it——

Mr. Stryker: I am only interested down to the date, your Honor, and I think I said January 1st.

The Court: January 1st. In other words, down to January 1st.

Mr. Stryker: All right.

The Witness: Your Honor, may I look at that piece of paper again, sir?

The Court: Sure. Mr. Dilberian, let me have it back before we mark it.

(787)

The Witness: Sir, again I say these are not all of the records.

The Court: Let me ask you this, Mr. Lubben: Could I see this? What other records were there, Mr. Lubben?

The Witness: There are some records, sir, for paid-outs. Some were, sir, I remember it. And I believe I have seen some records that showed some more paid-outs about that time, and I don't know where I have seen the records, sir, but I have seen

the records, that shows I paid out about that time a number of, substantial number of dollars to Bill, and that was Bill Giglio, for a sugar certificate, sir, and I don't see that there, sir. And I know there is another record, sir, I know that.

The Court: Are there any other records on money taken in?

The Witness: I wouldn't know that, sir, but I know, sir, I——

The Court: What about these invoices referred to? Would they be kept?

The Witness: Sir, I think when, one of these days—this is to the best of my recollection—I think Mr. Stryker gave me a photostatic copy one day

(788)

here of a record that says, "Money taken over from Franky," and when you took the corn box over from Franky, and on that, sir, it was a different piece of paper than that, and, sir, then I asked some question there, and I don't know where the paper went, sir, but I saw that paper here some place since I came from Puerto Rico, and I remember, sir, on that piece of paper there was two lines, it says, "Paid to Bill for sugar certificate."

I think right underneath it was another one for $5,000-some-odd, and I think that was when Mr. Stryker was talking about sugar certificates, and I am sure I saw it, sir.

You see, this doesn't show all the paid-outs.

Mr. Wessel: May I discuss this at the bench with your Honor?

The Court: Yes, come on up.

(Discussion at the bench not recorded.)

The Witness: Your Honor, sir, that was a photostatic copy I saw. I remember seeing the black and white.

The Court: All right, never mind that.

(Discussion at bench continued and recorded.)

(789)

The Court: At this time I am not going to receive this exhibit in evidence; in other words, I am going to change my previous ruling, and the reason I am not going to receive it in evidence is that the witness tells me it is not complete, and I am not going to take a record which is not complete and which may be misleading until I am satisfied on the subject of completeness.

Mr. Stryker: I think I ought to know wherein it is not complete. This is a record in his handwriting.

The Court: Mr. Stryker, this is your client's business. He knows a lot more about it than me. Do you assert to me that it is complete?

Mr. Stryker: I don't know about this corn box: whether it is or not, I have a right to go at it piecemeal.

The Court: No. These records are in your possession.

Mr. Stryker: True.

The Court: The Government can't make any demand on you for them, and I am not going to take just so much as you wish to offer.

Mr. Stryker: Will you tell me what records you

(789-1)

have in mind?

Mr. Wessel: I will specifically state what I have in mind. In the Shotwell case there were offered in

evidence, but not received, photostatic copies of a great number of pages of which this appears to be one. If counsel doesn't have all those, the originals of those, I can furnish him with photostatic copies.

Mr. Stryker: Do they bear on the testimony?

Mr. Wessel: Yes, on the corn box, and the very one the witness has referred to is one of that group.

Mr. Stryker: I really don't know what he is talking about.

The Court: I can appreciate the problem that confronts you, but on the other hand it is your problem and nobody else's, because nobody else can ask your client to look at their files.

Mr. Stryker: Judge, your Honor, here is the document headed, as you see, corn box, in the handwriting of this witness, down to, I think he said, January 1.

The Court: He tells me it is not complete.

Mr. Stryker: It is a document——

The Court: I am not going to take just that one of several documents you see fit to offer me.

Mr. Wolfram: If your Honor please, he says (789-2) it is not complete with respect to pay-outs.

The Court: I want to know what is the complete record before I take any of it.

Mr. Stryker: May I inquire about the balance of the handwriting? I want to get from this witness about that.

The Court: You may make any inquiry you wish to lay a better foundation. The thing that is bothering me now, you can see what could happen if you take just one page and not the other.

Mr. Stryker: If there is any page of anything—let's say there are pages that said this isn't so, this

is something else, or something that contradicts that; if there were such a page, the offer would be incomplete.

The Court: He says there is a record of payment to William Giglio.

Mr. Stryker: But this is dealing with the corn box, as it says there, at the time, and it says what he took over, and one of the issues in this case, and you will find it, it comes into the bill of particulars, is this $140,000 in the corn box.

Here is the record of this defendant—I don't mean that—of this witness, stating certain things about the corn box from November 30th down to January 1, and it is headed Corn Box; Money Taken (789-3) Over—wait a minute, let me get that right—I think it is headed, if I read it right, Money Taken In, and the first item is November 30, taken over from Frankie, $193.25.

Mr. Wessel: Now, may I state with regard to that particular item which is the one I examined about, why I have an objection on the grounds of completeness?

It could mean taken over from Frankie that day, a particular sum of money dealing with part of the corn, or it could mean the total amount of money that witness took over. As I understand the issue in this case, after the opening, in which Mr. Stryker made certain comments and which his clients sat and listened to and admitted by silence, there is admitted to be $140,000 in the corn box.

Mr. Stryker: There was at some point. The question now is the date.

The Court: All I want, Mr. Stryker—and I am not saying this ultimately wouldn't be admissible.

but on the recollection of this witness so far I am not going to admit it. Maybe you have another way to lay the foundation or you may have some other witness.

(789-4)

By Mr. Stryker:

Q. Mr. Lubben, I ask you whether or not this paper, Defendants' Exhibit II for identification, is a complete record of the money taken in, in the corn box deal, from November 30th down at least to the end of your handwriting, which, I think you said, was January 1st? Will you look at that and answer me that, please? A. Sir, I can't tell you whether this is a complete record of all the money taken in, sir. It may be and it may not, but these records, sir, were in a book, and, sir, there were paid-outs, sir, and——

Q. Mr. Lubben, I don't want to interrupt you, but my question, if you remember, was, I didn't ask about paid-outs, I said taken in. That was my question. A. This is the complete record?

Q. Of moneys taken in, in the corn box, from the date when your handwriting begins, which is November 30, do I read that right, all right? A. Yes, sir.

Q. Down to, I think you said, January 1st. Now, do you have my question in mind? A. That this is the complete record of the money taken in?

(790)

Q. That is it, yes. A. I can't answer that question, sir.

Q. Well, you kept—when you kept records, you kept correct records, didn't you. A. Well, any money that I got, sir, I would put down, but it may have been possible, sir, that some other time maybe I wasn't in the office and somebody else kept some records, and so on, but there was a book, sir, with a lot of pages and this is only——

Q. This isn't from a book, or is it? Is it a book? A. Yes, sir, it's from a book.

Q. Is it? A. Yes, sir.

Q. From a book? A. You know what I mean, sir, with three holes in it.

Q. All right. I think you are right.

Now, my question was, is this a complete record, in so far as you kept it, of the money taken in in the corn box during the period when you kept this record; that is, November 30 down to January 1? A. Sir, I can't answer that question, because there may have been other pages, other pages had money on, maybe another entry would require a longer explanation or something, and it wasn't just written on that one line. Maybe we had to tell a story about the

(791)

money or something, four or five lines, and——

Q. Mr. Lubben, I am not asking about what could have happened or might have happened or what you think might have happened. I am asking you whether this paper, H for identification, is a record of the moneys taken in in the corn box during the time that you, personally, kept that record: that is all I am asking. A. Well, you changed your question now from what you asked me before.

Q. Regardless of what I asked before I am asking that question now. A. You say is this a record——

Mr. Stryker: Repeat the question.

The Witness: Do you mind repeating the question?

Mr. Stryker: Not at all.

(Question read.)

A. It is a record, yes, sir.

Mr. Stryker: Will you read the question again. I don't think it is an answer to it. Read it again, Mr. Recorder.

(Question reread.)

A. And I answered, sir, it is a record.

(792)

The Court: Is it the complete record?

The Witness: No, sir, it is not a complete record.

The Court: You mean there is another record?

By Mr. Stryker:

Q. You mean to say there is another record that contradicts this somewhere? A. No. You say, is this a record, and I say, yes, it is a record, but it is not the complete record.

The Court: All right, Mr. Stryker, I am not going to spend more time on this now.

Mr. Stryker: Very well.

Your Honor will grant me a respectful exception?

The Court: I certainly will.

Mr. Stryker: Your Honor, I guess I will have to bother you again.

The Court: All right.

(Discussion at bench.)

(793)

Mr. Stryker: Your Honor, this I regard as a vital paper in the case affecting many issues. I know of no contradictory record to this. If there is one I should like to see it. I should like to see it now.

The Court: He doesn't say there is a contradictory record, as I recall his testimony. He just

doesn't recall whether this is complete or not. He says it is part of a book, it is three pages taken out of a book, and unless he can see the whole book he is not going to say it is complete.

Mr. Stryker: I am asking him about his handwriting running in date sequence.

The Court: I think the witness, being asked about transactions ten years ago, can say, "I want to see the book that my records were kept in." Go ahead.

Mr. Stryker: Now let me point the significance of this out. I am going to, subject to your permission, direct him two or three questions, to this document, and I don't want to do it if I am running afoul of any order you have made. I want to ask him—do you have those there?

Mr. Wolfram: Yes.

The Court: I want to ask him these questions.

(793-1)

Mr. Wolfram: May I state them?

The Court: Surely, yes.

Mr. Wolfram: In November, 1945, did you take over the corn box from Frankie; in November 1945 did you take over the corn box records from Frankie? That is two separate things, corn box and the records.

How much was in the corn box at that time? Did you write as your first entry in the records you began to keep, "Taken over from Frankie, $193.25?"

Mr. Wessel: I have no objection to those questions.

Mr. Stryker: All right.

Mr. Wessel: None whatsoever.

The Court: All right. I just don't like to put in a fragment when he says there is more.

Mr. Stryker: I am telling you if there is any paper that Mr. Wessel has or knows about——

The Court: I don't think he has them.

Mr. Stryker: I know of none.

The Court: These are partnership records and they didn't subpoena them.

Mr. Stryker: I know. If there is anything there I don't know of it.

Mr. Wessel: Let me just say this to protect the

(793-2)

record, Mr. Stryker: I would have no objection to those question. The only reason I didn't want this document in is only because those questions would not be asked about it. It would stand as if those were the facts.

Mr. Stryker: I am going to ask those questions and I am going to ask about the balance of the handwriting, that is all.

The Court: All right.

(793-3)

Q. Mr. Lubben, will you examine this document and tell me in whose handwriting the entries are after the entry "January 1"? Will you look at it and tell me if you can indentify the handwriting? A. Sir, it appears to be the handwriting of Roy Hankermeyer.

Q. Who is Roy Hankermeyer? A. Roy Hankermeyer was employed by Eatsum Food Products. He is an uncle of mine.

Q. He is named in the partnership articles as one of the special partners? A. But he wasn't any partner.

Q. I understand that: He is named there. I understand you said that. A. Yes, sir.

Q. Let me have it again, if you will. "Frankie" is Frank Loperfido, isn't it? A. Yes, sir.

Q. Now in November 1945 did you take over the corn box from Frankie? A. No, sir; I didn't take the box over. I believe that there was some dissension between Frank Loperfido and with Mr. Giglio, and he left the partnership sometime, sir—I can't say whether it was in the latter part of October or November—but he left some time anyway, and then, sir, I would take care of some of the records, I mean, when the records—anybody came in to pay us, sir, I mean the cash, I took care of them sometimes.

(794)

Q. That answers my question, thank you. In other words—— A. But——

Q. Pardon me. I didn't mean to interrupt you. A. I withdraw my "But," sir.

Q. All right. In other words, the fact is that at least in November 1945 you did take over the records, the keeping of the records of the corn box from Frankie; that's right, isn't it? I think you have just said that. If not, correct me, of course. A. Yes, sir; I kept some records, sir, yes, sir.

Q. You kept the records of the corn box, did you not? A. Yes, sir. As I say, I kept some records. Whether I kept all the records at a particular time, or somebody else took care of it when I wasn't there, all of the books—all of those pages would tell that, sir. But I took some cash in, sir. I don't deny that.

Q. Well, my question was—and it may have been a bit confusing to you—we have it definitely certain then that in November 1945 you did take over the corn box records from Frankie; that's right, isn't it? A. We have it definite?

Q. What? A. I said I don't recall whether it was in October or November. I mean I don't——

(795)

Q. Well, would this document refresh your recollection on that, the date? A. On the date that I took it over?

Q. Yes, in your handwriting, if you looked at it, would refresh your recollection as to the date? A. It may and it may not, sir.

Q. I will ask you if you will be kind enough to do that: I am asking about the first date (handing). A. Well, sir——

Q. Do you have my question in mind, Mr. Lubben, or not? A. It doesn't refresh my memory, sir. You asked me before when I took over the corn box; right, sir?

Q. I ask you now when you took over the keeping of the records of the corn box, and I asked you if this paper would refresh your recollection as to that date, and I am now asking, having handed it to you, whether it does or not? A. No, it does not, sir.

Q. We have that clear. A paper in your handwriting, with a date on it, doesn't refresh your recollection as to the date; is that correct?

Mr. Wessel: I object to the form of the question.

The Court: Sustained.

(796)

Q. How much money was in the corn box when you took over the keeping of the records of the corn box? A. Sir, if I had all the records I could tell, but, sir, as I said before, the last I know about it—and, sir, there was $140,000 or $144,000 that was in the cash box. Now that is the last I know of it, sir.

Q. I don't blame you for missing my question. I have asked you so many. A. I didn't mean to miss your question, sir.

Q. I didn't say you did. A. I am trying very hard to give you an answer.

Q. I said I don't blame you if you didn't get it.

Mr. Stryker: I am going to ask the reporter if you will be good enough to read it again.

(Question read.)

A. Well, sir, I saw some records.

Q. Mr. Lubben,— A. No, no.

Q. My question is, how much money was in it? That is a simple question. Would you be kind enough to give me an answer? A. Are you going to answer it in your words, or are you going to let me answer it, what I know?

Q. I want you to answer my question. A. I am, sir. I am trying to answer your question.

(797)

Q. Please do it. A. Sir, last I know, there was $140,000 to $144,000 in the corn box.

Q. My question was, Mr. Lubben, how much money was in the corn box when you took over the record of the corn box? A. Well, I didn't take over the corn box. I took over the records.

Q. I didn't say that in my queston either. I asked you when you took over the record of the corn box—— A. How much was in the corn box.

Q. That is right. A. Sir, if you give me all the records, the records would tell me. However, sir, I have testified some place that there was $140,000 or $144,000 in the corn box.

Q. That's right. A. And I was told that by Frankie Loperfido.

Q. Well, you have testified about 140 or 144. I remember that. A. Yes, sir.

Q. Now my question was, Mr. Lubben, examining that document marked for identification, not in evidence yet, if you can tell this jury how much money was in the corn box at the time you took over the keeping of the records of the corn box? That is my question. A. Well, sir, from this record, can you tell me how much was in it?

(798)

Q. Do you want me to answer that according to your record? I don't think you do. I don't think the Judge will let me do it, either.

The Court: Let's not get into any three-cornered argument.

Mr. Stryker: I quite agree with the Court.

Q. Now my question—I am sorry to be so tiring about it—is, can you or can you not tell this jury how much money was in the corn box when you started keeping the records of the corn box?

Mr. Wessel: I object. I think the witness has answered it several times.

Mr. Stryker: I don't think he has, your Honor, ever, to go back.

The Court: Well, as I understand it, Mr. Stryker, he said if he could have the records he can tell you, and if he can't have the records, he cannot. That is about when it comes down to. His recollection is between 140 or——

The Witness: Yes, sir, and that is what I answered right here, sir, and I also stated, sir, that when Frank Loperfido left, he told me there was 140 or $144,000 in the cash box, and I testified some place on that.

Mr. Stryker: Then I don't want to pursue anything after your Honor thinks I shouldn't.

(799)

The Court: I don't want you to pursue anything there is no point in pursuing.

Mr. Stryker: Then I will not pursue the question I asked.

The Court: Haven't we gone over all the questions in that vein?

Mr. Stryker: No, sir; there is another question.

By Mr. Stryker:

Q. Did you write as your first entry in the records——

The Court: Without reading, just call his attention to it.

Q. Did you write as your first entry in the records——

Mr. Stryker: Withdraw the question. I withdraw it and rephrase it.

Q. Did you write as your first entry in the records you began to keep: quote——

The Court: No, no.

Mr. Stryker: This is what you allowed, your Honor. This is the question you allowed.

The Court: Did you write as the first entry in the record you began to keep, the entry that I will point out to you?

The Witness: I know what we were talking

(800)

about.

The Court: (Continuing) This entry dated November 30th?

The Witness: How do I know that is the first entry, sir?

Mr. Stryker: All right.

The Court: Let's not have asides to the Court.

Mr. Stryker: Judge, I am sorry. I tried to listen to three or four people at once and I missed you.

The Court: He made an aside to me.

The Witness: I didn't mean anything wrong, sir.

The Court: That is all right.

Mr. Stryker: I didn't hear it. Maybe we better strike it out and save a discussion.

The Court: It may save some time, but I will tell you what it was.

(Discussion at bench, off the record.)

Q. Now, Mr. Lubben, after the dissolution of the partnership—the formal dissolution, I think, was in June 1946—you paid Mr. Giglio—correct me if I have the figures wrong, $75,000 on account of the inventory; is that correct? A. You say after the formal dissolution in June I paid Mr. Giglio $75,000 on account?

(801)

Q. Well, I will take it either way, either after the informal dissolution in March or the actual written dissolution—I will change my question in that way—did you pay Mr. Giglio $75,000 on account of the inventory? A. Sir, to the best of my recollection, I paid him—I believe one amount was $100,000, and another amount $75,000. Then the balance was in notes.

Q. All right, I don't much care. A. (Continuing) And there is records around here.

Q. I don't much care about the exact amount. Was it $100,000 or $175,000? A. I belive there was two, sir, one a hundred and one seventy-five.

Q. All right. And as you have just said, the balance was in notes; is that right? A. Yes, sir; for the inventory.

Q. And what where they? A. They were monthly notes.

Q. And was it $1250 or $2500? I forget. A. Sir, they were weekly notes.

Q. In what figure? A. In $2500 a month, and the last one, sir was $743 or something like that.

Q. You paid all of those notes down to the last one, is that not your testimony? A. No, I said I believe, sir. I

stopped on the last three or four notes, sir, and I didn't pay them.

(802)

Q. About when did you stop? A. Whenever the notes were due, or something, I believe we put a stop payment on it.

Q. Give me your recollection of—I am so tired of the details—if you can help me—about when was it? Give me your best recollection when you paid the last notes? A. Well, the other day didn't you say there was forty notes?

Q. I don't know if I said it. You know better. I think you are right, but I am not sure. A. I paid $2500 a week and we paid—it went to the bank and the bank would pay out the money, and it went down automatically. They would take it out of the bank account.

Q. All right. A. Some were down, some were from the time I bought it, until the last four, three or four notes, or five notes, whatever was due, I stopped payment on them, and the exact dates, sir, I wouldn't know.

Mr. Stryker: Have you got the notes, Mr. Wessel? I think they have been offered in evidence here by the Government.

The Witness: The notes that were offered in evidence, sir, were the ones, I believe, that were paid.

Mr. Stryker: Those are the ones I want. Would

(803)

you be kind enough to let me have those?

Mr. Wessel: I believe the clerk has the exhibit.

Q. I show you Government's Exhibit 28-1 to 28-33—I am not going to take time to count them—I think there were 31 notes, but subject to correction—at all events, the first one I see here is June 3rd——

Mr. Stryker: Strike that.

Q. Well, whatever it is, are those the notes we have just been talking about? A. Well, we talked a lot about the notes.

Q. Leave out—— A. What do you want specifically to know about it?

Q. Are those the notes that you paid? A. Now, sir——

Q. I think you identified them as such in your direct. If I am wrong, why take your time and tell me. A. Yes, sir; these notes were paid. However, sir, I don't say that this is all the notes that were paid.

Q. I didn't ask you that. A. I didn't know whether you did.

Q. You paid those notes, in all events, in evidence, didn't you? A. Yes, sir, but there was one, I know, seven (804)

hundred some odd dollars, I paid, and I don't see it in here, sir.

Q. I don't, either, but this is the Government's exhibit. A. These notes were paid anyway, sir.

Q. And each note is for $2500, or am I wrong? I think it is. That's right, isn't it? A. I believe it is, sir. I didn't look at each note. But I only recall one note, sir, the last note, was an odd amount, because that was the balance.

Q. The last one I have here, the Government's exhibit, was, the pay date—you correct me if I am wrong—March 14, 1947, wasn't it? Is that right? That is the date you promised to pay the note? A. Yes, sir; that is what it says.

Q. All right. Now, without bothering—— A. I don't know if that is the last one, sir. I don't know whether it is.

Q. I don't, either. I am not asking you. A. You said, "Is this the last note?"

Q. The last note in the Government's exhibit, the last one I hold in my hands. A. The last one stapled in that file, sir.

Q. All right. A. All right.

Q. About what—I don't want to stop with arithmetic (805) —as I see it and handled them, I would take it there were 31 notes, each one for $2500. Now would you tell me what that amounts to in money, altogether? A. You will have to give me a piece of paper and a pencil, sir.

Q. All right, I will do that. A. I don't know whether there is 31. You are only guessing. So why don't we just——

Q. I may be wrong. You count them. A. If we are going to add up something, better be exact.

Q. All right, do that, by all means. A. There is 33, sir.

Q. Thirty-three? A. Yes, sir.

Q. All right, 33. I said 31. Apparently I am mistaken. Now we have it at 33. Each of the notes is for $2500. A. Yes, sir.

Q. What do you make that altogether? I will take your figure. A. You can figure better than me, sir. I am not much on figures.

Q. You are not? A. No, sir.

Q. Well, let's see. Ten would be $25,000 and 30 would be $75,000, and three times 25 is $750, I take it. A. $7500. (806)

Q. What do you get as the total figure? A. I don't get any total, sir.

Q. You don't? A. No.

Q. But it was well over $75,000, wasn't it? A. I wouldn't answer the question, sir. If you just figure the 33 times 2500, that will be the answer.

Q. That's right. Well, that certainly was well over $75,000, wasn't it? As a matter of fact it would be about $82,500, wouldn't it? A. If that is the figure, sir, that is what the amount was.

Q. During all the times between the payment of the first note here in the Government's exhibit which was August 2, 1946, you say that Mr. Giglio owed you $70,000, is that right? A. Sir, Mr. Giglio owed me what?

Q. $70,000, your half of the corn box, $140,000? A. Well, sir, truthfully——

Q. Isn't that the fact, Mr. Lubben? I don't think it is complicated. Isn't that what you said here, that you, as half partner, were entitled to half of the money remaining in the corn box, which was $140,000? A. Well, sir, I was——

Q. And that you were entitled to your half, and that you didn't get it? Isn't that a fair statement of what you

(807)

said? A. In reality, sir, I was entitled to a lot more than I got, even on the dissolution agreement.

Q. We are talking about one thing. A. I wanted to cut the thing down the middle.

Q. I am talking now, at the moment I am talking about —I can't talk about everything at once—if it isn't a fact that you said as a half partner you were entitled to half of the $140,000 in the corn box, which even I can see was $70,000, that you were entitled to it, that you asked for it on the dissolution and that you didn't get it. Have you not so testified here this morning? A. I testified here, sir, that I went in and asked him for half the money that was in the corn box, and I testified, sir, that Mr. Giglio said, "What money?" and so forth.

Q. Yes. A. (Continuing) And I didn't get the money.

Q. That is it. A. That's right.

Q. You asked for the money and you didn't get it. A. That is right.

Q. That was a—— A. By the same token, I didn't get half of the whole business, either.

Q. Well, we will see about that.

(808)

The Court: Mr. Stryker, would this be a good time to take a recess, or do you want to finish up one or two questions?

Mr. Stryker: I think if you give me two or three questions, I can finish this item.

Q. Have we clear and definite then that during all the time that these notes, which my figuring is $82,500, were coming due, that you kept on paying and did pay those notes down to at least the last one the Government has offered, in spite of the fact that you say Mr. Giglio owed you $70,000 from the corn deal?

Mr. Wessel: I object to the form of the question.

Mr. Stryker: What is that, sir?

The Court: Read back the question.

Mr. Wessel: I object to the form of the question.

Mr. Stryker: What is the matter with it?

Mr. Wessel: It assumes facts not in evidence. I will be glad to state the facts if counsel wishes me to.

Mr. Stryker: Let's have an adjournment.

The Court: All right, we will take a recess. The jury can go ahead. Don't discuss the case.

(Jury excused.)

(809)

(The following took place in the absence of the jury during the recess:)

The Court: The witness, in that aside I referred to, said in substance that if Mr. Stryker thought that the amount on that November 30th entry was the amount that was in the corn box, he was wrong. But that was stricken.

Mr. Wessel: I didn't hear that, if your Honor please. I want the record to reveal that I have not heard it.

The Court: All right, we will recess this case for ten minutes.

(Short recess.)

(810)

By Mr. Stryker:

Q. Mr. Lubben, is it a fact that you paid the notes, the Government's exhibit in evidence, $82,500, to Mr. Giglio, at a time when you were claiming that he owed you $70,000? A. Sir, I wasn't claiming it at this particular time. When I dissolved the partnership I went and asked him for half the corn box, and I didn't get it, and I told you the reason, sir.

Q. You were claiming it from that time right on, you never gave up that claim, did you? A. Did I ever give up the claim?

Q. Yes. A. I didn't ask him any more.

Q. I say, but you never gave up the claim, or said to him, "Now, I haven't any claim," or anything like that, did you? A. Did I ever say I didn't have any claim?

Q. Yes. I mean, you never abandoned the claim, irrespective of whether you asked about it or not; that's right, isn't it? A. No, no, wait. Don't say—let me answer the question, sir.

Q. Well, isn't that right; that is my question. A. No, sir.

(811)

Q. It is not right. A. I—sir, I said this: that when I dissolved the partnership I went into Mr. Giglio's office and I asked, "What about the money in the corn box; how about my half of the money?" and Mr. Giglio says, "What money?"

Q. Yes, you have told us that. A. I said, "The 140,000 that was in the corn box," and he said, "We have had OPA trouble," and some other words and so forth, and he said, "You are lucky to get out with what we are letting you have," and this and that. And I looked around the office——

Mr. Stryker: This is no response to my question at all, your Honor.

A. And, sir——

Mr. Stryker: Wait a minute. It hasn't anything to do with my question, and I don't see how I can cross examine this man, if I can't get answers to plain questions, and he is allowed to make a speech, I really don't.

The Court: Really, I think that when you—I mean these characterizations of a plain question and speech doesn't help us. He was asked whether he has abandoned the claim. As I understand his testimony now, he is reciting the facts to you and you can draw your own conclusion as to whether he aban-

(812)

doned the claim or not.

In other words, he is refusing to characterize his conduct as an abandonment, and I am not going to compel him to do so.

Mr. Stryker: I will withdraw the question at the moment. All right.

By Mr. Stryker:

Q. Now, did you ever sue Mr. Giglio for the $70,000 that was a half of what you said was the $140,000 you saw in the box? A. No, sir, I did not.

Q. Never sued him at all? A. I didn't say that, sir.

Q. Well, as a matter of fact, you did sue him in 1947, didn't you? A. I don't think 1947 is the correct date, sir.

Q. What do you think is the correct date? A. There must be legal papers around here, sir. You are not interested in my guessing.

Mr. Stryker: I move to strike out that insulting answer which has no relation to my question.

The Court: I don't think there is any intent to—I mean——

Mr. Stryker: What's that, sir?

(813)

The Court: I decline to strike it out on the ground that it is insulting. There is an emphasis on precision, which I recognize here, which I don't think is insulting to anybody, and so I am not going to act on such a characterization.

Mr. Stryker: I respectfully except.

The Court: I think I can't say anything more on the subject without overstepping.

Mr. Stryker: All right.

By Mr. Stryker:

Q. If 1947 isn't the right date, was it 1949 that you sued Mr. Giglio? A. Maybe, 1949 or 1950, sir.

Q. I show you——

Mr. Stryker: I will ask to have this group of papers marked for identification.

(Marked Defendants' Exhibit JJ for identification.)

Q. I show you JJ for identification; ask you if you identify this as a photostat of your complaint in the action against Mr. Giglio? A. Sir, I don't see any dates on it.

Q. Well, on the cover I think you will see a date. At least, I did somewhere. Maybe I can help you. There, (814) look at the back of this particular paper I am showing you, the third paper in the group, and I ask you if it doesn't contain a file date; if that doesn't refresh your recollection? A. Yes, sir, it says "Filed March 22, 1949."

Q. All right. No, I think I still have a question pending that wasn't answered.

Do you identify, then, those papers as photostats of your complaint and the papers in that action you brought against Mr. Giglio in 1949? A. Yes, sir.

Q. Reading your complaint, I will ask you if it refreshes your recollection as to the amount for which you sued Mr. Giglio there in that action in 1949? A. About $23,000, sir. I testified to that before.

Q. Well, that sum by mathematics did not contain a claim for $70,000, did it? A. No, any more than it would have a claim for my full 50 per cent of the partnership.

Q. You did not—you asked, as I read it—correct me if I am wrong—for $25,000. Isn't that the demand that you made?

Mr. Wessel: I object to the form of the ques- (815) tion. The witness never stated he sued for the $70,000. He stated he did not sue for the $70,000.

Mr. Stryker: All right.

By Mr. Stryker:

Q. Then we have it plain and definite, and I can perhaps leave that, that in 1949, when you brought a lawsuit against Mr. Giglio, you asserted no claim for $70,000, your half of the corn box; that is right, isn't it, Mr. Lubben? A. I asserted no claim for the $70,000——

Q. That—— A. Just a minute, sir.

Q. Won't you just answer my question. I am talking about one suit at the moment.

Mr. Wessel: Counsel wants a yes or no answer and I submit it is not capable of being answered that way, and I will state——

The Court: I am not going to compel a yes or no answer.

A. Sir, I asserted no claim for the $70,000. By the same token, sir, I did not assert any claim, sir, for the full 50 per cent of the separation, sir.

All I wanted was the money that was due for tax, that I had from the best of my recollection filed with my tax report.

(816)

I did not know whether it was true or not, but based on that I owed Uncle Sam so much money, and that was all I was looking for.

Q. Mr. Lubben, I am not at the moment directing my questions to the truth or not of what you said in the complaint.

I just want to have it clear and definite that in 1949, when you sued him, you did not ask for judgment for your half of the corn box which I think we have—it was all exhausted—you claim was $70,000; is that so?

Mr. Wessel: Object to the form of the question.

The Court: I will sustain the objection on the ground it has already been answered.

Mr. Stryker: All right, I think it has, too.

By Mr. Stryker:

Q. Now, you knew that Mr. Giglio filed a petition in bankruptcy in 1951, did you not? A. Yes, sir, I got a notice that he had filed one, yes, sir.

Q. And you filed a claim against Mr. Giglio in that bankruptcy proceeding, did you not? A. I don't know (817)
whether we did or not, sir. I asked my lawyer to go and examine him and he says, "You haven't got any money," and he didn't go.

Q. I am asking you now if you will tell me, please, yes—well, if you will tell me whether or not you filed a claim against Mr. Giglio in his bankruptcy proceeding? A. Well, sir, I wouldn't know what the lawyer did. I know we had a judgment for $23,000, or whatever it happened to be; I know that.

Q. I am asking you, Mr. Lubben—if you can't tell me why I will pass to something else—whether you filed a claim in Mr. Giglio's bankruptcy, and whether in that claim you asserted a claim for this $70,000? A. Well, sir, I don't know whether we did or whether we didn't, but whatever the lawyer would think was proper, that is what he did. I can't say if he did or he didn't.

Q. Well, in that lawsuit against Mr. Giglio in 1949 for $25,000—— A. I didn't say $25,000. You heard me say about twenty-three, sir.

Q. I showed you the papers. I thought you told me what the—there is the complaint; I ask you to read the (818)
amount that you sued for. I thought we had that settled. A. You said, sir—it says here——

Q. Regardless of what I said, will you tell me what—refreshing your recollection from your own complaint, what amount you sued for? A. Well, it says here, sir, "Thereupon there became due to the Government of the United States"——

Q. I am not asking that, I am talking about the prayer for relief, where you tell the Court the damages or the amount that you are suing for. A. Where is there any

prayer in here, sir? Q. The last two lines, "Plaintiff asks"— A. Well, it didn't pray, sir. But up here, sir, it says "17"—

Q. Leave out—I don't care about that.

Isn't it a fact that the amount that you asked for, for your judgment, was $25,000? A. Yes, sir. But up here the figures don't figure 25,000.

Q. I don't care. Isn't that what you said at the time at the very end of the complaint: that is what you were asking the Court to award you? A. I didn't ask it, sir. The lawyer put it down here.

Q. He filed the complaint in your behalf, didn't he?

(819)

A. Yes, sir, he was working for me.

Mr. Stryker: Pardon me, your Honor.

The Court: All right.

By Mr. Stryker:

Q. You filed a tax return for the year 1946, did you not, both in the federal and state government? A. Yes, sir, to the best of my—yes, sir, we did.

Q. Did you in either of those returns state that Mr. Giglio owed you $70,000——

Mr. Wessel: I object to the form of the question.

Q. —as the profits of the corn deal?

Mr. Wessel: I object to the form of the question.

A. Sir, if I was going to ask——

The Court: Wait a minute now.

Mr. Wessel: This and a lot of other questions assume facts not in evidence. I object on that ground.

Mr. Stryker: I assume nothing. I asked if he said that, that is all.

Mr. Wessel: When the question says, "Did you say that," the next part of the question appears to

(820)

be a fact in evidence, which is not so.

Mr. Stryker: I don't claim it is a fact in evidence. I am asking if he said that in this particular paper.

The Court: All right.

Mr. Stryker: That is all.

The Court: You can answer.

Mr. Stryker: Go ahead, Mr. Lubben.

A. Well, did I say what, now, sir?

The Court: Read the question.

By Mr. Stryker:

Q. Did you say in your 1940 tax return that Mr. Lubben owed you $70,000 on this corn deal? A. You mean Mr. Giglio. I am Lubben.

Q. I mean Mr. Giglio, that's right, sorry. A. No, sir, I didn't say that.

Q. All right. Now, did you have the responsibility for the operation of the corn deal? A. Did I have the responsibility——

Q. That is it. A. ——for the operation of the corn deal?

Q. That's right. A. I would appreciate, sir, if you would define what you mean by "responsibility".

(821)

Q. Were you in charge of it? A. Was I in charge of it?

Q. That's right. A. Well, sir, I was a partner in the business. I mean I, naturally, had something to do with it.

Q. Well, you were in charge of that particular aspect of the business, weren't you? A. The corn division?

Q. Yes. A. No, I—I can't say that I was any more in charge of it than Mr. Giglio was in charge of it.

Q. In the Shotwell case, page 1229, were you asked this question:

> "Q. "And you did say that you had the responsibility for the operation of the business? A. I never denied it here."

Was that question asked and did you give that answer? A. Well, sir, there might be some more questions above that and something below.

Q. There are hundreds of pages, hundreds of pages. I am asking you if you were asked that question and you gave that answer? A. Sir, I would like to know what it says above it. I mean, you pick out—you admit there is hundreds of pages and you pick out one question and you

(822)

say, "Did you say it?"

Q. I will talk to you about it a little more. A. Let's read a little in front of it.

Q. I am asking you now if that question was asked you and you didn't give that answer? A. If that is what the book says, sir, I did, but I want to know why did I say that, what was the whole story.

Q. I didn't ask you that.

Now, you were asked about the College Town Candy case in the Shotwell case, weren't you? A. I don't know, sir. You have the book, sir.

Q. Well, I read you from a question on page 1282:

> "You testified in the Southern District of New York in the case of College Town Candy versus Betancourt, didn't you?"

Wasn't that question asked you? A. What question?

Q. What I just read. A. You didn't read any question. You said you testified, and everything else. I fail to see where you put a question in there, sir.

Q. All right, in the question, the first part, I can read it (823)

if you want me to, it hasn't any bearing:

"You testified" —this is a question, followed by a question mark: "You testified in the Southern District of New York in the case of College Town, Cand. versus Betancourt?"

Then colloquy:

"A. Yes, sir, I did."

So you were asked about that College Town testimony in the Shotwell case, weren't you? A. If that was the question, and I said, "Yes, sir," that was my answer.

Q. All right. It's about half a page further on that occurs the question that I asked you, that I think you said that if it was in the books, you gave such an answer. A. I didn't say "think", sir. I am not thinking here, sir. I am trying to refresh my recollection.

Q. Well, in all events, I asked you, and you did say that you had the responsibility for the operation of the business:

"A. I have never denied it here."

A. Sir, I—

Q. Did you give that answer, Mr. Lubben? A. I am not going to answer the question until I see all those, the (824)

couple of pages. You are just making a couple of pinpoints.

Q. All right, you go ahead and look at it. A. Yes, sir.

Q. Take your time. I will give you the record on appeal. There is where it starts. A. I don't know anything about any record on appeal. I want to see the——

Q. I will give you the book I am reading from. Mr. Wessel knows what it is, and the College Town is mentioned on page 1228. A. Well, would the record——

Q. You said you couldn't answer my question without looking at the book. Now look at it all you want. A. Sir, would the record on appeal be the same as a record stated in the court?

Q. Yes, sir, it would, just that. A. You are sure?

Q. I am sure. A. All right.

Q. Look at it all you want, and then answer my question. A. I have read the book, sir.

Q. Now will you answer my question? A. What was the question, sir.

The Court: Read the question back.

(825)

A. Just a minute, sir, you said I could read anywhere I want.

Q. You can. Go ahead. I did say that, and I invite you to go ahead.

The Court: Go ahead, read the question.

(Question read.)

Mr. Stryker: Now, at this point I should like an answer to that question, the witness having been shown the record, whether that question was asked and whether he gave that answer.

A. Yes, sir, I did, but there is some other questions in front of it, sir, that I gave another answer more clarified.

(826)

Q. You mean another question in front of it that changed that answer? If they do, look at it and tell me what they are. A. Well, it says over here, sir,——

Q. Suppose without reading all that, just tell me if there are other questions that change the answer that you gave? If so, point them out to me and I am perfectly willing that they should be read.

The Court: My recollection is that he said there are other questions and answers that clarify it. That wouldn't be changing it.

Mr. Wessel: It couldn't be changed because it came before.

Mr. Stryker: All right.

Q. I ask you to take the record, look at any part that you want and give me a plain answer to whether or not the question I read you was asked you, or whether the answer that I read that you gave was given by you? A. Yes, sir. The question—a man quoted from a book and "Did you say it? And if it says"—I can't see all this. You have got a lot of red lines underneath it, sir.

Q. I am not asking you about my red lines. A. But over on the preceding page, sir, there is a clarification of what goes on over here.

(827)

Q. All right, let me see what you are pointing to. If it is, I want it in. Show me, please. Put your finger on it. A. Well, sir, it says——

Q. Before you read it, show it to me. A. Well, you read——

Q. I didn't read this part, but if it has any clarification, I want it. A. Read this here, sir.

Q. All right. A. On page 1227——

Q. Is this what you want read, right here, beginning, "I meant to ask you a question"? Is that what you mean? Is that what you are pointing to? A. I am pointing to this part on the page here. Read this part.

Q. Do you want me to start? A. I don't care what you do. You are running the case, sir.

Q. I am not so sure about that. Well, all right, I will read the part that is indicated:

"Q. And you started General Confections, Inc.? A. Yes, sir.

"Q. You have no partners in that? A. No, sir.

"Q. I meant to ask you a question that I forgot. While you were in that partnership with Giglio and others, who ran the office of the partnership? Who carried on the business, you or Giglio? A. Well, sir,

(828)

I looked after the candy business, and I would say I ran the affairs, but anything that had to be cleared with Mr. Giglio, I mean, anything that was major or that we wanted to do something, I would check with Mr. Giglio or Mr. Roth, and Mr. Roth would be in my office very often, sir. But if it was something that required something I thought important, I would go talk to Mr. Giglio about it."

Is that what you want me to read? A. And the next one says, "Well, you had full responsibility for the conduct of the business, didn't you, in the partnership?" This is—I am under cross-examination here.

Q. Yes. A. I said, "Well, within a limit that the partnership imposed."

Q. Now you have read what you want. A. Not what I wanted, sir. I am only answering the questions.

Q. Well, now, the questions that I read you first followed the question about whether you testified in the College Town case, and I now would like to ask you if in the College Town case you testified as follows——

Mr. Stryker: I have got a pencil note here, Mr. Wessel, on mine. I don't know that it is right or

(829)

not. You can follow it. It is Lubben's direct, page 68.

Q. "Q. You were a general partner at Eatsum Products Company. Who was the other general partner? A. William Giglio.

"Q. You were both general partners? A. Yes, sir.

"Q. And the other partners were limited partners? A. That is correct.

"Q. Did you handle any particular line of business and Giglio the other, or were you in charge or was Giglio in charge? A. No. I would say I was in charge of Eatsum Food Products and Mr. Giglio did not have too much to do with it."

Where those questions asked of you in the College Town case and did you give those answers? A. Yes, sir; but there was a little more clarification to it, sir.

Q. Well, did you give those answers? A. I gave those answers.

Q. Were they true? A. I would say that I was—I have never denied it, I mean, that I was.

Q. You would say—pardon me. Go ahead. A. I would say, sir, that I was in charge of the candy business,

(830)

and I had certain limitations as a partner, but I would say that I spent more time in the candy business than Mr. Giglio. He had a number of other interests than Eatsum Food Products. Now if I said Eatsum Food Products at the time, sir, maybe I didn't follow through completely on the answer. That is why I want to make sure that the answers I answer correctly with you, sir.

Q. My only question——. A. Just a minute, sir. Just half a second. And, sir, as I say, this one here, I had charge of Eatsum Food Products, and words to that effect, I say, with other limitations that a partner had. But that had nothing to do with the jelly business. Now, the jelly business was part of the Eatsum Food Products business. I mean, we bought the sugar at Tavern Fruit, and all I did was—Eatsum billed, but I can't say jelly was mine. Now, the corn syrup business, sir, I don't know what you would call the corn syrup business.

Mr. Stryker: Is your Honor aware of the fact that I asked the witness whether certain questions were asked and whether he gave those answers?

The Court: I think you asked him what it was he did, and he is trying to tell you what his responsi-

(831)

bilities were, he said, on candy.

Q. All right, go ahead. A. On corn syrups, sir, you know and I know and we have heard it, it was sort of a—it was just a black market business from start to finish. There was nothing legitimate about it.

Q. And you ran it, didn't you, when you were there in Eatsum? A. I testified here, sir, that when the proposition was brought to me, how we could acquire corn and get some corn syrup, that I went in and consulted with Mr. Giglio, and Mr. Giglio said he would check up with Mr. Howard Lawn to see what the legal—check it with him. I testified to that, sir.

Q. That is right. A. Then—so then after Mr. Giglio told me that we could have it, that it was all right, that he thought it was a good idea, then Howard Lawn came to me and he was going to buy the corn, sir. I mean, who can you say ran it?

Q. Did you in the College Town case——

Mr. Stryker: Strike that.

Q. In that particular answer that you gave in College Town, would you say that was true or not true, after your explanation? A. Well, sir, I answered a question and I gave an answer at the time, sir, we didn't go into all the details, and if I had been asked more questions I probably

(832)

could have gone into it deeper, and so on. But I didn't. I wasn't asked any more and I didn't go in any more details, sir, and here it is different.

Q. Were you asked this question—these questions—and did you give these answers, at page 148:

> "Q. How about Eatsum Food Products Co. Did you know what your partners did in that particular business? A. To help you along a little, if there was anything wrong with Eatsum, I did it."

The word "period" is written in the answer.

> "I offered to tell you yesterday how I ran Eatsum Food Products. Mr. Giglio did dig his nose into too much. I was the guy running it, sir, distinctly."

Were you asked those questions and did you give those answers? A. Yes, sir; I was asked those questions and I gave those answers, but there was more to it, sir, than I testified at that time.

Q. There is probably a hundred pages. I am asking you if that statement that you made and that I read to you, was the fa '? A. Yes, sir; but I am talking about the candy end of the business, sir.

Q. I am talking about the questions that I have asked. A. Well, sir, I gave you the answer and I know what I was (833)

thinking when I answered it.

Q. Well, you have testified here some days ago that you testified falsely in many particulars in the College Town case. I am asking you if this answer you gave was in the category of truth or falsity? A. Well, sir, I don't think you can find any place where I testified that I testified many times falsely. I said I lied.

Mr. Wessel: I think, your Honor, before the witness answers that question, he should be shown the next four or five questions.

Q. Was this one of the lies?

The Court: I didn't hear you.

Mr. Wessel: I don't think that question could be answered unless the witness is shown the next four or five questions.

Mr. Stryker: Am I not allowed to have an answer to that?

Mr. Wessel: Well, it calls for a conclusion. "Is this a lie?" depends on the frame of reference of the question.

Mr. Stryker: Some things he said were true in the College Town case and some were false; I am asking which category did this fall into.

(834)

Mr. Wessel: I ask the Court to read the next four or five questions and answers which follow, and I hand the Court Defendants' Exhibit E for identification.

The Court: In other words, you want the entire page?

Mr. Stryker: If your Honor will recall, I offered this whole testimony in evidence.

Mr. Wessel: The question is whether or not this particular question and answer constitutes a lie.

I don't think the question can be answered in vacuo. It must be taken in conjunction with the other questions and answers.

The Court: Read the question.

(Question and answer read.)

The Court: In other words, Mr. Stryker wants to know at this point, was this a deliberate lie here or not?

The Witness: No, sir; you can't call that a lie, sir.

Q. All right. A. Now wait just a minute, sir. There was more to it than the question, and I didn't go into any further details in it. Maybe the lawyer was interrupting there, too. I don't know, sir.

Q. Mr. Lubben, for your benefit, I offered this whole (835)
testimony in evidence, and I would be glad to have it all in.

Mr. Wessel: I don't think the statement is made for Mr. Lubben's benefit. I move that it be stricken from the record.

Mr. Stryker: I think it is quite proper. He is asking why I don't read this and why I don't read that. I have offered the whole thing. He is criticizing me.

The Witness: Your honor, I am——

The Court: I don't think it is any serious criticism, Mr. Stryker. Mr. Wessel can supplement it, if necessary. I don't think there is any sense in taking in that entire record into the record in this case.

By Mr. Stryker:

Q. Did you give these answers in response to these questions:

"Q. You know all about this corn syrup transaction? A. If you ask me, I will tell you.

"Q. All right. I will ask you what price did you get for the corn syrup you sold Mike Cohen? A. Ceiling prices.

"Q. What was that? A. Our particular ceiling was 6½ cents a pound.

(836)

"Q. How did you get that? By cash or check? A. Either way Mr. Cohen wishes to pay me.

"Q. Did you get anything over and above 6 cents for the corn syrup? A. I did not."

Were you asked that question? A. Yes, sir.

Q. And did you give that answer? A. Yes, sir; and that was a lie when I answered that, yes, sir.

Q. All right. You have testified here that when you came up from Puerto Rico for this trial, your conscience troubled you and you went to Mr. Wessel and told him that you had lied in the College Town case, didn't you? A. Sir?

Q. Didn't you say that in substance? Don't let me get the exact words. A. No, no, I can't answer anything in substance to you, sir. I only——

Q. Isn't that what you said here before this jury? A. Let me tell you what I said. I said this:——

Q. Well, won't you tell me whether you said in substance what I have just asked you? A. I told Mr. Wessel that I lied in that case here? I didn't say in the case. I said a number of answers there, and I pointed out to Mr. Wessel and I told him what I had lied about.

Q. All right. Now let's see. That was in—— A. But (837)
my conscience had been troubling me long before that, sir.

Q. Had your conscience been troubling you when you went out to Chicago to testify against the Shotwells in 1953?

Mr. Wessel: I think this is almost a duplicate of questions asked several days ago.

Mr. Stryker: It is not, your Honor. The point I am coming to is——

Q. Did your conscience trouble you then as well as it troubled you when you came on and talked with Mr. Wessel?

The Court: I do recall that, Mr. Stryker, and it seems that this is the third time at least that we have comes back to this case.

Mr. Stryker: My memory is not as good as your Honor's. That was my recollection. I bow to your Honor's better memory.

Q. Did you, when you went out to the Shotwell case, tell the United States Attorney out there that you had lied in the Shotwell case—in the College Town case? Did you tell him that?

The Court: That, too, I think we covered here.

Mr. Wessel: I have the page reference here. (838)

Mr. Stryker: I don't think so, your Honor.

The Court: Either on the 17th or 18th, Mr. Stryker.

Mr. Stryker: What is that, sir?

The Court: You either covered that a week ago today or——

Mr. Stryker: What he told the lawyer out there?

The Court: Or the day before that.

Mr. Stryker: I would have to see that, because I don't remember it that way, sir.

The Court: You have the minutes there. You have them all typed up.

Mr. Stryker: Well, unless you can find that I did, may I not have an answer even if I asked it before?

The Court: No. I am not going to open that whole phase again, Mr. Stryker.

Mr. Stryker: Well, can I have a yes or no answer?

The Court: No. I will sustain objection to the question.

Mr. Stryker: May I ask this question and get your Honor's ruling on it?

The Court: Yes.

Q. I am asking you whether when you went out to testify in the Shotwell case you made a revelation to the (839)
United States Attorney of your false answers in College Town, just as you did to Mr. Wessel in this case?

Mr. Stryker: Now that, I don't think, has been answered.

Mr. Wessel: Objection, if your Honor please.

The Court: I sustain the objection.

Mr. Wessel: Thank you.

The Court: I think we have been all over it, the conversations with the United States Attorney in the Shotwell testimony.

Mr. Stryker: In Chicago?

The Court: Yes.

Mr. Stryker: My memory is refreshed, your Honor, but I believe I am right. But I stand cor-

rected, of course. The way the matter came up, as you said, many days ago in this trial, was that I asked him questions similar to that, and his answers were that he could not recall whether the College Town case was mentioned in the Shotwell case, and there the matter was left.

The Court: That is where we will leave it here. We have been over that and I am not going to open up that case again.

Mr. Stryker: All right. Let me ask this question, then:

(840)

Q. When you went out to testify against Weleck in New Jersey, did you tell the prosecutor before you testified that you had lied in the College Town case? A. Well, sir, why would I tell the prosecutor anything? College Town Candy Company had nothing to do with the case, absolutely nothing.

Q. Didn't you want him to know that you had lied in a case so that he would be forewarned in case you were asked about it on cross-examination? A. Sir, if you are talking to somebody, sir, that has nothing to do with anything, you don't start telling him all your past history, what you did. There was nothing about the College Town Candy case that the man, the prosecutor in New Jersey, had to know. He didn't ask it. It never even came up. That was not the question at the subject then.

Q. At all events, have we it this way, whether you thought it was material or not, you didn't tell the prosecutor what you tell us you told Mr. Wessel before this trial; is that the fact? A. I didn't tell the prosecutor where, sir?

Q. In New Jersey?

Mr. Wessel: Bottom of page 304 is the reference to which your Honor referred a moment ago.

(841)

Mr. Stryker: 304? Can I have an answer while I am looking that up?

A. I didn't tell the prosecutor in New Jersey before I told Mr. Wessel? I just got through answering it, sir. I don't know whether I did or I didn't. But I don't think I did, and I don't know, sir, because there was nothing about the College Town Candy in that case.

Mr. Stryker: All right.

Mr. Wessel: It runs over to page 306.

Mr. Stryker: What is that, Mr. Wessel? I didn't hear you back here.

Mr. Wessel: I said the reference to his conscience and questioning in Chicago with regard to the College Town case was referred to at pages 304 to at least 307 of the transcript on January 17, 1955.

Mr. Stryker: Since Mr. Wessel refers to it, I take the liberty, with your Honor's permission, merely on the question of whether this was asked or not, to read one or two questions that I asked.

The Court: No, Mr. Stryker.

Mr. Wessel: I object.

Mr. Stryker: Well, your Honor has expressed your recollection. I don't care how I do it. If I give it to your Honor will you look at those pages,

(842)

to satisfy yourself that my memory is not incorrect?

The Court: Surely.

(After examining) Mr. Stryker, without getting into any discussion of your memory, I think mine is correct. Now we will let it stand on that.

Mr. Stryker: It is really a collateral point. I just wanted to show you what I thought was correct.

The Court: We won't go back to that.

By Mr. Stryker:

Q. You testified a few moments ago—it seems like moments, maybe hours ago, this morning—to the effect that you had not said that you had lied on several occasions in College Town—that may or may not be a correct paraphrase—and asked me to show you the books or words to that effect. Do you remember? I am identifying the incident rather than the exact quotation of what occurred. Do you remember that this morning? A. Yes, sir, but I think your question was, "When you were up here," you said, "is it not a fact that you lied many, many times, or many times," and I said I think "several times," and that is what you said this morning, sir. I mean, I am not trying to make a play of words. I lied, I told you several times.

(843)

Q. All right, several times. A. You said "many times."

Mr. Stryker: If your Honor please, you can imagine the extent of papers I have to read. I think if we adjourn now, which is the usual hour, maybe I can foreshorten the rest of it, which I certainly would like to do, and I know you would.

The Court: All right, we will recess now for lunch and return at two o'clock, and don't discuss the case.

(Recess until 2:00 p.m.)

(844)

AFTERNOON SESSION

DAVID GEORGE LUBBEN, resumed.

Cross Examination Continued by Mr. Stryker:

Q. Did you withhold the payment of the last notes aggregating $12,000, notes to Mr. Giglio, because of Mr. Giglio's refusal to pay your taxes? A. I don't know the amounts, sir, that were withheld. I have not my books and records, but it may have been four or five notes, I don't know, that were——.

Q. Well, I am not—I don't much care about that. I want to know if the reason you didn't pay them was because of Mr. Giglio's refusal to pay your taxes? A. Well, sir, there was a definite contract that the taxes were to be paid as shown by the record of the books, that is, showing the amount of my drawings as set forth on the records of the Eatsum Food partnership books, and I never saw it.

Q. I am still asking you, did you hold out those last—payment of those last notes, whatever the amount was, because of his refusal to pay your taxes? A. Probably so, sir.

Q. What? A. Probably so, sir.

Q. Did you have a conversation with Mr. Giglio in

(845)

Mr. ——

Mr. Stryker: Strike it.

Q. Did you have a conversation with Mr. Giglio after you instituted the lawsuit, your lawsuit against him in 1949? A. Yes, sir, in my lawyer's office.

Q. Was that in Mr. Carlson's office? A. Yes, sir.

Q. And did Mr. Giglio say to you, "Why don't you sue me for a hundred thousand dollars," and did you reply, "You don't owe me a hundred thousand dollars"? Did that happen? A. Mr. Giglio——

Q. No, did that happen? A. Well, I am trying to answer it, sir. Mr. Giglio——

Q. Can't you just tell me whether that happened or not, Mr. Lubben? A. Sir, I am trying to answer the question.

Q. The answer would be either he did or he didn't, I should think.

The Court: I am not going to make him answer yes or no.

Go ahead.

A. When we had a discussion, sir, about the payment, I

(846)

think, sir, that it was prior to the time—or I don't know why you have a meeting in an office, the lawyer's office—whether a judgment had been entered, or was about to be entered I don't know, but it was sometime, and Mr. Giglio said to me, "Go ahead and make it for $100,000," and I said "Why a hundred thousand dollars? You don't owe me any hundred thousand dollars."

Q. All right. A. Wait a minute, sir.

And so I said—and Mr. Giglio said—I said, "The only thing I am looking here for is set, to the best of my recollection, on any income tax." It was $25,000 or $22,000 or something; I didn't have the books and records—and he said he didn't have the books and records, and he says, "Go ahead and make it a hundred thousand dollars. I am now in the drug business. I am going to make a lot of money, and you can have some".

I said, "I don't want any of that."

Q. And you replied to that that he didn't owe you a hundred thousand dollars? A. Sir, I was just looking for the——

Q. Didn't you reply to him "You don't owe me a hundred thousand dollars"? A. Sir, he didn't.

(847)

Q. Did you not reply to him, say to him, "You don't owe me a hundred thousand dollars"? A. I said, sir, "All

I am looking for is the tax, and the tax says that you owe me about twenty-some-odd thousand dollars."

I knew that that tax return was only taken from whatever records were available for us to take it from, but he said he had——

Q. Did you—— A. Just a minute, sir. He said he had no other records, so he says, "Make it for a hundred thousand dollars," and I said, "I don't want any hundred thousand dollars."

Q. Did you not say to him, "You don't owe me a hundred thousand"? A. I may have and I may not, sir. I don't know.

(848)

Q. Did you not testify before the Kefauver Committee——

Mr. Stryker: Page 1131, Mr. Wessel.

"Q. There is one other thing about this, sir. I filed my return. I realize it, and I am working on it to pay it off. I wasn't going to do anything about Mr. Giglio, but I happened to get a lawyer who had a little guts. I told him the story, and he said, 'Well, let's sue Mr. Giglio.' So we did. This was maybe a little over a year ago."

Your testimony was in August 1950. I interpolate that. I am going on with your answer.

"We had Mr. Giglio come down to this lawyer's office after he got a summons. We told him, as far as I am concerned, I am looking for $17,000 plus fees, whatever the tax penalties are going to be. It would be around $25,000. In the presence of my attorney Mr. Giglio said, 'Why don't you make it $100,000?"

And you said, "You don't owe me a hundred thousand dollars."

Did you so swear? A. Yes, sir; and I said here I don't remember whether I did or whether I didn't. So I don't deny it, or I don't say I did or didn't, if I said that.

(849)

Q. If you testified as I read before the Kefauver Committee—— A. That was it.

Mr. Stryker: I would like to have a paper marked for identification.

(Marked Defendants' Exhibit KK for identification.)

Q. When you left the partnership you immediately organized the General Confections, did you not? A. I think so, that I had to make the applications prior to leaving the partnership.

Q. When you left the partnership you went right up to your old factory in the Bronx, that you had had during the proprietorship; that is correct, isn't it? A. Yes, the factory I had when it was a proprietorship; that's right, sir.

Q. And about that time you organized the Reserve Trading Company also? A. Yes, sir.

Q. And you organized a good many other corporations. A. I don't recall, sir.

Q. Don't you know whether you had any others besides those? A. I can't think of any, sir.

Q. What? A. I can't think of any. I have organized corporations since then and maybe some before, I don't know.

(850)

Q. All right. Did you do a gross business in the two companies, the Reserve Trading and the General Confections, in the year 1946, of upwards of five million dollars?

Mr. Wessel: I object to this question and this line of examination as repetitious.

The Court: I think it is. Didn't we go over this about Wednesday?

Mr. Stryker: I don't think so. But it is getting to be now such a record, and I may have touched on it, but I haven't asked the question I have in mind.

The Court: It seems to me we did more than touch on it.

Mr. Wessel: We had the franchise tax return here and went over it in great detail.

The Court: It was somebody's working paper. It wasn't a return. There were erasures on it. Go ahead.

Mr. Stryker: The only information I have had thus far. Well, does your Honor disallow the question?

The Court: Well, we are not going back into it, Mr. Stryker.

Mr. Stryker: Then I understand you rule that I may not ask him.

(851)

The Court: I sustain the objection.

Mr. Stryker: I respectfully except.

Q. I show you this paper, Defendants' Exhibit KK for identification, and ask you if you can identify it? A. No, sir; I cannot.

Q. Can you identify the signature of the maker of the paper? A. Yes, sir; it is my signature.

Q. Can you identify the endorser on the back? A. Yes, sir; it is my endorsement.

Q. And can you identify the date of it? A. Yes, sir. I mean, I can't identify it, but I can read it. Is that what you mean?

Q. That is what I mean, yes. Was that check issued during the partnership? A. I wouldn't know, sir.

Q. Look at the date and tell me from that if you can't tell us that? A. No, sir, it doesn't refresh my memory.

Q. Was that check issued in the ordinary course of business? A. I would assume it was, sir.

Mr. Stryker: I offer it in evidence.

Mr. Wessel: If your Honor pleases, I have an objection to this check and to a number of other checks, all of which were marked in evidence before, on the grounds that they are all included in the general ledger, which summarizes all these checks. They

(852)

are all entered there and they are merely superfluous. They add nothing to the record and for that reason I object.

Mr. Stryker: Well, even if Mr. Wessel was correct about it, the evidence would still be relevant material.

Mr. Wessel: But not material.

Mr. Stryker: And I think necessary.

Mr. Wessel: But not material.

Mr. Stryker: And material.

Mr. Wessel: If I may explain, if your Honor please: as I understand it, all checks that were drawn were in the regular course of business entered on the books of the company, and when entered on the books of the company they were charged to various accounts. Now, the summary, or the conclusion or the books which charge all those various things to various places are in evidence, or at least the pages that are relevant to this witness's testimony, and I don't see any purpose served at all in putting the underlying voucher into evidence.

Mr. Stryker: It is a new objection to me that a document that is referred to in some book, the document itself is not admissible. I don't believe your Honor will rule that way.

(853)

The Court: No, I am going to sustain the objection, because, Mr. Stryker, we have here a whole series of checks which are drawn on the company account to Mr. Lubben. They mean nothing in themselves, as I see it, but the ledger, which is now in evidence, shows how they were treated on the books. Now if there is anything you wish to impeach on it, that would be something different. But I don't gather that is your purpose.

Mr. Stryker: Well, has your Honor this in mind, that the witness, if I understood him correctly, has sought to convey that he was not properly dealt with on the dissolution of the partnership, and all those checks that we put in evidence bear on that, and so does this?

The Court: I don't think so, sir.

Mr. Stryker: Well, sir, you are the Judge.

The Court: All right. Well, I mean, there is a link which we don't have, except in so far as the ledger might furnish it.

Mr. Wessel: The general ledger specifically has that item charged to that witness.

Mr. Stryker: I don't care whether it does or not. Your Honor has ruled, and I bow with great respect to this and every ruling your Honor makes.

(854)

Mr. Wessel: I think, if I may, this is probably an appropriate time, if your Honor pleases, to renew my objection——

The Court: Let Mr. Stryker proceed.

Mr. Stryker: And I add a very respectful exception to your Honor's ruling.

The Court: Very good.

By Mr. Stryker:

Q. Did you ever amend your 1946 tax return, your personal return? A. What do you mean by "amend", sir?

Q. Well, file a new return in place of the one that you filed before. I don't know that I am giving you the accountant's definition of the amended tax return, but I am giving you what I understand by the amended return; did you ever do that? A. No, sir, I don't recall ever making any different return.

Q. And after you talked with Mr. Twohig and the other accountants, you made no amended return; is that right? A. No, sir; I didn't make any amended return.

Q. Now I just want the fact. I am not asking for the contents. You did file a return for the year 1946, a personal return, did you not? A. Wasn't that the one, sir, where I had the copy of the dissolution agreement and everything pinned to it?

(855)

Q. I think so. Well, you filed that, didn't you? A. Yes, sir, I am quite sure I filed it.

Q. All right. Did you also file a return, a corporate return, for General Confections, a consolidated return for General Confections? A. Are you finished, sir?

Q. Yes. A. When?

Q. For the year 1946. A. You mean a return to show the Reserve Trading Company was the wholly-owned subsidiary of General Confections, and all on one return?

Q. All right, take my question that way. Did you do it? A. Well, whatever the accountants did, sir, I think we did.

sir. I can't specifically say it, but the accountants brought me the income tax returns and it was their job, so I am sure I filed it. I signed it.

Q. Did you ever amend that return? A. I can't remember ever amending any returns.

Q. All right. Did you also file what in your State law is called a franchise return, that is, showing your personal income and also a corporate return for the income of General Confections and Reserve Trading? A. For the same year '46?

Q. For the year '46? A. Well, sir, the accountants made up the papers, they made up the income tax returns, and I suppose they made it up for that, too. But to specifically

(856)

state here now that I put my name on some New York tax, I don't know whether I did or not, but I am sure I did. But I mean I feel it was in the course of good accounting practice, I did it.

Q. You were told by them it is good accounting practice that you may file a return if the accountant on whom you relied prepares it for you? A. What do you hire a certified public accountant for?

Q. Well, your question is rhetorical, but I think you and I ought to agree on that.

Mr. Wessel: There seems to be no pending question.

A. You just got through saying we agree.

The Court: Go on to the next question.

(857)

Q. You mean we agree that when a taxpayer hires an accountant on whom he relies, it is good accounting practice to file the return that he prepares; is that what you mean?

Mr. Wessel: I object to the question as improper summation.

The Court: I will sustain it.

By Mr. Stryker:

Q. Well now, you have said somewhere in this trial that you filed honest returns and that you did not seek to deprive the Government of any income, have you not? A. I don't remember saying that, sir.

Q. Well, in substance, isn't that what you have told us? A. Sir——

Q. If I am wrong I will be glad to be corrected. I think that is what you said. A. I don't recall saying it, sir, but I say this——

Q. You say it now, don't you? A. No, no, I say this, that the accountants prepared the returns, they checked all the books and records, and everything else about the business, and they prepared the returns, and they knew the money that went in and the money that went out and they say, "This is how much you owe the Government," and

(858)

the returns they paid.

Q. And you relied on the accountants? A. Well, sir, I mean, I am sure there was nothing wrong with the returns.

Q. Well, I mean you relied on the returns they prepared for you? A. Well, by the same token, I rely on the financial statements they give me. That was their business. They went to school for that. That is what they are supposed to know.

Mr. Stryker: All right. Now, at this point I again ask the production of Mr. Lubben's personal income tax returns, state and federal, for the year

1946, and the returns of his corporations, General Confections and Reserve Trading, for the same period, and I ask that they be produced in order to enable me to pursue this cross examination.

Mr. Wessel: Well, I object to the request, if I must, your Honor.

I should say, of course, we are not custodians of the state tax returns.

Mr. Stryker: But I am sure Mr. Wessel will not say that he hasn't them.

Mr. Wessel: I am quite sure that I will, Mr. (859)

Stryker, as a matter of fact, but I would have to check to be positive. I am positive I don't have the originals, and I doubt if I have photostats, but I could check.

Mr. Stryker: They were under subpoena, your Honor remembers.

The Court: I remember. No, I don't think I will direct him to do so.

Mr. Stryker: All right.

By Mr. Stryker:

Q. Now, Mr. Lubben, let me see if I have got this straight: You testified before the grand jury that found this indictment that we are trying here; is that not so? A. Well, sir, I wouldn't know what the grand jury found, but I testified before it.

Q. I didn't ask you that. I asked you if you testified. A. No, you asked me, you said, "You testified before a grand jury that found this indictment here."

Q. I see what you mean. Well, did you testify before the grand jury in this building, in July, August or Septem-

ber of the year 1953? A. I can't recall the date, sir, but I testified before a grand jury.

(860)

Q. In that summer? A. It might have been in '53, yes, sir.

Q. Of course, it might have been anything. Can't you tell me whether it was not sometime in the months of July, August or September of the year 1953?

Mr. Wessel: I object to the question as irrelevant.

The Court: I will sustain it.

Mr. Stryker: At the moment I can't ask all my whole points in one question.

The Court: All right, I will overrule the objection.

Go ahead.

By Mr. Stryker:

Q. Did you testify? A. I testified before a grand jury in the building, the exact date I don't know, sir.

Q. Well, was it in the year 1953? Can't we have that? A. Well, this is—last year was 1954——

Q. That is about a year and a half ago. A. No, I think, sir, it was in—I think it was in 1952.

(861)

Q. Well, you are talking about the grand jury that returned the indictments that were dismissed, the six indictments, aren't you? A. I don't know that anything was dismissed, sir.

Q. You don't? A. I am living in Puerto Rico, sir. I don't know what's dismissed or not dismissed.

Q. Did you testify both in the year 1952, before the grand jury, and in the year 1953, and let me go on to some other point; tell me yes or no, if you will? A. Did I testify

two years, is that what you mean, two different times before two different grand juries?

Q. That's right, that is correct. A. No, sir, only before one.

Q. Only one. Did you make a written statement to any of the agents in this case, including Mr. Twohig, and by the words "written statement," I want to include a statement that you wrote in your handwriting, a statement that was taken down by a stenographer and that you saw or signed, or questions and answers that you gave to the agents?

Now, by "statement," I mean all those. I am asking you (862)

if you did or did not. A. You mean, sir, of the issues at hand in this case?

Q. Yes, I do. A. I don't recall ever signing anything, sir.

Q. That doesn't quite—that answers part of my question, but not all. Did you make a statement to them, whether you signed it or not? A. Well, I answered questions, if that is a statement. I mean, certainly I was asked a lot of questions.

Q. And was some of it either taken down in longhand or by a stenographer? A. I don't ever recall any stenographer, sir. I know that Mr. Twohig made notes, but what he made notes of I wouldn't know.

Q. All right, I see.

Did you ever testify or make a statement before an Assistant United States Attorney Mitchell back in the year 1948? A. Did I ever make a statement before him?

Q. That is right. A. No, the only time I ever met that man, Mr. Mitchell, was when Mr. Ronayne went in there that time about some points on sugar with me. (863)

Q. Well, did you make any statement then, I just want to know; I don't know? A. I answered some questions, but I didn't sign anything.

Mr. Stryker: All right. I now call upon the Government to produce for your Honor's inspection, in order that you may determine whether you will furnish them for my inspection, all of the testimony that this witness gave before the grand jury that found this indictment or found any other indictments against these defendants, for all written statements or stenographic statements or handwritten statements, or any kind of statements that he made to any of the agents, and for the statement, whatever its form was, before Assistant United States Attorney Mitchell, in the year 1948.

I call upon the Government to produce such documents for your Honor's inspection, in order to enable you to determine whether you, in turn, will submit them to my inspection.

Mr. Wessel: May I state, if your Honor please, in the first place——

Mr. Stryker: I think I should add, these I believe are all covered in our subpoena.

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Mr. Wessel: There is no question about that.

May I state, if your Honor please, in the first place there is, so far as I know, absolutely no foundation in this record that in any of these statements ——and they are extremely voluminous—there is any inconsistent statements, taken inconsistent with the witness' present testimony.

As I understand the rulings, both of the Supreme Court of the United States and of this circuit court, there must be such a foundation laid before such

documents are subject to production inasmuch as they are confidential records of grand jury proceedings and of investigations by criminal law enforcement officers.

May I state finally, and this is a matter which has been given a great deal of consideration by the courts of appeal, that these records are extremely voluminous. It would take your Honor I think at least a day and possibly a good deal longer to read them, and unless some foundation is laid for this kind of a request it would disrupt the trial and delay both the jury, the Court and counsel and the witness.

Mr. Stryker: If your Honor please, may I make this observation in regard to Mr. Wessel's statement——

(865)

The Court: Mr. Stryker, I don't think we need labor the point any more. I am pretty familiar with the basis for such applications. We have been over this at some length.

Mr. Stryker: There is some basis you haven't heard.

The Court: Oh, you have a new basis? All right, go ahead.

Mr. Stryker: And it is implicit in Mr. Wessel's own statement. He had made a statement here that there is nothing inconsistent in these papers.

I dare say that he makes that statement—I am sure he does—in all good faith; but whether or not he is correct is a question concerning which I should not be bound by the mere statement of the prosecutor, but that I should be enabled to determine whether or not in any of these statements this witness has

said anything that is inconsistent with his testimony here.

Now, you have my point and your Honor will rule.

The Court: I will give you my ruling. I have listened to this witness testify since January 17th,

(866)

at or about this time, and I have heard him cross examined with respect to his testimony in the Shotwell trial, the Kefauver hearings, I think some New Jersey proceeding, and so forth, and I see no basis for producing any further documents on the basis of what I have heard here, and Mr. Wessel's statement simply supports my conclusion that I would otherwise have come to.

Mr. Stryker: With complete respect, will your Honor note my exception.

Will your Honor have the papers to which I have referred sealed as a part of the record of this proceeding?

The Court: To the extent that that can be done without disrupting the further progress of this trial or the administration of justice in some fashion which I can't anticipate, I will be glad to do that.

Mr. Wessel: I think that can be done, if your Honor please. It may take me a while to get these things together.

Mr. Stryker: I am not going to obstruct or delay. If it can be done, that is all I ask for here. Without stopping to enumerate them, that would include the papers that I have mentioned here before, that I have just mentioned.

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The Court: I think Mr. Wessel can tell what that is from the record.

Mr. Stryker: All right, your witness.

Mr. Wessel: I have no questions of Mr. Lubben. Thank you.

The Court: All right, step down, Mr. Lubben.

The Clerk: You may step down.

The Witness: You mean I can go?

The Court: I think so.

Next witness.

(Witness excused.)

Mr. Wessel: May I at this time, if your Honor please—this being, I think, an appropriate occasion—move to strike from the record certain checks which were introduced, and which I am sure are summarized in the general ledgers, if I may mention that.

The Court: I would like to reserve decision on that and we will talk about it outside the presence of the jury. No sense holding them up while we discuss that. Then I can make my ruling in the presence of the jury after I have heard both sides.

Mr. Wessel: The next witness is Frank Loper-

(868)

fido.

FRANK LOPERFIDO, called as a witness by the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Wessel:

Q. Mr. Loperfido, what is your relationship to Mr. Giglio? A. First cousin.

Q. Is that a blood relationship? A. Yes.

Q. Now, were you a limited partner in the Eatsum Food Products Co.? A. Yes.

Q. During what period, sir? A. It was from I think it was, sometime in June, May or June of 1945, to the end of November of the same year.

Q. 1945 that is? A. That's right.

Q. What was the amount of your investment? A. The amount was, I think, $3,350, if I remember correctly.

Q. What was the percentage of your interest? A. Five per cent.

Q. Did you have a salary in the Eatsum Food Products Co.? A. Yes, sir.

Q. What was that salary? A. Well, it was a salary against the percentage that I was to receive at the end of

(869)

the period. We were drawing $250 a week.

Q. What were your duties? A. My duties were to assist Mr. Lubben in running the candy end of the business.

Q. Specifically what did you do? A. Whatever Mr. Lubben asked me to do. I don't know any——

Q. What was that? A. Well, such as, we'd be in there; he wouldn't be there, if he was going to buy sugar, he'd say to me, "Somebody is coming up; he is going to bring sugar, and you pay him," and I did so, or vice versa, if somebody were to come in to pay a bill I would accept the money.

Q. I ask you, sir, if you were not a glorified clerk? A. Well, you may call that so, I mean, I wouldn't know.

Q. You wouldn't know? A. Well, I say, you asked me a clerk—I mean, a clerk takes in a lot of territory, sir. If you ask me if I was going to be a clerk, I could say yes, and it could be yes or no.

Q. Do you recall having given a statement to the Treasury Department on January 16, 1950? A. I have been in

there several times. I don't remember now what you are talking about, but, I mean, it is possible.

(870)

Q. I ask you if you recall having given the following question and answer to the Treasury Department on January 16, 1950:

"What were your actual duties in this particular partnership? A. I will say a glorified clerk."

Mr. Stryker: Your Honor, am I interrupting?

The Court: No.

Mr. Stryker: It would appear to me that Mr. Wessel is endeavoring to impeach his own witness.

The Court: Well, without characterizing that, I will let the question stand. I overrule the objection.

Mr. Stryker: Exception.

By Mr. Wessel:

Q. Do you recall that question and that answer, Mr. Loperfido? A. Not offhand, but I may have said that.

Q. You also use another name, sir? A. What's that?

Q. You also use another name besides Loperfido? A. No.

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Q. Have you ever been known as Frank Lopez? A. No.

Q. Do you know the amount of money which you drew out of Eatsum partnership during the period you were a limited partner? A. Yes, I think it runs—about 26,000-and-some dollars is what I actually drew from the partnership while I was there.

Q. Did you receive any moneys from Eatsum partnership during the year 1945 other than $26,000? A. No.

Q. Was part of that $26,000——

Mr. Stryker: Pardon me, Mr. Wessel, won't you ask him to answer you out loud and not shake his head. He sometimes does that.

By Mr. Wessel:

Q. Did you hear the comment, Mr. Loperfido? A. No, I didn't sir.

Q. Will you please try to speak up and answer the question verbally and not by a gesture. A. I will try, all right.

Q. Did you receive any money from Eatsum partnership during 1945 other than the $26,000 you just referred to? A. No, sir.

Q. Did a part of that $26,000 represent a return of your

investment of $3,350? A. I think it did.

Q. Do you recall what your net earnings from Eatsum partnership were during 1945? A. Well, now, I am not sure whether it was—the net earnings was $26,000 or whether the three thousand-and-some-odd dollars that was due me on the resale was in that or not. I mean, I am not sure of it.

Q. Mr. Loperfido, I show you Government's Exhibit 6 in evidence, which is the Eatsum partnership return for the fiscal year ending May 31, 1946, and refer you to Schedule 1 on the back of that exhibit. Do you see that schedule? A. Yes, sir.

Q. I ask you whether you received from Eatsum Food Products Co., Ltd. during the fiscal year ending May 31, 1946, the sum of $45,682.20? A. Well, I didn't receive that money because of the fact that the remainder of the moneys from what I did receive to that was supposed to have been the payment that they were going to make from my taxes.

Q. Did you or did you not receive the sum of $45,000

(873)

odd set forth in that exhibit? A. No, sir.

Mr. Wessel: I ask that this document be marked with the next exhibit number for identification.

(Marked Government's Exhibit 45 for identification.)

By Mr. Wessel:

Q. Mr. Loperfido, I show you Exhibit 45 for identification, and ask you, first, if that is a document or a photostatic copy of a document which you signed? A. Is this the release? Yes, this looks like one. Yes, that is my signature.

Q. Is this a photostatic copy of an agreement between you and Mr. Giglio? A. I think it is a photostatic copy because the original, I think——

Mr. Stryker: I don't hear him, your Honor.

A. I think that is a photostatic copy. I think the original, the agent, Mr. Twohig, had taken and had photostated.

Q. Do you know where the original is? A. Right at the moment I don't, sir.

Q. When did you last see the original? A. Oh, I think right after that, I think Mr. Twohig sent it back to me, but I just don't remember what happened to it.

(874)

Q. When did you last see Mr. Giglio before today? A. I think it was last week, sir.

Q. Did you discuss the original of this document with him? A. No, sir.

Q. Have you discussed it with anyone else? A. No, sir.

Mr. Wessel: I offer it in evidence.

Mr. Stryker: I have no objection.

(Government's Exhibit 45 for identification received in evidence.)

Mr. Wessel: Will you mark these two.

(Marked Government's Exhibits 46 and 47 for identification.)

Mr. Stryker: Mr. Wessel, will you let me have that while you are doing this, Exhibit 45.

Thank you.

Am I holding you up?

Mr. Wessel: I am going to read it to the jury.

Mr. Stryker: Oh, I am very sorry, you had better take it.

Mr. Wessel: Exhibit 45 is an agreement which is signed by Frank Loperfido and William Giglio, and made this 24th day of December, 1945.

(Mr. Wessel reads from Exhibit 45 to jury.)

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(Hands exhibit to jury.)

Q. Mr. Loperfido, I show you Government's Exhibits 46 and 47, and ask you first if you can identify the signatures on those documents? A. I don't follow you, what you want to me to, Mr. Wessel.

Q. On Exhibit 46, can you identify the signature at the bottom of that document? A. No.

Q. You don't know whose signature it is? A. I know, if I read it, I know. If you are asking me——

Mr. Stryker: I am awfully sorry, but back here where I belong I can hear some of those answers.

The Court: Keep your voice up.

The Witness: I will try to.

A. I don't quite understand your question.

Q. I will rephrase it. A. I don't know whether you mean can I read it, or whether I can identify the signature as a signature. This is what I don't follow.

Q. I will rephrase my question, Mr. Loperfido. Is Exhibit 46 a photostatic copy of a piece of paper which you have ever seen before? A. No, sir, I have never seen this before.

Q. That is in reference to Exhibit 46. Now Exhibit 47, have you ever seen that piece of paper before? Have

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you ever seen the paper of which that appears to be a photostatic copy, I should say? A. I don't remember, sir. I don't remember seeing this.

Q. Did you have any discussions with Treasury agents in or about 1950, in connection with your personal tax liability? A. Yes.

Mr. Stryker: One moment. I object to that as immaterial, irrelevant and incompetent.

Mr. Wessel: Seeking to refresh the witness's recollection.

The Court: Objection overruled.

Mr. Stryker: What does your Honor rule?

The Court: I overrule your objection.

Mr. Stryker: Exception.

Q. Do you recall whether or not in discussion with the agents at that time you were asked whether or not you had received the income set forth opposite your name in the Eatsum partnership return? A. Yes, sir.

Q. You were asked that question? A. Yes, sir.

Q. Do you remember telling the agents that you had not received that amount of money? A. That is right.

Q. Do you recall the agents asking you to procure (877) the affidavits to establish that fact?

Mr. Stryker: One moment. It is not relevant or material here——

Mr. Wessel: I am seeking to refresh the witness's recollection, if your Honor please.

Mr. Stryker: I should think it is in the nature of impeachment. It is not relevant to any issue what he did or did not do or say to an agent.

The Court: I will overrule your objection at this time.

Mr. Stryker: Exception.

Q. Do you have my question, Mr. Loperfido? A. I wish you would repeat it again, Mr. Wessel.

Q. Do you remember in connection with your own personal taxes and amount of money you earned from Eatsum, the agents saying to you that if you had not earned the amount of money set forth in the partnership return, you should get affidavits from Mr. Giglio and Mr. Roth to prove that fact? A. I remember something like that but I just don't remember what happened now.

Q. Do you remember whether or not you went to Mr. Giglio and Mr. Roth and obtained affidavits from them in which they said that you were not a partner after December 1945? A. No, I don't remember.

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Q. Have you in the last weeks, Mr. Loperfido, that is, the last four weeks, shall we say, had any discussions with Mr. Giglio in connection with whether or not you furnished copies of his affidavit to the Government? A. Will you repeat that again, Mr. Wessel. I am sorry, but I can't hear you so good because I have a cold. I am not trying to be nasty. I mean I just——

Mr. Wessel: Would you read the question, please.

(Question read.)

A. No, sir.

Q. Did you have any discussions about that subject with anybody else? A. No, sir.

Q. Have you ever been in Mr. Stryker's office? A. Yes, sir.

Q. No, sir? A. Yes, sir.

Q. You mentioned with regard to Exhibit 46 that you could not identify the signature. I ask you with regard to Exhibit 47 whether you can identify that signature, and I am referring to the signature on the lower righthand corner of the document? A. This one here, of Giglio?

Q. The signature which I have indicated in my question, sir, and you have your thumb on it, your right thumb. A. All I am trying to find out, Mr. Wessel, I am not trying to be difficult, I am trying to understand your question cor-

(879)

rectly, so that I can answer you correctly. Do you mean, can I understand the signature or——

Q. Can you identify that as the signature of William Giglio? A. Yes, sir.

Q. You can? A. It looks like others than I have seen.

Q. You have seen his signature before? A. Well, yes, sir.

Mr. Wessel: I offer Exhibit 47 in evidence.

Mr. Stryker: No objection.

(Government's Exhibit 47 for identification received in evidence.)

Mr. Wessel: (To jury) Exhibit 47 is an affidavit sworn to on May 17, 1950, signed by William

Giglio, stating in part;—(reads to jury and hands to jury after reading).

Q. Now, Mr. Loperfido, do you have any recollection of having discussed that affidavit with Mr. Giglio at or about the time he gave it to you? A. I am trying to remember. I remember discussion that we have had, and I think it was with Mr. Twohig, because of the fact that I was under the impression that my taxes would have been paid, and I think something like this come up, but I just can't seem to set it in its right place—let's say it that way. I mean,

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I can't seem to set it in its right place.

Q. During the operation of the Eatsum partnership in which you were a limited partner, did you for a period of time have charge of a cash box? A. Yes, sir.

Q. Did you keep records in connection with that cash box? A. Yes, sir.

Q. During what period of time did you have charge of the box? A. Well, I don't remember the exact day that it started. Now, we are talking—I am trying—let me get this straight, Mr. Wessel. You are talking about what box?

Q. There were two boxes in the partnership; correct? A. That's right.

Q. Will you describe those two boxes, please, just generally? A. They are the average, oh, I don't know, safety box, I guess you call them. They are about this big, metal, I think they were; let's say about this big, about that high. I guess that is about the way they were.

Q. Maybe about a foot and a half to two feet long, or maybe a foot long? A. Well, I can't judge, I can't tell you exactly, because I don't know. But I think it is a standard box that you buy in a stationery store. I mean, I am

(881)

not sure of the exact dimensions of it.

Q. What color were these boxes? A. I think they were a dark gray or black, in a dark tone finish.

Q. Were they kept for different purposes, the two boxes? A. Yes, sir.

Q. Will you describe what the purpose of keeping each box was? A. Well, I would have to go into a discussion on that. Is that what you would like me to do?

Q. Well, I think you could, yes. A. All right. Originally, when I went to work in Eatsum, I was to take over or help Mr. Lubben with certain duties that were required of us, and when I first went in there he had a box, which he claimed was for cash, that was used in order to buy sugar and buy other merchandise which he could not buy in the regular run of business; you had to go outside and pay cash for it. So there was a box, and a book that was kept by all the overage sales, and they were marked, and the cash was supposed to be put in this one box. Now after that——

Q. That would be the candy cash box, is that right? A. That is correct. Now after that the corn deal came up, in which the same thing happened. There was a certain amount of moneys in cash that had to be handled, and they used this box, of which I handled and kept the records of it.

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Q. Can we call that the corn box? A. The corn box.

Q. Did there come a time when you stopped handling that corn box? A. Yes, sir.

Q. When was that, about? A. I think it was the end of November or first week or so in December, sir. I am not sure exactly.

Q. Do you know—excuse me. A. What is that?

Q. I didn't mean to interrupt you. Did you have something else? A. No. I said I think it was the end of November or the first weeks of December.

Q. How much money was in the corn box when you stopped handling it? A. There was—actual moneys in the box?

Q. Well, moneys, IOUs, or any slips of paper at all. A. All right, there was althogether, if I remember correctly, the full amount that was supposed to be accounted for was, I think, around 140, or 141, maybe 142 thousand. I don't remember the exact amount, but it ran into that, around that figure, of which there were some IOUs in there. There were about—I think there were 30 or 40 thousand dollars. I am pretty sure of the IOUs.

Q. Now, was the remaining 100 or 110 thousand dollars

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in cash? A. Yes, sir.

Q. What kind of bills were they? A. They were in large denominations of $100.

Q. Anything over a hundred-dollar bill? A. I don't think so.

Q. No thousand-dollar bills? A. I don't remember precisely, but I don't think there were. There may have been a $500 bill, but that I wouldn't even swear to, because I am not sure of it.

Q. When you left the partnership, did you receive as part of your 5 per cent interest, any part of that cash box? A. No, sir.

Q. Did you ever ask for it? A. Yes, sir.

Q. Whom did you ask? A. I asked both Mr. Lubben and Mr. Giglio.

Q. Now I am asking you with regard to your conversations with Mr. Giglio at this time only: what was the discussion you had with Mr. Giglio? A. Well, they were both present, so I mean, if you want me to——

Q. If they were both present, let me have the full conversation. A. Well, the conversation was that I was under

VOLUME II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1957

No. [redacted] 9

HOWARD LAWN, PETITIONER,

vs.

UNITED STATES OF AMERICA

No. [redacted] 10

WILLIAM GIGLIO AND FRANK LIVORSI,
PETITIONERS,

vs.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

NO. 131 PETITION FOR CERTIORARI FILED JUNE 4, 1956
NO. 133 PETITION FOR CERTIORARI FILED JUNE 6, 1956
CERTIORARI GRANTED OCTOBER 15, 1956

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the impression that my 5 per cent interest in the corn deal, whatever cash came in, that I was supposed to get the 5

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per cent, as well as any of the other business. But was made very clear to me by both of them that I was only entitled to the 5 per cent of the business of Eatsum, and that that was not considered business of Eatsum; it wasn't the book business of Eatsum.

Q. Whose business was it? A. What is that?

Q. Whose business did they say it was? A. They didn't. They just said it was another business that didn't have anything to do with the books or records of Eatsum, so I wasn't entitled to it. It was a cash business that they were running, and I had nothing to do with that, but I was to get 5 per cent of any box moneys that came in on the books.

Q. Did they say whether or not any of the moneys that had been in that cash box had been put in the Eatsum books? A. Did they——

Q. Do you understand my question? A. No, I didn't.

Q. Do you know whether or not any part of the profits in the cash box that you described went through the books of the Eatsum partnership? A. The cash didn't, that I know of, unless it happened after I left.

Q. Did you receive any moneys from Eatsum partnership in 1946? A. Now that question I don't quite understand it. I mean, the total of it is——

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Q. Let me rephrase it. A. The total amount of money that I received ran about 26, $27,000, and we established that by—I think Mr. Twohig and I think one of the auditors from the Government, I mean if I remember correctly. Now, if you ask me the specific dates that I got this, that I received this money, that is something different again. I couldn't answer the question because I don't remember it.

Q. In any event, the total amount of moneys that you received as a partner in Eatsum Food Products Company, at whatever time you received them, is $26,000 or thereabouts? A. That's right.

Q. And part of that was a return of your capital investment of something around $3,000 or $3,300? A. That is something I am not sure of. I am not sure whether that was included in that $26,000 or not. I mean, this is something I am not sure of.

Mr. Wessel: I ask that this document be given the next exhibit number for identification.

The Court: Mr. Wessel, at this point I would like to take our recess, if I am not interrupting something.

Mr. Wessel: No, you are not interrupting.

(Short recess.)

(886)

(Marked Government's Exhibit 48 for identification.)

By Mr. Wessel:

Q. Mr. Loperfido, I show you Government's Exhibit 48 for identification and ask you if the second long paragraph doesn't refresh your recollection as to whether the $3,350 was a part of the $26,000? A. Mr. Wessel, this document, if I remember correctly, was something that we had tried to arrive at, I think, with the—with Mr. Twohig, I think, at that particular time. I don't know whether this definitely establishes the fact that that is what it was.

Q. Is that your signature on the bottom righthand portion of the document? A. Yes, that's right.

Q. Do the initials "F. L." appear next to the first full paragraph? A. Yes.

Q. And is there something struck out next to that "F. L." in the first full paragraph? A. Yes, sir.

Q. Does that indicate a correction you made in the affidavit? A. Yes, sir.

(887)

Q. Now, down at the bottom paragraph, your initials "F. L." appear twice; is that correct? A. That's right.

Q. Were there corrections made in that paragraph by you? A. Yes.

Q. And do those initials which appear there twice indicate that you corrected that paragraph twice? A. Yes.

Q. Now, at the top of the second page, do your initials "F. L." appear there? A. Yes.

Q. Does that indicate a correction you made there? A. Yes.

Q. And somewhat lower down in that same first paragraph did you make another correction? A. Yes.

Q. And do the initials "F. L." appear there? A. Yes.

Q. In the next paragraph, the second paragraph on page 2, do the initials "F. L." appear four times? A. Yes.

Q. And do there appear to be four corrections there? A. Yes.

Q. Now, in the next-to-the-last full paragraph, do your

(888)

initials appear there? A. Yes.

Q. And there are also some words written in? A. Yes.

Q. And are there also some typewritten words struck out? A. Yes.

Q. Would that indicate that you read this thing carefully? A. Yes.

Q. And was it correct when you signed it? A. To the best of my ability at that particular time, yes.

Q. Does that refresh your recollection in any way as to whether the $3,350 was a part of the $26,000? A. The

only reason I say this here right now is because we had figured out, at that particular time, that all we had gotten, I think, was $19,000 plus the $3,350, but since then it seems to have been corrected. I mean this is what I am trying to bring out.

Q. When you say $19,000, I take it you are referring to the last sentence of the first full paragraph? A. That's right.

Q. Is there also a $7,500 referred to in the second full paragraph? A. I will have to read the whole thing, Mr. Wessel——

Q. I think that would be an excellent idea. A. —so

(889)

I can go through it more carefully.

Q. Why don't you go ahead and read it.

Have you finished reading it, Mr. Loperfido? A. Yes.

Q. Does that refresh your recollection as to whether the $3,350 you received was a part of the $26,000 you received? A. Well, according to that, at that particular time, Mr. Wessel, if I read it correctly, understood it correctly, again, I mean, I still say the amount mentioned in there as my, all my share of the moneys I received was only $19,000, but I say that since then it has been established that I received more than that.

Q. How much did you receive? A. Altogether I think it was $26,000. Now, I don't remember whether at that particular time it was with the $3,300 or not.

What I am trying to say is, even without the $3,300, it does not amount to $19,000.

I mean, if you were to deduct $3,300 or $3,350 from $26,000 or $27,000, it still wouldn't be nineteen.

Q. Sir, do you recall receiving a total of $19,000 as your 5 per cent interest in Eatsum up to December, 1945?

(890)

A. Up to 1945.

Q. Up to the end of December, 1945. A. Well, that would be something I couldn't answer you honestly either because I don't remember when I did get the checks. I got them, I think, three or four different times, so I don't remember the exact dates on them.

Q. Do you recall testifying before the Treasury Department on February 14, 1950? A. Yes, I have been there several times. I mean I don't remember the exact dates, but I have been there several times.

Q. I am going to read you the following questions and answers, Mr. Loperfido, and ask you if they refresh your recollection in any way as to the amount of money you received from Eatsum and whether this $3,350 was a part of the total $26,000 you received:

> "When did you receive the $3,350 and from whom? A. I received on March 27, 1946, a check for $5,000 and on April 22, 1946, I received a check of $10,000. The $3,350 was included in the payment of that $15,000, and these payments were made to me by Eatsum Food Products Company."
>
> (891)

Does that refresh your recollection in any way as to whether the $3,350 was a part of the $26,000? A. Yes. Well, I don't know whether it was part of the 26,000 on the whole. I know it was a part of the amount of moneys that we recorded there, because of the fact I think that we verified those particular checks.

Q. When you say "we," didn't you testify before the Treasury Department? A. Yes, but I say with Mr. Twohig, and I think at the time there was the auditing, an auditing agent there. I think that is how we arrived at that particular figure.

Q. You have some recollection that Mr. Twohig was present at this time? A. When we were discussing this? I think so.

Q. What I just read to you, Mr. Loperfido. A. I am talking about the statement that you gave me to read, which included $19,000, in the figures. I think at that particular time we had gotten those figures from one of the agents who was from the auditing department. I think that is the way it was.

Q. Now, you heard the questions and answers I just read to you; is that correct, from a statement you gave the

(892)

Treasury Department? A. Yes.

Q. Do you recall whether or not Mr. Twohig was present at that time?. A. I think Mr. Twohig was present all the time when I was down there, I think. I am pretty sure. I won't swear to it, but I am sure he was.

Mr. Wessel: I ask that this document be marked for identification.

(Government's Exhibit 49 marked for identification.)

By Mr. Wessel:

Q. Mr. Loperfido, I show you Government's Exhibit 49 for identification and ask you if that doesn't refresh your recollection that in the statement I just read to you before the Treasury Department, neither Mr. Twohig nor Mr. Mahon nor any other Treasury agent you see here in court was present?

Do you have to read that whole document to answer my question, Mr. Loperfido? A. What's that.

Q. Can you answer my question without reading the whole document? A. I couldn't answer it honestly, because I honestly don't remember.

I thought when you were asking me before about the
(893)
$19,000 and you asked me about Mr. Twohig, I thought at that particular time Mr. Twohig was there, and this is not the time I went down to see Mr. Twohig.

Q. Now that you have refreshed your memory that Mr. Twohig wasn't there at the time that the statement I just showed you was given, does that refresh your recollection in any way as to whether this $3,350 was part of the $26,000? A. No, because at that particular time it never dawned on us at the particular time that it was going to be $26,000.

Q. Do you recall being examined by the Treasury Department on January 16, 1950, another occasion, when Mr. Twohig was not present? A. I was examined a number of times, Mr. Wessel. I honestly wouldn't remember the dates.

Q. I ask you whether you recall having given the following answer to the following question:

"Do you recall any of the names of that particular partnership? A. I don't remember"?

Do you recall that question and that answer?

Mr. Stryker: One moment. I can't see that, your Honor. That is an effort to impeach the wit-
(894)
ness he has called. I think it is improper, incompetent, irrelevant and immaterial.

Mr. Wessel: I will withdraw the question.

By Mr. Wessel:

Q. Mr. Loperfido, until November 1, 1954, where did you live? A. Till when, sir?

Q. November 1, 1954, where did you live? A. My last address was in Bellport.

Q. In where? A. The last address prior to my going to Florida was in Bellport.

Q. When did you go to Florida? A. About three months ago, I think.

Q. Would it refresh your recollection if I suggested you went to Florida about November 1, 1954? A. It was later than that.

Q. It was later than that? A. Yes, sir.

Q. November 15, 1954? A. It was sometime in November. It was after the 1st, because we had my dad reburied and I know that he was buried on the 1st.

Q. Who lives in your home now out in Long Island? A. No one, we don't live there.

Mr. Stryker: I object, immaterial.

Mr. Wessel: It is very material regarding my (895)

right to cross examine.

Mr. Stryker: I think it is quite irrelevant and immaterial to any issue in this case.

Your Honor will remember that I did not ask certain questions about who lived with whom.

Mr. Wessel: I can impeach the witness, if your Honor please, on the grounds he is hostile to the Government and I am trying to show certain of the circumstances not with regard to the subject Mr. Stryker is talking about.

Mr. Stryker: I haven't seen any hostility displayed by this witness. A mere statement by Mr. Wessel is not proof of it.

It seemed to me, at least, that he was answering fairly and frankly, and I don't see any ground for that statement, your Honor, none at all.

The Court: I will permit the question.

Mr. Stryker: What?

The Court: I will overrule the objection.

Mr. Stryker: Exception.

Mr. Wessel: Let me ask a new question.

By Mr. Wessel:

Q. Is Raymond Giglio living in your home out in Long Island? A. It was not my home, Mr. Wessel.

(896)

Q. Well, the home that you rented. A. That I rented. I think he is, sir.

Q. Do you plan to return there after this case is completed?

Mr. Stryker: One moment.

A. Where?

Mr. Stryker: I object to it. It has no bearing on any issue in this case, so far as I can see, and I don't believe so far as your Honor can see, and I see no point at all in that, and I think——

Mr. Wessel: I offer in evidence Exhibit 48, and I withdraw the question.

The Court: All right.

Mr. Stryker: I object to this paper. There is no foundation laid whatever for it. It appears to be a——

Mr. Wessel: Objection is well taken. I withdraw the offer.

Mr. Stryker: All right.

By Mr. Wessel:

Q. I ask you, Mr. Loperfido, if it isn't the fact that you received 5 per cent of the profits of Eatsum Food Products

Co. for the period June 12, 1945, to December 31, 1945, which profits amounted to $19,000? A. Well, that question

(897)

is hard to answer, Mr. Wessel. Again, like I said, I mean originally we thought that it was $19,000, and it was only brought up that it was more later on, and it was brought up——

Q. I am not asking for what "we" thought. I am asking for what you thought and what you think now, Mr. Loperfido. A. No, what I did—I didn't think—even at that particular time I didn't have an exact figure.

Q. Let me ask you, Mr. Loperfido, as of right this morning, in this court, how much money did you receive from Eatsum Food Products Co. while you were a partner? A. About twenty-six a little better, $26,000 or $27,000.

Q. Did you receive any other moneys besides that $26,000? A. No, sir.

Q. That is the total amount of moneys you got out of the partnership? A. I am quite sure, yes, sir.

Q. Did Mr. Giglio ever pay the taxes he agreed to pay? A. No, sir.

Mr. Wessel: I have no further questions of this witness.

(898)

The Court: All right.

Cross Examination by Mr. Stryker:

Q. Mr. Loperfido, who managed and directed the business of Eatsum? A. Mr. Lubben and myself, as an assistant.

Q. Who set up and ran the corn deal? A. Mr. Lubben.

Q. Where was the corn box kept? A. Well, it was kept—it was kept sometimes in the desk, and sometimes it was kept in a safe, the office safe.

Q. When you say "his," you mean Mr. Lubben's? A. Yes, the Eatsum Company's safe.

Q. I see. Who handled the cash and the records of the corn box? A. Well, the cash, the cash at the time was handled by myself, Mr. Lubben and possibly the secretary. I don't recall her name right offhand, but she——

Q. Was that Miss Feldmann? A. I think that is it, yes.

Q. That was Mr. Lubben's secretary? A. That's right.

Q. When did the corn deal end? A. The corn deal ended as I left there.

Q. That was about when? A. That was, I think it was,

(899)

the end of November or the first week in December.

Q. And at that time did you turn over to Mr. Lubben the cash in the corn box and the box? A. Yes, sir.

Q. I show you Defendants' Exhibit II for identification, and I ask you first if you recognize the handwriting? A. No, I don't recognize the handwriting.

Q. You don't? A. No, sir.

Q. Well, would the date November 30th refresh your recollection as to when you handed over to Mr. Lubben the records of the corn box? A. Well, sir, right after I left, I handed over the box and the records to Mr. Lubben, and from there on I don't know what they did.

Q. What did you do with the corn box and the records when the corn deal ended? A. When the corn deal ended, I took the box with the records and in front, in Mr. Lubben's office, of course, where I was also situated, and Mr. Giglio was called in, and the records were accounted for, they counted the money, they saw that it was all okay, and I politely walked out and left them there.

(900)

Q. Did someone count the money? A. Oh, yes, sir, they counted the money.

Q. That is, Mr. Lubben and Mr. Giglio, together? A. I think it was Mr. Lubben who counted the money and Mr. Giglio was standing there when he did.

Q. Now, was it all money or was some IOUs? A. There was, as I stated before, to the best of my recollection, I think there was about $30,000 or $40,000 of IOUs belonging to Mr. Lubben and there was about $100,000 or $110,000 in cash.

Q. When you say belonging to Mr. Lubben, do you mean by that that the IOUs were signed by Mr. Lubben? A. Well, that's right.

Q. Did you see the money counted and did you explain the records—— A. Yes, sir.

Q. —in the box to Mr. Lubben and to Mr. Giglio? A. Yes, sir.

Q. Can you tell us what profit was in the corn box part of the deal? A. I don't quite understand the question. Can you repeat it?

Q. Well, the amount that you said was in the corn box was $140,000 in cash? A. Yes.

Q. Less, I think you said, $30,000 or $40,000 in Lubben's IOUs: is that right? A. That's right, that's right.

(901)

Q. All right. Now, you said something about another cash box. Did Mr. Lubben have another cash box, called a candy box? A. Yes, sir.

When we originally went there, as I stated before, when we originallly went there, the operation was—Mr. Lubben's operation at the particular time was, as he explained to me, that you could not buy certain merchandise unless cash was used, and in order to use cash we had to sell above and under the table, as they would use the expression, so that we would get cash back.

Mr. Wessel: I don't have any real objection to this, if your Honor please, except that it is hearsay and I don't think the record should be——

Mr. Stryker: You brought out part of the transaction——

Mr. Wessel: —filled up.

Mr. Stryker: I submit I have the right to bring the whole up.

Mr. Wessel: If counsel will permit me to state my objection.

It is not proper impeachment, if it is sought to be that, of Mr. Lubben because it is collateral. Other-

(902)

wise it certainly is hearsay and the record should not be filled with that testimony.

Mr. Stryker: I am not impeaching the witness. I am asking for the whole transaction, part of which has been brought out; that is all.

Mr. Wessel: Well, if it won't be long, I don't have any real objection to it.

The Court: All right.

(903)

Q. Now, did he tell you, Mr. Lubben, that he had always had a cash box in the candy business that he was running under the sole proprietorship of Eatsum Company, when he was operating alone? A. Yes, sir.

Q. Did you ever see Mr. Lubben after the dissolution of the partnership, this date in I think you said the latter part of November, the first part of December, did you see him again after that?

Mr. Wessel: I think I must object. If this is an attempt to impeach Mr. Lubben by collateral evidence, it is improper.

Mr. Stryker: It is no such thing at all, your Honor. This is cross-examination and I am asking him if he saw Mr. Lubben after that.

The Court: He hasn't testified to anything about Mr. Lubben, as far as I remember.

Mr. Stryker: What?

The Court: Will you come up here for a second and I will find out where we are going.

(Discussion at bench, not transcribed.)

Q. Did you see Mr. Lubben after this incident that you described, where the box was opened and the money was counted, including IOUs? Just did you see him later at any time? A. Well, I saw him when I came back, but that

(904)

was——

Q. I don't care when. Did you see him again after the incident we have just been through? A. Yes, sir.

Q. Did he ever at any time state to you that he had not received his share of the corn box of $70,000?

Mr. Wessel: I object. Hearsay.

The Court: Sustained.

Mr. Stryker: I think it is very material on this issue that is tendered by the Government, not by me, and parts of conversations with Mr. Lubben having been brought out and what Mr. Lubben said or didn't say in that connection is highly material to one of the issues in this case, which is the corn box. So whether——.

The Court: I don't recall any testimony as to conversations with Mr. Loperfido after he left.

Mr. Wessel: There was one that I recall, if your Honor please.

Mr. Stryker: I think Mr. Wessel is right about that, but I submit this would be a proper part of the cross examination.

The Court: I will sustain the objection.

Mr. Stryker: I very respectfully except.

Q. Well, did Mr. Lubben, after his incident in November, the counting, in December, November or December (905) of 1945, ever claim to you that he had been unfairly treated by his partners?

Mr. Wessel: Same objection.

The Court: Same ruling. I will sustain the objection.

Mr. Stryker: Same exception.

Q. Did you ever tell Mr. Lubben that Mr. Giglio had taken the corn box containing $70,000 to his home?

Mr. Wessel: I object.

Mr. Stryker: I think, your Honor, my memory is that that is what Mr. Lubben said Mr. Loperfido said to him. If I am correct, then I should think it was directly material to interrogate this witness with respect to that.

Mr. Wessel: I don't think it is proper to impeach another witnes. by collateral evidence.

Mr. Stryker: I am not trying to impeach anything. I am trying to find the fact.

Mr. Wessel: It is not relevant to this witness's testimony, it is not relevant to anything except as possible impeachment of Mr. Lubben, and in that regard Mr. Stryker had full and ample opportunity to cross-examine Mr. Lubben.

Mr. Stryker: It is relevant to the issues in this case, and if my memory is correct—now the record (906) is so large I don't pretend to remember every item—if I am correct, I think that is what Mr. Lubben said.

Mr. Wessel: I don't think——

Mr. Stryker: Unless I am wrong about that. But it seems to me that when he says that Mr. Loperfido said a certain thing to him—the Government, not I, called Mr. Loperfido—that I am entitled to inquire whether or not he had said that.

Mr. Wessel: If I may state, if your Honor please, I could not have brought out on direct examination anything with regard to what Mr. Loperfido told Mr. Lubben. It is hearsay as to these defendants, and I did not do so. Mr. Stryker brought the statement out on cross examination, and now, having brought it out on cross-examination, he seeks to impeach it by collateral evidence, all of which is far beyond——

Mr. Stryker: No, no.

Mr. Wessel: Please, Mr. Stryker, let me complete my statement.

Mr. Stryker: Sorry.

Mr. Wessel: All of which is far beyond this witness's cross-examination, and improper cross-examination of Mr. Loperfido.

Mr. Stryker: If your Honor please, if we can (907) settle one fact then I would be in a better position to present this. Am I right or not in my recollection Mr. Lubben said that Mr. Loperfido told him that

Mr. Giglio had taken the box to his home? If I am wrong about that, I want to be set right. If I am right, then I think I have a right to ascertain the fact.

The Court: I am not clear enough to answer your question, but let me say this, Mr. Stryker, your position is exactly the same whether the Government called Mr. Loperfido or not, because you are not cross-examining him here as to his direct testimony. You are making him your own witness.

Mr. Stryker: I think that might——

The Court: You have no broader range of examination than if you had called him for this purpose. Now I frankly don't know the answer to the question you posed.

Mr. Stryker: Can somebody tell me?

Mr. Wessel: Mr. Lubben did testify precisely or very closely to what Mr. Stryker said he did testify to.

The Court: But on cross.

Mr. Wessel: I believe it was on cross examination. I could find the testimony.

(908.)

Mr. Stryker: Just a minute, your Honor. Pardon me. Whether direct or cross, it certainly was not collateral matter. I realize very well the rule that you can't bring testimony to contradict a witness's testimony on a collateral matter.

The Court: We are wasting a lot of time. I am going to overrule the objection.

Go ahead, Mr. Stryker.

Mr. Stryker: Will you read it now, Mr. Reporter.

(Question read.)

A. No.

Q. To your knowledge, did Mr. Giglio ever take the corn box to his home? A. No, sir.

Mr. Stryker: That is all.

Redirect Examination by Mr. Wessel:

Q. If I understand you, Mr. Loperfido, you said on your cross examination that you and Mr. Lubben ran the Eatsum business? A. No, I said I was his assistant.

Q. Well, will you please tell me what your function was, what your duties were? A. Well, my duty was very simple. Anything that he asked me to do, because he knew the candy business. I didn't know anything about it.

Q. Isn't it the fact that you just sat around? A. Well, to a great extent, yes.

(909)

Q. That was exactly what you did, wasn't it? A. No, no, I did not. I handled the corn box for him, and when Mr. Lubben wasn't there he gave me certain instructions of buying certain things, or things that were coming in, such as sugar, raisins and the like, and that they were to be paid for and that I was to get the money and get it for him. I mean, that is the extent of what I did.

Q. I ask you—— A. I had no actual say in the running of it.

Q. Do you recall having testified before a grand jury in connection with this case? A. Yes, I was there.

Mr. Stryker: Now, at this point, before he asks, if counsel is going to read from grand jury testimony, I shall object unless I am allowed to read all of the grand jury testimony on the subject of any witness. I want to make that plain at the start, your Honor. Of course you will rule as you see fit, but

I want that position before you. I have been trying very hard to get it, as you know.

The Court: We will cross that bridge when we come to it. Go ahead.

Q. I ask you if you recall having given the following answer to the following questions before a grand jury in (910) this district:——

Mr. Stryker: Mr. Wessel—all right, go ahead, go on.

Q. (Continuing) "Q. When you went to work, who gave you your instructions as to what you were supposed to do? A. Mr. Lubben. I was supposed to be working for him.

"Q. What were you supposed to be doing? A. What was I supposed to be doing?

"Q. What did you do? A. I didn't do anything except what I told you. I sat around.

"Q. You sat around? A. That's right."

Do you recall having given those answers to those questions? A. Mr. Wessel, that is very possible, but I think if we went along you will find out that that wasn't the whole of it. I gave the same testimony before.

Q. In other words, you also handled the corn box. A. I did mostly handle the corn box, that's right, because the corn box came in existence just—I don't know just exactly how long, but I don't think it was more than three or four weeks after I was there, or five weeks, something like that. I mean, I don't know the exact amount of time.

Q. In 1950, did you know where your cousin William (911) Giglio, lived?

Mr. Stryker: I object as immaterial, not part of the redirect examination.

The Court: I will overrule the objection.

Mr. Stryker: Exception.

Q. In 1950, did you know where your cousin William Giglio lived? A. I knew he lived in Jersey, if that is your question. If you ask me if I knew his address, no.

Q. In 1950 did you know whether or not William Giglio was a partner at one time in Eatsum? A. Did I know whether he was a partner in Eatsum?

Q. Yes, sir. A. Yes.

Q. I ask you, sir, if you recall having given the following answer to the following question to the Treasury Department on January 16, 1950:

"Q. Do you recall any of the names of that particular partnership? A. I don't remember."

Do you recall having given that answer to that question? A. No, I don't.

Mr. Wessel: I have no further questions.

Mr. Stryker: Your Honor, I am going to ask you to give me all of the grand jury testimony that this witness swore to, and all of that statement, part of which was read, both of which I am trying

(912)

to get, as you know. He has just read part of a man's statement before a grand jury. I submit that when a part is read, the rest should be forthcoming, and we have had that time and again with Mr. Lubben where, when I read part, we showed him to help himself on any other page.

The Court: I don't think the witness was asked to say any more, Mr. Stryker. Under the circum-

stances here I don't see anything that requires the disclosure of all that testimony.

Mr. Stryker: Very well, just so I have the record clear.

The Court: All right.

Mr. Stryker: My request is with regard to the entire grand jury testimony of this witness, part of which only Mr. Wessel read.

The Court: I understand. I will deny your request.

Mr. Stryker: And my further request is for the statement that he is supposed to have made—he read a line or two—to some agent, and I request that I be shown the whole statement.

The Court: He denied recalling making the statement, and I will deny your application.

(913)

Mr. Stryker: Very well, with a very respectful exception, I have nothing further.

The Court: Is that all of this witness?

Mr. Wessel: That is all.

The Court: Why don't we quit now and start tomorrow with a fresh one?

Ten-fifteen tomorrow morning. (To jury) Don't talk about the case.

(Whereupon an adjournment was taken until Wednesday, January 26, 1955, at 10:15 a.m.)

(914)

New York, January 26, 1955,
10:15 o'clock a.m.

Trial resumed.

(Jury in box.)

Mr. Wessel: May I proceed, your Honor?

The Court: Go ahead.

Mr. Wessel: The Government calls Ronald Stone as its next witness.

RONALD STONE, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Wessel:

Q. Mr. Stone, will you identify the defendants Howard Lawn, William Giglio and Frank Livorsi, please?

The Witness: Before I do that, your Honor, I have a qualified claim of privilege. I don't know whether I should make this application in your presence here or in your chambers with, of course, counsel present?

The Court: All right, why don't we go into chambers for a few second. The jury will please wait right here.

(915)

(The following took place in the judge's robing room:)

The Court: All right, Mr. Stone, get a chair over there. What is the problem?

The Witness: Your Honor, I was indicted for income tax, alleged income tax evasion, upon matters arising out of the same situation as herein before you. I don't mind answering any questions of things that I know, but I request that no questions be asked of me concerning any of my own financial doings, relative to this situation.

Now, if I do answer any questions, do I open the door for questions to be asked of me concerning my own personal finances? If that is the case——

The Court: I don't know, Mr. Stone, what either party is interested in, but I assume that one thing they are interested in is how much money you received from the Eatsum partnership. Now, is that one of the things you are going to claim your privilege to?

The Witness: Yes, sir.

The Court: Mr. Wessel, can I ask you now——

Mr. Wessel: That is the primary purpose of his being called.

The Court: That is the primary purpose of his

(916)

being called.

The Court: That is the primary purpose of this inquiry?

Mr. Wessel: Yes, your Honor.

May I say, as I have said before, without regard to the technical details, I believe this witness does have a privilege.

The Court: Yes. Well, I recognize his concern with the New Jersey proceeding.

All right, I will not compel you to answer questions on that.

As I see it, it is just as well to have this question disposed of here as in the presence of the jury, and as far as I am concerned, there is no point in Mr. Stone going back on the stand, unless there is some other field that either party would like to go into.

Mr. Wessel: As far as the Government is concerned, that is the only field that is of any substantial importance.

The Court: Mr. Stryker, is there something——

Mr. Stryker: There are other fields other than the ones that Mr. Stone refers to, into which I would like very much to go.

The Court: Well then I think that will have to (917)

come up when you call him as your own witness. Am I correct on that?

Mr. Stryker: Well, that would be for you to rule, if he is called. I certainly would respect his or any man's constitutional privilege, just as you would.

Aside from that, there are a good many facts that I think Mr. Stone might give us—I don't know whether he will or not, but I think he might—with respect to other issues in the case, and the Government has called him, put him on the stand, and how you decide this, of course, is for you.

The Court: Yes. There is no direct testimony left, as I see it.

Mr. Wessel: There is no testimony left.

The Court: So, Mr. Stryker, we will face that when we come to your own case. In other words, from here on you are dealing with Mr. Stone as your own witness, and we will pass on his claim of privilege as it comes up in that course.

Mr. Stryker: Of course, the only thing I would like to add, I would like to ask Mr. Stone this, if he is willing to say whether or not he told the Government that he expected to assert his claim of privilege, in other words, whether they knew that? (918)

The Witness: Yes, I intimated to Mr. Wessel that I was going to call both Mr. Wessel and Mr. Stryker before your Honor in chambers to make this request.

As I repeat, your Honor, I don't mind testifying to anything I know other than my own finances.

Mr. Wessel: Let me see if we have got this straight on the record, Mr. Stone. You recall telling me sometime ago that you believed you would assert a claim of privilege?

The Witness: Yes.

Mr. Wessel: Do you recall a few days ago telling me that there was some doubt in your mind whether you would assert your claim of privilege?

The Witness: That is why I said it was a qualified claim.

Mr. Wessel: That is right.

The Witness: Meaning, if the Court said I had to testify, I sure would.

Mr. Wessel. Let me state on the record after I had discussion in chambers, in which I made various statements in regard to Mr. Stone, he then told me he might not claim privilege.

The Witness: That is correct.

The Court: Mr. Stone, is your income for the

(919)

year 1945 and '46?

The Witness: Only for '45, your Honor.

The Court: And '45 is the substantial part of this case?

Mr. Wessel: Is the year, yes.

The Court: All right, Mr Stone, I won't compel you to testify.

The Witness: Thank you, sir.

The Court: All right, we will go on with the next witness, then.

(The following proceedings took place in the courtroom:)

(920)

The Court: Mr. Foreman, ladies and gentlemen, every now and then there are things that you probably surmise take place in chambers, in which I make certain rulings on matters of law, which have nothing to do with the issues of this case, and the witness who just took the stand is not going to be recalled, but I tell you now not to draw any inference from that whatever. That was a matter entirely for me and not for you.

Mr. Wessel: Government calls as its next witness Joseph McCue.

JOSEPH G. MCCUE, called as a witness by the Government, being first duly sworn, testified as follows:

Mr. Wessel: I think I should explain to the Court, counsel and the jury that this witness is being called somewhat out of order, for personal reasons expressed to me.

The Court: All right.

Direct Examination by Mr. Wessel:

Q. Mr. McCue, what is your business? A. I am a realtor.

Q. And where is that business? A. At 30 Ridge Road, Rumsen, New Jersey.

(921)

Q. Can you identify the defendants, Howard Lawn, William Giglio and Frank Livorsi? A. Could I?

Q. Yes, sir. A. Yes, sir, I could.

Q. Do you see them in this courtroom? A. Yes, sir.

Q. Would you point them out, please, for the Court and jury? A. Mr. Giglio there, Mr. Lawn, and Mr. Livorsi behind them.

Mr. Wessel: Let the record indicate the witness has pointed out the defendants.

The Court: All right.

By Mr. Wessel:

Q. Did your brother at sometime have a business association with Howard Lawn? A. Yes.

Q. Would you describe that association, please? A. He was associated—he is associated with the firm of Quinn, Doremus, McCue & Russell, and Mr. Lawn was one of the associate lawyers there with my brother.

Q. Do you know at what time that association ceased? A. I don't recall.

Q. Do you know any of the background of Howard Lawn by way of education and training, business experience? A. Some.

(922)

Q. Would you tell the jury what you know of your own personal knowledge? Would you mind, sir, speaking up just a little, please? A. Well, I understood Mr. Lawn was a graduate of Harvard University or Harvard Law School. He was regarded as of very good character and an excellent lawyer in his capacity as an associate with Quinn, Doremus, McCue & Russell. I believe he was raised in Long Branch, and he had a good reputation as a young lawyer and a citizen.

Q. Do you know what he did after he left the law firm of Quinn, Doremus, McCue & Russell? A. I think he became associated with the United States District Attorney's office.

Q. Do you know that of your personal knowledge or is that something that you just picked up? A. I am not positive.

Q. Now, sir, did you have discussions with Howard Lawn in the year 1946 with regard to the purchase of certain properties? A. Yes.

Q. When did you have the first of such discussions? A. Well, it was either 1946 or 1947.

Q. Is there any way in which you can refresh your recollection as to the date? A. In the spring of 1946.

(923)

Q. Will you tell me how that discussion came about? A. Well, Mr. Lawn, having been associated with my brother's firm, came to me and said that he had one or two friends who were interested in purchasing a fine home in that area and arranged to meet me there to show them some properties, which I did, shortly afterward.

Q. Can you fix the date of that first meeting that you just referred to, as closely as possible in time, sir? I don't mean the particular day or even necessarily the particular month, but as close as you can fix it. A. I believe it was in March, 1946.

Q. Now, subsequent to this telephone conversation, then, you had a meeting with Mr. Lawn? A. Yes.

Q. Was anyone else present at that time? A. Mr. Lawn was present with Mr. Giglio, and I am not sure whether anyone else was present or not. I don't think so.

Q. Would you state what the discussion was at that time, sir? A. Well, Mr. Lawn told me that he wanted to buy a fine home, and would be interested in one on the water-

(924)

front, but it wasn't confined to a waterfront home.

Q. Have you finished, sir? A. Yes.

Q. Did he indicate whether the home was to be for himself or not? A. Oh, he did indicate that it would be for himself.

Q. For Mr. Lawn? A. No, for Mr. Giglio.

Q. I am afraid I did not understand your response. That was Mr. Giglio that said that to you? A. Well, Mr. Lawn had told me that it was Mr. Giglio who was going to look for a home, and he, Mr. Lawn, accompanied him.

Q. Now, did Mr. Lawn introduce Mr. Giglio to you in some way? A. Yes, sir, he did.

Q. How did he introduce him? What were the words used, if you recall, or the substance of the words? A. Well, we met this certain morning early in the month of March, and he merely said he wanted me to meet a friend of his, Mr. Giglio. That is about what it consisted of.

Q. Now, what did you do next with Mr. Lawn and Mr. Giglio? A. I drove them to several fine homes, estate homes, pointed some out, and on sight they were not of

(925)

interest; a couple were.

Q. Which houses were of interest? A. Why, Willowbrook, owned by the late Mike Jacobs, was one that was of interest, and the home of the late senator, United States Senator Warren Barbour, was the other.

Q. Well, now, was there any discussion with regard to the Senator Barbour estate, first? A. Well, that seemed to be Mr. Giglio's preference.

Q. Did you have any discussion as to purchase price? A. Yes, we did.

Q. What was that discussion? A. Well, I told Mr. Giglio that Mr. Charles McVeigh of Morris & McVeigh at 64 Wall Street, who was, I believe, a trustee of Warren Barbour's estate, whom I had known for many years, had told me that he thought the property could be bought for a certain figure, and so I told Mr. Giglio and Mr. Lawn.

Q. What was that figure, sir? A. $70,000 is what he led me to believe would be considered.

Q. Would you continue, please. Have you finished your answer, sir? A. Yes, sir.

(926)

Q. Did you make any suggestion as to what price, if any, they should offer for the estate? A. I did.

Q. What was that suggestion? A. $40,000.

Q. Did Mr. Giglio or Mr. Lawn or either of them authorize you to make such an offer? A. Yes.

Q. Was there any further discussion at that time with regard to the Barbour estate? A. No, except Mr. Giglio signified a keen interest to acquire it as his home.

Q. Now, what was the discussion with regard to the Jacobs estate? A. Well, either Mr. Lawn or Mr. Giglio stated that they had another friend who they thought might be interested in the Mike cobs property.

Q. Did either of them mention the name of that friend at that time? A. Not that I recall.

Q. Would you, sir, give a brief description of, first, the Barbour estate? A. Well, it is situated in Middletown Township, opposite Rumsen, on the north side of the Navesink River; it embraces 40 acres, about 30 of which is in woodland, about 10 cleared, and it is on a very high elevation overlooking the countryside south of the river and out.

(927)

into the ocean.

On that site there is a very fine brick home, practically fireproof, that was erected by the late Warren Barbour in about 1930, and in addition the usual complementary buildings, garage and stable, apartment over the garage.

Q. Would you describe, sir, the Jacobs estate? A. The Jacobs estate is located on the north side of Rumsen Road, Rumsen. It is a Virginia colonial brick house, built in 1931 and 2 by Hubert K. Dalton to whom I sold it at that time, and it is considered one of the finest homes down there, about 18 or 20 rooms.

Q. Incidentally, sir, am I correct that both Senator Barbour and Michael S. Jacobs are deceased? A. Yes.

Mr. Wessel: Mark these.

(Marked Government's Exhibits 50 and 51 for identification.)

By Mr. Wessel:

Q. I show you Government's Exhibits 50 and 51 for identification, Mr. McCue, and ask you if those are fair and accurate photographs of the Jacobs estate in 1946, at about that time? A. Yes, sir.

(928)

Mr. Wessel: I offer them in evidence.

Mr: Stryker: No objection.

(Government's Exhibits 50 and 51 for identification received in evidence.)

Mr. Wessel: Exhibits 50 and 51 are two different views of the Michael Jacobs estate.

(Exhibits handed to jury.)

By Mr. Wessel:

Q. Were you authorized in this first conversation, Mr. McCue, to conduct negotiations with regard to the purchase of the Jacobs estate? A. No, sir.

Q. Now, subsequent to this first meeting, Mr. McCue, did you conduct negotiations with regard to the purchase of the Barbour estate by Mr. Giglio? A. Yes.

Q. In connection with those negotiations, did you have conversations with Mr. Giglio and Mr. Lawn? A. Yes.

Q. During what period of time did you have such conversations? A. Well, between the latter part of March and the early part of April.

Q. I wonder, sir, if you could summarize those con-
(929)
versations generally for the jury without going into the particular details of each talk? A. Well, it had to do with the negotiations, the various offers that I was authorized to make for the acquisition of the Barbour place for Mr. Giglio.

Q. Well, now, specifically, sir, I think you said you were authorized first to make an offer of $40,000, and the asking price was $70,000. Would you describe the negotiations in so far as price is concerned? A. Well, the asking price actually wasn't $70,000. It was in excess of $100,000, the listing price, but as previously stated, the attorney and trustee for the estate, Mr. McVeigh, had indicated to me that $70,000 would be accepted.

After I made the offer of forty, which was not favorably received, I was authorized to increase it to fifty, and later on to the $70,000 that I indicated in good faith to Mr. Giglio I thought it could be acquired for, and Senator Barbour's daughter was living on the place at the time, Mrs. Higgins, in the apartment over the garage, and her husband was in the service, and Mr. McVeigh did not want to sell the property without she was satisfied, gave her willing consent, regardless of what the price was, and much
(930)
to the surprise of the lawyer for the estate and myself, too, she wouldn't sell it for less than $100,000, and Mr. Giglio authorized me to increase the price, the offer, rather, and it was necessary to come up to $100,000 to buy the property.

Q. Was that the final purchase price? A. Yes, sir.

Q. Now, during these discussions, Mr. McCue, is it correct that you talked to both Mr. Lawn and Mr. Giglio? A. Yes.

Q. Were you ever advised by either of them as to the capacity in which Mr. Lawn was acting? A. Well, I thought Mr. Lawn——

Q. Not with regard to what you thought, Mr. McCue. Were you ever advised of that? A. No, sir.

Q. Were part of these discussions by telephone? A. Yes.

Q. And did you place some of the telephone calls yourself? A. Yes, I did.

Q. Now, where did you telephone Mr. Lawn when you telephoned him during this period? A. I telephoned him at his office in New York.

Q. Do you know where his office was, or do you know (931)

the telephone number? A. I know where the office was.

Q. Where was the office? A. My recollection is that it was at 19 Rector Street.

Q. Did there come a time, sir, later, when you sold this Barbour estate? A. Yes.

Q. Do you know to whom it was sold? A. Mr. Giglio.

Q. Well, now, after Mr. Giglio bought it, was it subsequently sold to somebody else? A. Yes, sir.

Q. Did you participate in the negotiations and the sale? A. Yes, sir.

Mr. Stryker: If your Honor please, I object to any testimony about the sale upon the ground that if his testimony has any relevance at all it would relate to the so-called concealment counts of the indictment which did not specify at all what assets were alleged to have been concealed.

Also, although I asked for a bill of particulars on that subject, I did not receive it. None was given me, and I claim surprise owing to the fact that

I have not been apprised of what that charge in the indictment was.

(932)

The Court: Overruled.

Mr. Wessel: May I state for the benefit of counsel that the charge relates to the concealment of all assets.

Mr. Stryker: Well, now, just a minute, I don't know about that statement. The indictment is before you, and I have no bill. Mr. Wessel's characterization of it would not add to or subtract from the indictment itself. And as I have said before, although a bill of particulars as to these items was asked for, none was furnished.

The Court: All right. I will overrule the objection. Go ahead.

(933)

By Mr. Wessel:

Q. I will rephrase a new question, Mr. McCue. Did there come a time when you participated in another sale of Senator Barbour's estate? A. Yes.

Q. When was that? A. Sometime in 1948, I believe.

Q. Will you describe how that came about, Mr. McCue, in general terms, please?

Mr. Stryker: I presume, your Honor, in order that I may not interrupt, I have a running objection to all of this on the grounds stated, have I?

The Court: All right, you have such an objection and I will overrule it.

Mr. Stryker: Very well, exception, sir.

A. Well, about a year after I sold the property to Mr Giglio, he placed the property on the market for sale and stated that he had business reverses and could no longer

afford to live in that property. It was for sale for quite some time, and finally I succeeded in selling it to Townsend B. Martin.

Mr. Stryker: Who? I didn't catch that.

The Witness: Townsend B. Martin.

A. (Continuing) For the sum of $85,000.

Q. Who is Townsend Martin, sir, if you know? A. Well, he is connected with the Phipps family. I believe his (934)

mother is Florence Phipps, and that is about all.

Q. Do you know what his business or occupation is? A. He is connected with the Phipps estate.

Q. You said Mr. Giglio placed the property on the market for sale; can you fix the time of that a little more accurately than about a year after, or a year and a half after you first sold it to Mr. Giglio? I see that you are looking at a piece of paper; do you have something there that might refresh your memory on this subject? A. Just a few notes as to dates that I thought might be helpful to me.

Q. Are those notes taken from your own records? A. Yes, sir.

Q. Please, if you can fill in the dates, sir, I would appreciate it. A. Sometime around 1948; I think around August 1948.

Q. That you actually sold it or that Mr. Giglio said he wanted to sell it? A. I don't know which.

Q. Well, now, in any event, sir, you said that there was a period of time during which you attempted to sell the estate before you finally sold it. A. Yes.

Q. Did you have discussions with Mr. Giglio during that period of time with regard to the proposed sale? A. Oh, I did, yes.

(935)

Q. Without going into each discussion, what was the general subject-matter of those discussions? A. Well, Mr. Giglio showed anxiety about the sale of the property; it was a burden to him and he couldn't afford to live there, and he was pressing me to do all I could to liquidate it for him, which was quite natural.

Q. There came a time when you finally did liquidate the property? A. Yes.

Q. Was there a title closing? A. Yes, there was.

Q. Were you present at that title closing? A. No, sir.

Mr. Wessel: I ask that this paper be marked with the next exhibit number.

(Marked Government's Exhibit 52 for identification.)

Q. I show you, Mr. McCue, Government's Exhibit 52 for identification, and ask you whether or not that refreshes your recollection as to whether you were present at the title closing on the sale of Mr. Giglio's property to Mr. Martin? A. Yes, it does, at the closing of the sale to Mr. Martin, yes, I was present at that closing.

Q. Who else was present? A. E. Allaire Cornwall. He was the attorney representing Mr. Martin. Mr. Roth—

(936)

I don't recall anyone else.

Q. Does that paper refresh your recollection in any way? A. Mr. Giglio, of course, was there. I don't remember the other two names of the other persons, the other two names here.

Q. Was Mrs. Roth present? A. I think Mrs. Roth was present.

Q. Did you know what Mr. Roth was doing at that time, present at this closing? A. He was the owner of record at the time. He was the seller, actually.

Q. Had you had any discussions with Mr. Giglio before the date of the closing, as to whether or not Mr. Roth was the owner? A. I believe Mr. Roth—Mr. Giglio, rather, had told me that his financial condition was such that he had to borrow on the property, and—yes, that he was indebted to Mr. Roth for a loan.

Q. When was that discussion, sir? A. Oh, quite a few months before that.

Q. Was it during the time that you had been advised to sell the property? A. Yes.

Q. Did you have any discussion after that time with Mr. Giglio on that subject? A. I believe he told me that he had conveyed title to Mr. Roth to secure the loan that he had, that Mr. Roth had extended to him.

(937)

Mr. Wessel: I ask that this paper be marked with the next exhibit number for identification.

(Marked Government's Exhibit 53 for identification.)

Q. I show you Government's Exhibit 53 for identification and ask if you have ever seen that paper before, and specifically, whether you saw it at the time of the closing, Mr. McCue? A. I have no recollection of having seen this.

Mr. Wessel: I offer it in evidence.

Mr. Stryker: No objection.

(Government's Exhibit 53 for identification received in evidence.)

(Government's Exhibit 54 marked for identification.)

Mr. Wessel: I seem to have confused the documents. I misdescribed this document as a mortgage,

when in fact it is a deed from Mr. Giglio to Mr. Roth, and I will ask counsel if he has any objection to it?

Mr. Stryker: Is that the one you had before, Mr. Wessel:

Mr. Wessel: Yes.

Mr. Wolfram: You have already shown us this, haven't you?

(938)

Mr. Wessel: Yes, but I described it incorrectly.

Mr. Stryker: All right, regardless of that, I consent to it.

Mr. Wessel: Does your Honor want to see it?

The Court: No.

Mr. Wessel: (To jury) Exhibit 53 is a deed from Mr. Giglio, Emanuel Giglio to Louis J. Roth, dated September 11, 1947, and it deeds this property to Mr. Roth.

Mr. Stryker: What is the date of it again, Mr. Wessel?

Mr. Wessel: September 11th.

(Government's Exhibit 55 marked for identification.)

Q. I show you, Mr. McCue, Government's Exhibit 54 for identification and ask you if you recall ever having seen that document before, and the same question with regard to Exhibit 55 for identification? A. Yes.

Q. You recall having seen Exhibit 54? A. That one you hold.

Q. Was that at the time of the closing? A. In Mr. Cornwall's office, yes. I don't recall having seen this conveyance from Mr. Roth to Mr. Giglio.

(939)

Q. That is Exhibit 55 you are referring to? A. Yes, sir.

Mr. Wessel: I offer them, that is Exhibits 54 and 55, in evidence.

Mr. Stryker: Well, irrespective of the fact I might have objected on the ground that foundation has not been laid, the witness I understood did not see it—am I right about that? Irrespective of that, I have no objection. Put it in.

Mr. Wessel: On the grounds that these are exemplified documents, admissible in evidence under Title 28, U. S. Code, 1732 and '33.

Mr. Stryker: You are too much for me on the numbers. When I say, your Honor, that I don't object to the introduction, I want it understood that I am not waiving my fundamental objection of surprise, because neither the indictment disclosed or stated it and we had no bill of particulars.

The Court: All right, it is so understood.

(Government's Exhibits 54 and 55 for identification received in evidence.)

Mr. Wessel: Exhibit 54 is a copy of the deed from Louis Roth and his wife to Townsend B. Martin, dated June 25, 1948 (handing to jury).

(940)

Exhibit 55 is the document I referred to before, which is a mortgage dated September 11, 1947, and it reads in part:

"Whereas the said Louis J. Roth is justly indebted to the said party of the second part"—that is Mr. Giglio—"in the sum of $20,000 lawful money of the United States"

—and it goes on to refer to certain other matters of consideration; and the document, of course, is the mortgage of the property.

By Mr. Wessel:

Q. Mr. McCue, during this period of negotiations with regard to the sale to Mr. Martin, did you ever have any discussions with Mr. Roth? A. No.

Q. When did you meet Mr. Roth for the first time? A. I don't recall.

Mr. Wessel: I ask that this document be marked with the next exhibit number for identification.

(Marked Government's Exhibit 56 for identification.)

Q. I show you, Mr. McCue, Government's Exhibit 56 for identification, and ask you if that refreshes your recollection in any way as to when you first met Mr. Roth, and I am specifically referring to the next to the last paragraph? A. It doesn't help me recollect when I met Mr. Roth.

(941)

Q. Does it help you remember in any way as to when you first learned that Mr. Roth was the record owner of the property? A. Mr. Giglio had told me at the time or shortly after he listed the property for sale, that Mr. Roth held title as security for a loan that he had made to him.

Q. And the next to the last paragraph doesn't refresh your recollection in any way in that connection as to the date, the time or when you first met Mr. Roth? A. No, sir.

Q. Now, sir, getting back to the Jacobs estate, after this first meeting at which you met Mr. Lawn and Mr. Giglio, when did you next have any discussion about the Jacobs estate? A. Shortly after Mr. Giglio had looked at the Bar-

bour estate, a few days or it might have been two or three weeks after.

Q. With whom did you have a discussion at that time? A. Well, as I previously stated, Mr. Giglio exhibited serious interest in the Barbour estate, or very shortly afterward Mr. Lawn and he said that another associate or friend they thought would be interested in the Jacobs estate, which they had also seen with me when they first set out to look at properties, and shortly afterward they came down with Mr.

(942)

Livorsi, for him to see the Jacobs property.

Q. That is, Mr. Lawn, Mr. Giglio and Mr. Livorsi came down? A. Yes, sir.

Q. About how long after the first meeting was that? A. Oh, it might have been two, three or four weeks—two or three weeks.

Q. Was anyone else present besides those three gentlemen and yourself? A. I don't think so.

Q. What happened at that time, sir? A. Well, it was indicated by Mr. Livorsi that he was interested in the Jacobs property, and, as I recall, they came down again, a Sunday or two afterward.

(943)

Q. Now, before this next time that they came down, the Sunday or two afterwards, had there been any discussion about price? A. Yes, there had been.

Q. Would you tell what those discussions were? A. Well, I had quoted the price that Mike Jacobs had listed the property for.

Q. What was that? A. I believe it was $100,000, and I was authorized to make an offer, which I think was $85,000, I am not sure of that, but in any event, in the course of the negotiations I was further authorized to bring it up to $85,000, which was what I last submitted to Mr. Jacobs.

Mr. Stryker: I didn't hear the last, which was what?

(Answer read.)

By Mr. Wessel:

Q. And was that last submission before this Sunday meeting a week or two later? A. I think so.

Q. Well, now, would you state what happened at that Sunday meeting, please? Who was present and what was the discussion? A. We met at Mr. Jacobs' home and Mr. Lawn and Mr. Livorsi, Mr. Giglio were present, and I believe their wives were, and one of the persons present told

(944)

me that they felt that they could negotiate a better deal with Mr. Jacobs, for some reason, business reason that existed between them, and they went to the house and they arranged the sale.

Q. I take it you were not present during those arrangements? A. No, sir.

Q. Was anything said as to where you were to be? A. Well, one of them suggested that I wait outside with the ladies or take a look around the greenhouses with them.

Q. Do you recall which one of the three that was? A. I do not, sir.

Q. Now, after the meeting in which you did not participate, were you advised by either Mr. Giglio or Mr. Lawn or Mr. Livorsi, or in their presence, as to what had happened at that meeting? A. Yes, I——

Q. What was said? A. I was informed that they had arranged for the purchase of the property at $50,000.

Q. Was the property subsequently sold for that price, sir? A. Yes, sir.

Q. Now, after that time did you sell the property for Mr. Livorsi to someone else? A. Yes, sir.

(945)

Q. To whom did you sell it? A. Henry Mercer.

Q. And who is Henry Mercer? A. At that time he was president of the States Marine Corporation, 90 Broad Street, New York.

Q. What was the sale price of that transaction? A. $85,000.

Q. Were you present at the closing? A. Yes, sir.

Q. You were present at the closing? A. Yes, sir.

Q. Can you state the names of the persons who were present at the closing? A. Well, Mr. Mercer was present, and Thomas P. Doremus, one of the partners of Quinn, Doremus, McCue & Russell. I don't recall who else was present.

Mr. Wessel: I have no further questions of this witness.

Mr. Stryker: Now, if your Honor please, before I begin cross examination, in view of Mr. Wessel's statement that the defendants are accused of concealing all of their assets, I would like, first, to correct that statement as of record, that that is not

(946)

what the indictment charges. The indictment doesn't charge that at all. It says, it accuses them, each one, of concealing his assets. I can help you to clarify that, your Honor—if I misspoke, the indictment doesn't accuse at all Mr. Lawn of concealing his assets. You will find it in count 8, end of the count, "did conceal his assets," not all his assets, and I have not found any statement in the indictment conforming to Mr. Wessel's statement, which I am sure was an inadvertency.

The Court: So that I may not be more confused than necessary, count 7 charges Giglio, Lawn and Roth with concealing "the assets of William Giglio."

Count 8 charges Livorsi with concealing "his assets."

Mr. Stryker: That is right.

The Court: All right. Well, it is a question then, between you and Mr. Wessel as to what "the assets" means, whether that means all or some undisclosed part of them.

Mr. Stryker: The point of my observation, your Honor—maybe I have not made plain—is that by the statement by Mr. Wessel that these defendants or any of them are accused of concealing all their

(947)

assets, he thereby, it seems to me, seeks to broaden the charge beyond that which is stated in the indictment, and I think that that is all the more reason why we should have had, and why we now should have a bill of particulars, and I now request, even at this late date—I am not tardy because I have requested it weeks ago, and again when this trial started—I now request that the Government give me a bill of particulars of precisely what assets it is that the defendants or any of them are charged with concealing.

The Court: I will decline your motion, Mr. Stryker. I have always read the indictment as Mr. Wessel reads it and I believe that Judge Palmieri and I, when we denied your motion for a bill of particulars previously, were reading it that way.

Mr. Stryker: Is your Honor saying by that—I just want to understand—that I am wrong in saying the word "all" is not there?

The Court: The word "all" is not there.

Mr. Stryker: That is what I mean.

The Court: But the word "the" is there, and it says "the assets," in plural, and to me that means all the assets.

Mr. Stryker: All right. And in this connection, (948) I understand your Honor denies my motion.

The Court: Yes.

Mr. Stryker: I am reserving at all times my objection that the indictment does not charge the defendants with concealing all of their assets, merely "his assets," and that I have not been informed or enabled to prepare to meet that particular part of the charge by reason of the wording of the indictment and the lack of a bill of particulars.

Now, if I have that clear before you, I will ask a question or two, with your Honor's permission.

The Court: Very good.

Cross Examination by Mr. Stryker:

Q. Mr. McCue, I gathered from your direct examination that you are in the real estate business out in New Jersey. A. Yes, sir.

Q. And that you have a real estate firm out there. I think you gave me the name of it, didn't you? A. Joseph G. McCue Agency.

Q. Agency. Where is your place, Mr. McCue? A. 30 Ridge Road, Rumsen.

Q. Rumsen? A. Yes, sir.

Q. How long have you been in business out there as a (949) real estate broker? A. Twenty-nine years.

Q. And you have a brother who is a member of the very well known law firm; is that right? A. Yes, sir.

Q. That is the firm with which Mr. Lawn for a time was associated? A. Yes, sir.

Q. Now, all of these transactions that you narrated in your direct examination were held in the open, just as any other transactions that you conduct in the real estate business, were they not? A. Yes, sir.

Q. There was nothing clandestine or secret about them, was there? A. Not that I know.

Q. You mean so far as you know—— A. No, sir.

Q. —they came to your office, they talked to you, the sales were made in the regular and ordinary course of business, isn't that so? A. Yes, sir.

Q. Now, when Mr. Giglio purchased the Barbour estate, he received a deed for the estate, did he not? A. Yes, sir.

Q. And that deed was recorded in the regular recording office for the recording of deeds and mortgages in your (950)

county? A. At Freehold? A. Yes.

Q. I mean it wasn't held in a side room or off secret somewhere; it was recorded right out in the open in the records; is that right? A. Yes, sir.

Q. Now, when Mr. Giglio sold the property, at that time Mr. Roth had the title to it, didn't he? A. Yes, sir.

Q. And a deed was given by Mr. Roth, and I imagine joined in by his wife? A. Yes, sir.

Q. And that deed was given to whom? A. It was given to Townsend B. Martin.

Q. Now, was that done in your office? A. No, sir, it was done in the office of Mr. Cornwell, Applegate, Stevens, Foster & Reusille.

Q. They are lawyers? A. At 34 Broad Street.

Q. They are very high-grade and well regarded lawyers of New Jersey, are they? A. Yes, sir.

Q. And that deed was furnished by Mr. Roth to the purchaser in this well known and respectable law office; is that right? A. Yes, sir.

(951)

Q. And thereafter the deed which was thus sold was recorded in the regular record office? A. Yes, sir.

Q. There is nothing very secret about the recording of a deed, is there, in a record office? A. No, sir.

Q. In fact, isn't it the purpose of the recording act in New Jersey, as elsewhere, that the whole world may be apprised of the ownership, antecedent ownership of real property? A. Yes.

Mr. Wessel: I just think, if your Honor please, this is not time for summation. The witness is not an expert in that field.

By Mr. Stryker:

Q. Haven't you been in the real estate business for 29 years?

The Court: I will sustain the objection without in any way disputing the witness' qualifications.

Mr. Wessel: The purpose of the recording act surely is not an issue at this time.

Mr. Stryker: I think it is definitely an issue.

Q. There was a mortgage somewhere — I think you

(952)

offered it in evidence. Was that duly recorded in the regular way? A. I believe it was.

The Court: The records all speak for themselves, Mr. Stryker.

Mr. Stryker: What is that, sir?

The Court: I say, the record will show. It is right on the back.

Mr. Stryker: That is what I thought.

The Court: So I don't think you need to ask this witness.

Mr. Stryker: You mean it is part of the evidence, that it was recorded.

The Court: Yes, I think the record speaks for itself.

Mr. Stryker: I think that is so.

Your Honor, I try to do the best I can, not being prepared for this issue, I have one or two notes, and I think recess time has come—I would be glad if we could take an adjournment here.

The Court: Well, we are going to take our adjournment, but I make no finding of lack of preparation, Mr. Stryker. As a matter of fact, I haven't observed any during the trial.

Mr. Stryker: Well, your Honor, in regard to

(953)

that, I have done the best I could. I have tried to look into everything that I could imagine was the Government's charge. I will admit that. I have done the best I could. I still am not prepared.

The Court: You can have an adjournment any time you want. I didn't just want to make that kind of a finding, Mr. Stryker.

Mr. Stryker: I am not asking you to make a finding.

The Court: Good.

We will take our ten-minute recess now and come back at 11:30.

(Short recess.)

(954)

(Jury in box.)

Cross Examination by Mr. Stryker:

Q. Mr. McCue, can you recall when Mr. Giglio listed his property with you for sale? A. I believe it was in 1948.

Q. Was it not in April 1947? A. It might well have been.

Q. And there came a time finally when you sold it? A. Yes, sir.

Q. When was that? Can you tell me that? A. Sometime in 1947, I believe, a year after.

Q. Aren't you mistaken about that? Isn't it 1948?

Mr. Stryker: Let me have the deed.

A. I think in June 1948.

Q. That is right, isn't it? A. That is what my note shows here, yes.

Q. All right. Then you tried to sell it from April 1947, but did not sell it until June 1948; is that correct? A. Yes, sir.

Q. Did you make efforts to sell the property during that interval of approximately fifteen months? A. Yes, I did.

Q. And you did your best to sell it? A. I listed it with

(955)

such other cooperating brokers as I thought would be capable of cooperating, and I also advertised it, yes, sir.

Q. You did all that a responsible and reputable broker like yourself would do in that fifteen months to sell it; that is right, isn't it? A. I tried, yes, sir.

Q. Despite those efforts that you made during those fifteen months you weren't able to sell it; that is right, isn't it? A. No, sir.

Q. When you say "No, sir," you mean—I say "Is that right," and you mean it is right. A. I wasn't successful in selling it until I showed it to Mr. Martin.

Q. There appeared to be no market for it; is that right? A. Very thin.

Q. Well, that is why you didn't sell it, because there wasn't a market. A. Yes, sir.

Q. Did you have any bids at any price for the property during those fifteen months, when you were trying to set it, until the final bid, when you did sell it? A. I did not.

Q. What did Mr. Lawn do in these transactions? What was his role? What did he do? A. Well, Mr. Lawn, from (956)
what I could gather, was acting in the capacity of guiding Mr. Giglio, so far as the legal end was concerned.

Q. And he was guiding him to what he believed, and don't think that I am doubting it, to be a good and able real estate man, yourself? A. Well, I hope so.

Q. Well, I am sure that is so. When you say "legal aspects," the closing was not done in Mr. Lawn's office but in this other, in the office of this other law firm that you mentioned; isn't that right? A. Yes.

Q. Isn't the fact that Mr. Lawn was just a friend who introduced you to Mr. Giglio, who was looking for a house? A. Yes.

Q. Do you know whether or not Mr. Livorsi ever lived for a day in the house that he bought? A. I do not.

Q. Well, you never knew—you don't mean by that that you knew he did? A. I don't think he ever lived in the house.

Q. Mr. Livorsi asked you to sell the house at some point, I believe you said on direct? A. Yes, sir.

Q. And how soon after he bought the house was it that he asked you to sell it? A. Oh, four, five months.

Q. The date when he bought it I think you have given (957)
to us; it is in the record. Would you mind telling me what that was, if you have it there? A. March 18, 1946.

Q. And he asked you to sell it when? A. Well, in the middle of that following summer.

Q. Within, I think you said, within six months? A. Yes, sir.

Q. All right. Had you ever met Mr. Giglio before? A. Before——

Q. Before he came to you to buy this house? A. No, sir.

Q. What? A. No, sir.

Q. You didn't know him or his family? A. No, sir.

Q. Do his children go to the same school your children do? A. Oh, you meant before the sale to Mr. Livorsi?

Q. That's right. A. I met Mr. Giglio through Mr. Lawn, when he set out to acquire the Barbour home, or home for himself first.

Q. That is when you met him? A. Yes, sir.

Q. And you came to know him fairly well, did you? A. Yes, sir.

Q. And knew how he was regarded out there in the same way you have told us Mr. Lawn was regarded? A. He was well regarded.

(958)

Mr. Wessel: I object to that as well beyond the scope of the direct. I have no objection to his asking questions if he knows it is well beyond the scope of the direct examination.

Mr. Stryker: I am sorry, I don't understand this. I asked about Mr. Giglio.

Mr. Wessel: I asked nothing about Mr. Lawn's reputation.

The Court: We won't get into that. He didn't ask about Mr. Lawn.

Mr. Stryker: How does your Honor rule?

The Court: I rule that this is beyond the direct but there is no objection to the question.

By Mr. Stryker:

Q. All right; will you answer the question? A. Mr. Giglio was well regarded in the area.

Q. What school did your children go to? A. They did go to Holy Cross School.

Q. That is where his children went? A. Yes, sir.

Q. The Livorsi property, I think you told us, was sold to a man by the name of Martin, wasn't it? A. Mercer.

Q. Mercer? A. Yes, sir.

Q. The Livorsi property was sold to Mr. Mercer. A. (959) Yes, sir.

Q. After Mr. Mercer became the owner, did you——

Mr. Stryker: I withdraw that. I seem to be in error.

Q. The Giglio property was sold to Mr. Martin, was it? A. Yes.

Q. After Mr. Martin bought the property did he ask you to sell it? A. Mr. Martin?

Q. Yes. A. Yes.

Q. Did you try to sell it? A. I have been trying ever since he listed it.

Q. When was it listed with you? A. Oh, about three or four years ago. He was there about a year when he—a year and a half, when he——

Q. Well, when was the transaction—you can remember; I have forgotten—when Mr. Giglio sold to Martin? Maybe you can tell me that. A. In 1948.

Q. '48. Now, it was shortly after that that Mr. Martin listed the property with you for sale? A. About a year and a half.

Q. That would be sometime in the latter part of '49? A. Latter part of '49 or early part of '50.

Q. You have been trying to sell it ever since and haven't been able to? A. Yes, sir.

(960)

Q. Isn't this particular property that you have been trying to sell for five years known in the trade as a white elephant? A. Very much so.

Mr. Stryker: That is all.

Mr. Wessel: Just a few questions, Mr. McCue.

Redirect Examination by Mr. Wessel:

Q. As I understood your direct, and I may be wrong, perhaps we need the reporter, I think you said that when Mr. Giglio first put the property on the market with you for sale, he advised you that the record owner was Mr. Roth; am I correct about that? A. Not when he first listed it.

Q. When did he tell you that? A. Oh, it was several months afterwards.

Q. Well, about how many months? A. I would say five or six.

Q. Incidentally, is there anything that refreshed your recollection during the recess with regard to that time? A. With regard to what?

Q. To that time, when the property was first listed with you?

Mr. Stryker: I am sorry, Mr. Wessel, you had your back to me and I didn't get the question.

Mr. Wessel: I will reframe the question.

(961)

Q. What has refreshed your recollection, sir, with regard to the date the property was first put on the market by Mr. Giglio? A. Well, I didn't know it had been refreshed.

Q. In other words, you knew about that when I asked you the questions? A. I should have known anyway.

Q. You have a piece of paper in your hand which you have been using to refresh your recollection; am I correct, sir? A. Yes.

Q. May I examine it, please? A. Surely (handing).

Mr. Wessel: I ask that this be marked with the next exhibit number for identification.

(Marked Government's Exhibit 57 for identification.)

Q. Have you had any discussions with Mr. Stryker or Mr. Lawn or Mr. Livorsi or Mr. Giglio during the recess? A. No, sir.

Q. This sheet of paper, Exhibit 57, which has just been in your hands, that doesn't have any date with regard to the first offer of Mr. Giglio's property, or first listing of his property for sale, does it? A. No, sir.

Q. If I am correct, sir, did I understand you to answer something with regard to Mr. Giglio's reputation in the Rumson area? A. I said his reputation was regarded as

(962)

good.

Q. And you know that—— A. And those who have dealt with him and knew him, yes.

Q. I never asked you anything about Mr. Giglio's reputation during your testimony here, did I? A. Not that I recall.

Q. For the first time you were asked that question by Mr. Stryker on cross examination? A. Yes, sir.

Q. If you knew, sir, that Mr. Giglio had been arrested in Detroit, would that change your testimony with regard to Mr. Giglio's reputation?

Mr. Stryker: I object to it. It is a fact not in evidence, inflammatory, unfair, and I ask for a mistrial.

Mr. Wessel: Under the ruling of United States v. Michaelson, by the Supreme Court, I am entitled to ask that question once the reputation of a defendant has been put in evidence, in issue.

Mr. Stryker: Furthermore, an arrest is no possible basis for impeachment of reputation.

Mr. Wessel: Specifically referred to in the Michaelson case.

Mr. Stryker: Well, your Honor has my objection.

(963)

Is there any ruling?

The Court: Can you find me Mr. Stryker's question on reputation? Did you have that?

(Questions and answers read.)

Mr. Wessel: I may make this offer on the record, if your Honor please: I will be very happy if counsel wishes to do so, to strike all this witness's cross-examination with regard to the subject of Mr. Giglio's reputation, and to strike at the same time any redirect on my part on that subject.

Mr. Stryker: I certainly do not wish to strike out, and this topic arose from the fact that on direct examination Mr. Wessel asked the witness about Mr. Lawn.

Mr. Wessel: But not about Mr. Lawn's reputation.

Mr. Stryker: Well, the record will show whatever it was.

The Court: I think that last basis doesn't help us at all.

Mr. Wessel, I think at this point I am going to sustain the objection. I recognize the basis for your action but I am going to sustain the objection, and I will instruct the jury to disregard that last question and not to give it any effect whatever. As I

(964)

have told you before, and I will probably tell you many times again, any recital of a fact incorporated in the question is not proof of anything before you. So without getting into any question of what it would prove if it were true, we just disregard that question completely.

All right.

Mr. Stryker: Now, if your Honor please, irrespective of your Honor's direction, I again ask for a mistrial because of the question you have asked them to disregard. They have heard the question and I press my motion.

The Court: Mr. Stryker, I am going to deny your motion for the mistrial. I think the question was proper and that if Mr. Wessel insisted, I would rule the other way and permit the question. My own feeling, however, is to keep the issues as simple as I can, and I am going to sustain the objection.

I will be glad to hear any further discussion on it though.

Mr. Wessel: I won't press it, your Honor.

Mr. Stryker: Your Honor simply denies my motion and I respectfully except.

The Court: I deny your motion.

(965)

Mr. Stryker: Do you have any further questions?

Mr. Wessel: Yes.

By Mr. Wessel:

Q. Mr. McCue, I wish you would listen very carefully to this question, please. I show you Government's Exhibit 56 for identification, and ask you whether or not that in any way refreshes your recollection as to the date when you discovered that Louis J. Roth held title to the Barbour property (handing)? A. Next to the last paragraph of this exhibit does refresh my memory as to when I learned that Mr. Roth held title to the property.

Q. What is your refreshed recollection? A. When the transfer took place.

Q. When was that? A. At the closing of title in Mr. Cornwall's office, June 1948.

Q. The first time that you knew Mr. Roth was the record owner of the Barbour estate, where Mr. Giglio resided, was in June of 1948, is that correct, sir? A. I wish to correct that. I think it was on the 18th of November, 1948. That is when title passed, although I am not sure of that.

(966)

Q. Now, I show you, sir, Government's Exhibit 54 in evidence and ask you if that refreshes your recollection as to the date when title passed? A. Yes, sir.

Q. And now, sir, will you state when it was that you first learned that Mr. Louis Roth held title to Mr. Giglio's property, the Barbour estate? A. Well, I had thought that Mr. Giglio told me months before the closing that he had transferred title to the property on account of a debt to Mr. Roth, but I must admit that is contradicted in the exhibit that you hold there.

Q. Which is the fact, sir, and I am asking you now as to your present recollection? A. At the closing of title.

Q. Let me ask you the question again, sir. Is it your present recollection that the first time you learned in any way that Louis J. Roth was the record owner of the Bar-

bour estate was at the closing of title in June of 1948? A. Yes, sir.

Mr. Wessel: I have no further questions of this witness.

Recross Examination by Mr. Stryker:

Q. Well, long before that, Mr. Giglio had told you (967)
that he owed Mr. Roth money and that Mr. Roth had taken a mortgage on the property; isn't that a fact? A. I had thought he had told me that. It is difficult to remember details pertaining to any particular transaction.

Q. But your recollection—— A. That was my recollection.

Q. —was, regardless of the passing of the title, the date of that, Mr. Giglio had told you some considerable time before that, had he not, that he owed Mr. Roth money and that he had given Roth a mortgage on his property; that is right, isn't it? A. Well, I am not sure of my recollection in that respect.

Q. You wouldn't say he did not, would you? A. I wouldn't.

Mr. Stryker: Can I see the papers for identification?

Mr. Wessel: Sure. The record should show that I handed counsel Exhibit 56 for identification.

Mr. Stryker: That is right.

By Mr. Stryker:

Q. So that I will be clear, and perhaps can help you, this paper, 56 for identification, Government's, refers to (968)
the fact that you had heard—that that was the first time you heard that Roth held title.

Let me draw your attention to that, this part here, the next-to-the-last paragraph.

Will you read that again for yourself, the whole thing. That is right, isn't it? A. Yes, sir.

Q. In other words, all you were referring to in that paragraph of the exhibit for identification, 56, that Mr. Wessel referred you to, was the question of title; that is right, isn't it? A. Yes, sir, that he owned the property.

Q. That is right. All right. Now, just a minute, I think maybe I am through.

And that had nothing to do, of course, did it, with Mr. Roth owning the mortgage, long before that? A. I didn't know what the nature of the indebtedness was. I do recall that Mr. Giglio had told me that he had borrowed money from Mr. Roth, that he was being pressed for payment of it, and that he wanted to get rid of that place and get rid of it fast, or words to that effect.

Q. And you don't remember this time whether he told you then that he had given a mortgage to Roth on his

(969)

property? A. He did not say what the security was.

Mr. Stryker: Have you the mortgage there, Mr. Wessel?

Mr. Wessel: It is in evidence.

Mr. Stryker: Would you mind giving it to me? I think you are more familiar with it than I am.

Mr. Wessel: I don't think that is true.

Mr. Stryker: Well, I do. Well, I will have to look for myself, then.

Can I take these and look at them? I don't know.

All right, what I desire to refer to is in evidence. I won't pursue anything further in cross examination.

Mr. Wessel: I just have one or two more questions, if counsel is finished.

Mr. Stryker: Yes.

Redirect Examination by Mr. Wessel:

Q. Mr. McCue, you have been in this real estate business for a long time, have you not? A. Twenty-nine years.

Q. It would be impossible for Mr. Roth to give a mortgage on property unless he had title to the property, wouldn't (970) it? A. Impossible for anyone to give a mortgage on property that they did not own.

Mr. Stryker: That is confusing. That isn't what I asked at all. Your Honor knows that.

Mr. Wessel: If counsel has some recross, he may proceed with it, but at the moment I am on redirect examination.

Mr. Stryker: I know, but I want to be fair and that is not what I was talking about.

By Mr. Wessel:

Q. There is no question, Mr. McCue, that you could not have learned about any mortgage from Mr. Roth to Mr. Giglio before you learned about the transfer of title, could you, sir? A. Ordinarily I would have, because we subscribe to a weekly report which shows all transfers of deeds and mortgages and judgments against property owners in the County of Monmouth, and I must have slipped up on that one and did not see it, because——

Q. Well, now, let me ask you this question, sir. As I recall your testimony, you said that the first time you learned of the transfer of title was at the closing, which was June 25, 1948. A. Yes, sir.

(971)

Q. Now, if you knew of a mortgage before that, you would have known that title was transferred before that, would you not, sir?

Mr. Stryker: I object.

The Court: I will sustain the objection as argumentative. You may argue from the facts.

Mr. Wessel: No further questions.

Mr. Stryker: That is all. No more questions.

The Court: Thank you.

(Witness excused.)

Mr. Wessel: Government's next witness is Louis J. Roth.

LOUIS J. ROTH, called as a witness by the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Wessel:

Q. Mr. Roth, you are one of the defendants in this prosecution, am I correct, sir? A. Yes, sir.

Q. And you have pleaded guilty to all the counts in which you are named? A. Yes, sir.

Q. And you have also pleaded guilty to another crime?

(972)

A. Yes, sir.

Q. What crime is that, Mr. Roth? A. RFC, Reconstruction Finance Corporation violation.

Q. Is there any question in your mind about your guilt, Mr. Roth? A. No, sir.

Q. Now, Mr. Roth, I ask you if you can point out in this courtroom the defendants, Frank Livorsi, Howard Lawn and William J. Giglio? A. Mr. Lawn is sitting next to Mr. Wolfram, Mr. Livorsi is directly behind Mr. Lawn, and Mr. Giglio is to the right of Mr. Lawn.

Q. Did you ever know Mr. Giglio by any name other than William J. Giglio? A. Yes, sir.

Q. What was that name or what were those names? A. Back in 1944 he used the name Bill Roberts.

Q. Any other names? A. Well, I imagine his birth certificate name of Emanuel Giglio.

Mr. Stryker: I move to strike out what he imagines the birth certificate is.

Mr. Wessel: I join in the motion.

The Court: All right.

Mr. Stryker: I ask your Honor to instruct the jury to disregard what this man says he imagined.

The Court: All right, we will strike out the (973) reference to the birth certificate, and disregard the testimony.

Q. Do you know whether Mr. Giglio ever used the name Emanuel? A. Yes, sir.

Q. He did? A. Yes, sir.

Q. Now, Mr. Roth, would you please tell the Court and the jury some of your background by way of education, where you born, business and so forth? A. Well, I was born October 30, 1899, in Manhattan, and my education consisted of the public school, city public school education, city high school education, and night college student at New York University.

From time to time some extra, special courses at New York University.

During my senior year in school I worked on a per diem basis for a number of accountants that had an office together. I continued working for them on a per diem basis and gradually built up my own clientele until such time when I had a sufficient amount of clients to keep me full time busy by myself without doing per diem work.

I continued practicing accounting up to about five years ago as an independent accountant.

(974)

Q. And you have never been certified, Mr. Roth, as an accountant? A. No, sir.

Q. Did there come a time, Mr. Roth, when you first met William Giglio? A. Yes, sir.

Q. Was he the first of the three other defendants in this suit that you met? A. Yes, sir.

Q. Can you tell me when you met him? A. About the middle of 1944 I was introduced to him by one Michael Cohen at the Park Central Hotel.

Q. Was anyone else present at that time? A. Well, there was Michael Cohen there, there was his partner, Joseph Iger, there was Sidney Cohen there; Mr. Livorsi may have been there, I do not recall.

Q. Will you state, Mr. Roth, what was said at that time and by whom, limiting yourself only to the conversations in the presence of Mr. Giglio?

Mr. Stryker: Pardon me, may I have that date again?

The Court: Middle of 1944.

Mr. Stryker: Middle.

The Court: All right.

Mr. Wesel: Would you read the question, please,

(975)

to the witness.

(Question read.)

A. After being introduced by Michael Cohen to Sidney Cohen, who in turn introduced me to Mr. Giglio, we went, Mr. Giglio and I went into the other room of the hotel suite, and we discussed work, accounting work for me to do, among which was that at that time David Cohen had a

sugar allotment privilege canceled by the OPA, and he asked me whether I was familiar with an enforcement attorney by the name of Harry Pfeffer.

I told him I know Mr. Pfeffer. He also asked me whether I could accomplish anything by having that sugar allotment reinstated. I told him I will try.

We also discussed work that I would do in filing the tax returns for Bronx Home Products. It was a short business meeting—it was a short meeting.

Q. I neglected to ask you this question, Mr. Roth: You have not yet been sentenced for the crimes to which you pleaded guilty, have you, sir? A. No, sir.

Q. Did you thereafter become accountant for Mr. Giglio and some of his companies? A. Yes, sir.

(976)

Q. Would you name the companies for which you became accountant, and I am now referring to the years 1944 and 1945, not 1946? A. I prepared his personal tax return for 1944. I did the work for Tavern Fruit Juice Co., Inc. I did the work for Tavern Fruit Juice Company partnership——

Mr. Stryker: Just a moment, your Honor. I object to it; not within the indictment.

The Court: Overruled.

Mr. Stryker: Exception.

By Mr. Wessel:

Q. Would you continue, please, Mr. Roth. Do you want your answer read back to you? A. Yes, I would appreciate it.

Mr. Wessel: Would you read back the first part of his answer.

(Answer read.)

A. American Brands Corporation, American Brands Wholesale Corporation——

Q. Now, these latter companies were in 1946, am I correct, sir? A. Yes, sir.

Q. I am just asking about 1944 and 1945 at the moment. A. Well, there were the two Tavern companies and a part-

(977)

nership of Eatsum Food Products Co.

Q. Now, did you receive compensation for your work? A. Yes, sir.

Q. And that would be for all these various companies and for Mr. Giglio, personally? A. It included Mr. Giglio personally, but I did not receive any independent compensation for preparing his tax return.

Q. What was your compensation, Mr. Roth? A. On Tavern Fruit Juice Co., Inc. I received $100 a week for the first three months, and the second three months during the life of that corporation I received $200 a week. At the commencement of the partnership of Tavern Fruit Juice Co. I received $500 a week.

Eatsum Food Products Co. I received payment on a per diem basis, on verification of the audits of the official accountant of Eatsum Food Products Co.

Q. Were any part of these payments in cash? A. Yes, sir.

Q. Which parts? A. The $100 and the $200 a week that I received, the Tavern Fruit Juice Co., Inc.

Q. Did you report those as income to the United States

(978)

Government? A. No, sir.

Q. As an accountant, Mr. Roth, will you tell the jury what would have been a reasonable rate for your accounting work at Tavern Fruit Juice Company, partnership and incorporated? A. There was no bookkeeper employed at

Tavern Fruit Juice Co., Inc. and Tavern Fruit Juice Company partnership. That would depend on the amount of time we would devote to the work, either myself or an assistant, but I would judge that the reasonable compensation would be from $150 to $200 a month.

Q. Now, you mentioned in your testimony Tavern partnership. Do you recall when that company was organized? A. Approximately May, 1945.

Q. I show you Government's Exhibit 7 in evidence, Mr. Roth, and ask you if that is a tax return which you prepared for Tavern partnership? A. Yes, sir.

Q. Did you sign that return, Mr. Roth? A. No, sir.

Q. Why not? A. Whenever I was doubtful about the——

Mr. Stryker: One moment. I object to this (979) man's operation or alleged operation of his mind. The record speaks for itself, what he did, and what he now says his mind was is not material to this issue, not relevant, not competent.

The Court: I will overrule the objection.

Mr. Stryker: Exception.

By Mr. Wessel:

Q. Let me ask a few more questions, Mr. Roth. Do you know whether or not a public or certified public accountant is required to sign a return which he prepares? A. Yes, sir.

Q. Did you conspire with these defendants to evade the taxes due by them to the United States Government? A. Yes——

Mr. Stryker: I object. Wait a minute. If the answer is there, I ask that it be stricken until your Honor passes on it.

I object to it. It is incompetent, irrelevant, immaterial, a conclusion of the witness' mind, a characterization of events.

The Court: I will sustain the objection.

Mr. Wessel: I am seeking to lay the foundation for the answer to the prior question.

Mr. Stryker: And, your Honor, I think the (980)

witness answered rapidly. Will you strike out whatever the answer was?

The Court: Yes, strike out the answer.

Mr. Stryker: All right.

By Mr. Wessel:

Q. In any event, Mr. Roth, you pleaded guilty to count 10 of the indictment, am I correct? A. Yes, sir.

Q. And there is no question in your mind but that you were guilty of whatever is charged in count 10 of the indictment; correct, sir? A. Yes, sir.

Q. Now, I ask you, Mr. Roth, why did you not sign the tax return, Exhibit 7 in evidence?

Mr. Stryker: May I have that again? May I have the question again, please? I am sorry.

The Court: It is the same question that you originally rose on, why did you not sign the tax return. I overruled your objection then, and I overrule it now.

Mr. Stryker: You will now?

The Court: Yes.

Mr. Stryker: All right. I except.

A. Because the contents of the tax return, and the income (981)

account was not a true statement of income to be reported to the Government.

Q. Now, Mr. Roth, I want to refer you specifically to item 2(e) of the Tavern partnership return, and ask you whether the statements or lack of statements there represented a true statement in this tax return? A. It does not represent a true statement.

Q. Was that a false and fraudulent statement to the United States Government?

Mr. Stryker: If your Honor please, I think we have it here several times in this trial—discussing truth. I think your Honor pointed that out to me once, and I object to the question on the grounds that you have sustained some——

The Court: I never sustain an objection to a question involving truth, but I have declined to make a witness say yes or no when you ask him whether something is true, and I won't make this witness say yes or no.

Mr. Stryker: Well, I object to the question——.

The Court: I overrule the objection.

Mr. Stryker: —on what your Honor has previously laid down in this trial.

(982)

I except.

Q. Do you have the question in mind, Mr. Roth? A. No.

Mr. Wessel: Would you read it, please.

(Question read.)

A. The answer to that is yes.

Q. In what respect, Mr. Roth, is that false? A. By omitting to include the inventory that existed on March 31, 1946, as an asset of the business, and by including the in-

ventory as an asset of the business it would automatically increase the net income that the partnership earned.

Q. In other words, the failure to state a closing inventory in this return understates true partnership income; is that correct? A. That is correct.

Q. Do you know whether or not Mr. Giglio knew that there was a closing inventory in Tavern Fruit Juice Co. partnership at the end of its fiscal year of operation? A. Yes, sir.

Q. I want to refer you, Mr. Roth, to item 24 on a sheet of paper attached to that tax return and made a part of it, which reads, "Laboratory and research and engineer's expenses," and ask you whether the figure there set forth

(983)

as an expense represents in whole a true expense of the partnership? A. The entire amount of $74,000 is not a true expense.

Mr. Wessel: I ask that these papers be given the next exhibit number for identification.

(Marked Government's Exhibit 58A to 58G for identification.)

By Mr. Wessel:

Q. Mr. Roth, I show you Government's Exhibits 58A through G for identification and ask you whether you can identify those documents for me, please? A. Yes, sir.

Q. What are they, Mr. Roth? A. These documents are a statement of assets and liabilities and income account that were prepared, both at Mr. Giglio's and Mr. Lawn's request to be given to Mr. Portner and Mr. Rabkin, accountant and tax expert, for the purpose of conferences and seeking advice for all the various enterprises, and the best manner in which to handle their tax problems.

Q. Were they prepared by you or by accountants operating under your supervision? A. Well, they were either prepared by me or one or my assistants.

(984)

Q. And were they prepared from the books and records of the various companies for which they appear to be statements? A. Yes, sir.

Q. And were they done in the regular and ordinary course of your business as an accountant? A. Yes, sir.

Q. And do they truthfully reflect the figures set forth on the books of those companies? A. As per the books, yes.

Mr. Wessel: I offer them in evidence.

Mr. Stryker: I apologize for the time, but they are quite voluminous, and I think I must examine them.

Mr. Wessel: I don't think I should let that remark stay on the record too long without criticism. Those were turned over or photostatic copies were turned over to defendants.

The Court: All right.

Mr. Stryker: Well, it is the first time I have seen them.

(985)

Preliminary Questions by Mr. Stryker:

Q. In regard to 58 for identification, I ask you whose pencil notations there are on that paper, at the bottom?

Mr. Wessel: I limit my offer to include only the typewritten portions.

Mr. Stryker: Well, you were offering it and——

Mr. Wessel: I limit my offer only to the typewritten portions.

Mr. Stryker: It is offered in evidence and I have a right to interrogate him about it.

A. I do not know, sir.

Q. Do you know when they were added? A. No, sir.

Q. What? A. I do not know when these pencil notations were put on.

Q. Or whose notations they are? A. I don't know whose they are.

Q. You know your own handwriting? A. I could recognize my handwriting.

Q. That is not your handwriting, I take it? A. No, sir, it is not.

Q. Do you know the handwriting of your assistant, Mr. Hausman? A. I could recognize it.

Mr. Wessel: If your Honor please, I have limited my offer—— (986)

Mr. Stryker: I want to find out.

Mr. Wessel: Just a minute, Mr. Stryker. I don't think cross examination on this subject at this time is proper in view of the limited offer.

Mr. Stryker: But it is on the paper and regardless of the limited offer, it is there and it is offered in evidence, and I would suppose I had a right to ask him about it.

The Court: Let me have it. Let's see it.

Mr. Stryker: (Handing) Bottom of the first page, Judge.

The Court: (After looking) You can ask him about it if you want to.

By Mr. Stryker:

Q. What assistants did you have that worked with you on these matters? A. At this time I had two assistants.

Q. What are their names? A. Mr. Starr and Mr. Hausman.

Q. Do you know their handwriting? A. I could recognize their handwriting.

Q. Is this their handwriting, either of them? A. No, sir.

(987)

Q. Do you know when that handwriting was put on there, whosoever it was? A. No, sir.

Q. When did you last see Government's Exhibit 58 for identification after it was prepared? A. About a week ago.

Q. It is dated here, "March 31, 1946," and the first time you saw it after that was about a week ago?

Mr. Wessel: It is not dated March 31, 1946, and counsel knows it is not dated that.

Mr. Stryker: I am reading from the exhibit.

Mr. Wessel: I think counsel knows what an income and financial statement as of a certain date is. It doesn't mean it was put on there at that time.

Mr. Stryker: It reads "Tavern Fruit Juice Company, Limited Partnership. Statement of Assets and Liabilities, March 31, 1946." That is the only date I see on it, and that is what I was asking about on the paper.

Q. Now, Mr. Roth, I was interrupted there. You said the first time you saw this paper after you prepared it, which I take it must have been March 31 or afterwards, is that right? A. Much later than March 31.

Q. When would you say, Mr. Roth? A. About a week before the conference that we had with Mr. Rabkin and Mr. Portner.

(988)

Q. That was when, approximately? A. I would say toward the latter part of '46 or the early part of '47.

Mr. Stryker: All right. Well, with the exception of the pencil notations which are physically on it, and which I understand Mr. Wessel does not offer, I will have no objection to these documents.

The Court: All right; received.

Mr. Stryker: How will you handle that?

The Court: We will worry about that when we find out what we are going to do with it, Mr. Stryker. Let's see if he is going to show it to the jury.

Mr. Stryker: I will leave it to you.

Mr. Wessel: I should point out there are pencil notations on others of these papers, and my offer does not include any pencil notations.

The Court: All right, we will go along and see how these figure in the case.

Mr. Stryker: With great deference, I simply would imagine that your Honor will not submit documents to the jury, part of which are not offered.

The Court: I certainly won't unless they are covered up or unless we make a photostat with the entry covered up. We will do something.

Mr. Stryker: I don't care how it is done.

(989)

(Government's Exhibits 58-A to 58-G for identification, received in evidence.)

(Government's Exhibits 59-A and 59-B marked for identification.)

By Mr. Wessel:

Q. Mr. Roth, I want you to refer to Exhibit 58-A, page 3, which is a supporting schedule of that exhibit, and

ask you whether you can tell me what portion of the laboratory and research engineers' expense of $74,000 in the tax return represents salary payments to one C. Goldenberg, according to the schedule? A. According to the schedule, the amount is $32,780.93.

Q. Now, sir, can you tell me——

Mr. Stryker: Pardon me, your Honor.

The Court: Yes.

Mr. Stryker: I am a little bit late on this objection. I submit that unless the schedule is in evidence, the witness may not give testimony to the effect that something is in accordance with something not in evidence.

The Court: 58-A is in evidence. That is one of the papers we just took in.

Mr. Stryker: Is that one there?

The Court: Yes.

(990)

Mr. Stryker: Then I withdraw my objection.

Q. Now, sir, can you tell me what part of that $32,000-odd you just referred to represents a true partnership expense of salary to C. Goldenberg? A. I could only answer that by an explanation.

Q. Please explain that, sir. A. This amount of $32,780.93 represents salary given to C. Goldenberg. It may very well be that the salary that was drawn——

Mr. Stryker: I object from here on to what may very well be.

The Court: We may strike it, but we will listen to it. Go ahead.

A. (Continuing) That the salary of C. Goldenberg was included in the labor account and not under the caption of "Re-

search Expenses." I could only determine that from the books, but looking at the statement here, the salary that Mr. Goldenberg received over a four-month period from the partnership would be in the area of $7,500 to $8,500. Now, if the salary of seventy-five to $8,500 was charged to this account, then the $24,000 difference between the 32 and the 85 is wrong. However, if the $8,500 salary was charged to the regular labor account, then the entire amount of $32,000 difference is wrong. (991)

Mr. Stryker: Well, now——

Mr. Wessel: There is more to this, Mr. Stryker.

Mr. Stryker: I would like to interpose here, because it already goes to the rest.

I move to strike out the purely hypothetical character of that answer. He said if something else was charged to something, if something else was done, then something else might happen. That isn't evidence.

The Court: I may misunderstand, Mr. Stryker, but I think the hypothetical part is whether it is $25,000 overcharge or a $32,000 overcharge.

Mr. Stryker: I may be wrong, but——

The Court: We may be able to clear that up as we go along.

Mr. Wessel: I can clear that up. I think his Honor has quoted exactly what it is the witness has said.

The Court: All right.

Q. Mr. Roth, first, who is C. Goldenberg? A. C. Goldenberg is William Goldenberg.

Q. And was there any Goldenberg employed by Tavern Fruit Juice Company partnership other than William Goldenberg? A. I do not know of any.

Q. About how long a period was Mr. Goldenberg em- (992)
ployed? A. For approximately four months during the life of the partnership.

Q. Do you recall what his salary was during that time? A. $500 a week.

Q. Do you recall the total amount of salary or earnings Mr. Goldenberg had from the partnership during the period he was employed by it? A. I could only estimate over a four-month period, sixteen weeks times $500, $8,000, without books and records.

Q. And that figure would not be exact, am I correct, sir? It is an approximation of approximately what he made. A. Within a week or two or three. I have no—I am going by the best of my memory.

Q. Now the schedule you are looking at, which is attached to Exhibit 58-A, indicates a salary payment of C. Goldenberg, thirty-two-odd thousand dollars: correct, sir? A. That's right.

Q. Is your recollection that there may have been an additional payroll account f Mr. Goldenberg? May have been, I asked you, sir? A. There may have been. There may have been a payroll account in which Mr. Goldenberg's name was included to the $500 a week that he received. (993)

Mr. Stryker: Your Honor——

Q. Is there any way you can determine that?

Mr. Stryker: Just a moment. I must object to the witness saying "It may have been."

The Court: We will let it stand for the time being. We may strike it later.

Q. How can you determine, Mr. Roth, whether or not there was such a payroll account? A. By looking at the

books and records, the payroll books, an analysis of the labor account that appears in another part of this statement.

Q. Did you ever ask Mr. Giglio for those books and records, Mr. Roth? A. I don't know whether I asked Mr. Giglio specifically for those books and records, but I asked him for a great many books and records.

Q. Where was that? A. I turned those over to Mr. Giglio when I gave up my 62 William Street office. I turned over two transfer cartons full of papers, in connection with all the work that I did for Mr. Giglio and his interests, and those books may have been there.

Q. And when you asked for those papers, who was present? A. My attorney, Mr. Rosenblum, Mr. Corson, Mr. Stryker, Mr. Wolfram, Mr. Lawn, Mr. Livorsi, Mr. Giglio and the accountant, Mr. Holtzer.

(994)

Q. Did you get the books and records that you turned over? A. No, sir.

Q. Have you seen them since, sir? A. No, sir.

Q. Now, Mr. Roth, referring to the Tavern partnership return, I ask you whether Schedule I, which reflects partners shares of income and credits, is a true statement to the United States Government? A. No, sir.

Q. In what respect is it not true? A. The wives of Mr. Giglio and Mr. Livorsi are included thereon as partners, and they were not picked up for their distributive share when I filed their individual—when I was supposed to file their individual tax returns. Both Mr. Giglio——

Mr. Stryker: Just a minute. I have an objection there. What the witness is being interrogated about is not within the scope of the limited bill of particulars which we did get regarding various items of the indictment.

Mr. Wessel: This is in regard to the conspiracy count of the indictment, if your Honor please.

The Court: Overruled.

Mr. Stryker: I except.

Q. Have you finished your answer, Mr. Roth? Would you like it read back? A. I don't know whether I finished it or not, but I would like it read back.

(Answer read.) (995)

A. (Continuing)—And Mr. Livorsi included the distributive share of their wives on their individual tax returns.

Q. Mr. Roth, do you know whether or not Margherita Giglio and Dorina Livorsi played any active part in the management of the Tavern Fruit Juice Company? A. I do not know of any active management or any active work that they did in the partnership.

Q. Do you know whether or not they invested any money of their own in the partnership? A. I do not recall them investing any money in the partnership.

Q. Do you recall ever having had any discussion with Mr. Giglio or Mr. Livorsi or Mr. Lawn with regard to Mrs. Livorsi or Mrs. Giglio being partners in the Tavern Fruit Juice Company? A. No discussion with Mr. Lawn or Mr. Livorsi, but a discussion with Mr. Giglio.

Q. When was that discussion? A. At the inception of the partnership I suggested to Mr. Giglio that at that particular time it would be perfectly legal for them to have their wives as partners on their tax return, under the caption of "Family partnership," and Mr. Giglio thought about it and later on adopted that suggestion.

(996)

Q. Incidentally, was anyone else present at that time? A. I do not recall.

Q. Do you recall having had any discussion with regard to the wives' share of Tavern income not being included in the individual returns of Mr. Giglio and Mr. Livorsi—of Mrs. Giglio and Mrs. Livorsi? Excuse me. A. Yes, sir.

Q. When was that discussion? A. I would say that would be the latter part of August or the early part of 1947.

Q. Or the early part of what month, 1947? A. Or the early part of September 1947.

Q. Where was the discussion and who was present? A. The discussion was in Mr. Giglio's office in the presence of Mr. Ronayne.

Q. Who is Mr. Ronayne? A. Mr. Ronayne was employed as general tax counsel for the various businesses and enterprises that Mr. Giglio was associated with.

Q. Is that James A. Ronayne, sir? A. Yes, sir.

Q. Do you know Mr. Ronayne's background? A. His background is a C.P.A., a former special agent in the Intelligence Unit of the Tax Department. His position was that of a squad leader, and professor of tax law in St. John's University.

(997)

Q. Did Mr. Ronayne receive a retainer of any kind from Mr. Giglio? A. He received a retainer of $10,000 a year to cover all the enterprises and all the affairs that Mr. Giglio and his associates were connected with.

Q. To cover all——

The Court: We are going to break now.

Mr. Wessel: May I ask one more question?

The Court: Go ahead.

Q. To cover all the enterprises with regard to wnat subject? A. Taxes.

Mr. Wessel: All right. I will stop at this point, if your Honor please.

The Court: All right. We will recess now until two o'clock, and don't discuss the case.

(Recess until 2:00 p. m.)

(998)

AFTERNOON SESSION

2:00 p. m.

(Jury in.)

LOUIS J. ROTH, resumed.

Direct Examination continued by Mr. Wessel:

Q. Mr. Roth, at the recess I had asked you with regard to a conversation in Mr. Ronayne's office, regarding Mrs. Giglio and Mrs. Livorsi as partners in Tavern.

Would you now state what that conversation was, please? A. Mr. Wessel, I don't think that conversation took place in Mr. Ronayne's office.

Q. Excuse me, where did it take place? A. It took place at Mr. Giglio's office with Mr. Ronayne present.

Q. I am sorry. Would you please state the conversation, Mr. Roth? A. At that particular time the individual tax return of William Giglio was to be filed, I had a statement indicating the source of income of Mr. Giglio, Mr. Livorsi, and their respective wives, and Mr. Ronayne suggested that he thinks it is wise not to file individual tax returns for Mrs. Giglio and Mrs. Livorsi because the tax will not be paid and there is no use causing the womenfolk any trouble by future assessments on the part of the Tax

(999)

Department, and for both Mr. Giglio and Mr. Livorsi to

pick up the income of their respective wives in their own tax return.

Q. I show you, Mr. Roth, Exhibits 2 and 4 in evidence, and ask you if those are the individual returns of Mr. Giglio and Mr. Livorsi to which you just made reference in your answer? A. Mr. Wessel, I would like to look at the partnership tax return that you showed me a while back.

Mr. Wessel: Let the record show I am handing the witness Exhibit 7 in evidence.

The Witness: May I hear the question?

(Question read.)

A. Yes, sir.

Q. I also hand you, Mr. Roth, Exhibit 6, the Eatsum partnership information return, Exhibit 8, the American Brands Corporation consolidated return, and ask you if those are returns which you caused to be filed? A. Yes, sir.

Q. The Eatsum partnership information return lists a partnership distribution share for Mrs. Giglio and Mrs. Livorsi also; is that correct? A. It does.

(1000)

Q. Was there any discussion in Mr. Giglio's office at that time with regard to the Eatsum distributive share for the wives? A. Yes, sir, the discussion at that particular time applied to the income of their wives with instructions not to file individual tax returns for Mrs. Giglio and Mrs. Livorsi which applies both to the Eatsum partnership and the Tavern partnership.

Q. Can you explain, Mr. Roth, why the individual returns for Mr. Livorsi and Mr. Giglio picked up the partnership distributive shares of the wives of those gentlemen while the information return did not disclose that the entire

share of Mr. Giglio and Mr. Livorsi included their wives' shares.

Is my question clear, Mr. Roth? A. Not very well, Mr. Wessel.

Q. Well, I will rephrase it, Mr. Roth. Am I correct that the exhibits I have handed to you, and that is Exhibits 2, 4, 6, 7 and 8, were all filed on the same day? A. Yes. It may be within one day difference. I have no record of dates, but I recall them being filed all between September 10 and 15, 1947.

Q. And were they all prepared at or about that time? A. Some of these returns were prepared possibly six or seven

(1001)

months prior to the time of filing.

Q. Now, Mr. Roth, the individual returns for Mr. Giglio and Mr. Livorsi include all the earnings which they stated they had from Eatsum and Tavern partnerships, although the partnership information returns indicated that half of those earnings were attributable to their wives; is that correct? A. That is correct on the Tavern partnership and partially correct on the Eatsum partnership.

Q. Well, can you explain that inconsistency if it is an inconsistency, please? A. Well, on the Tavern partnership there are only two—the partners are William Giglio and Frank Livorsi, while on the Eatsum partnership there are other partners besides Giglio and Livorsi, besides their wives.

(1002)

Q. I don't think I have made myself clear, Mr. Roth. The Tavern partnership return lists a distributive share of the Tavern partnership income for Mrs. Giglio and Mrs. Livorsi; is that correct? A. That is correct.

Q. The individual return of Mr. Giglio and Mr. Livorsi, filed at substantially the same time, includes the income

which the information return ascribes to the wives; is that corect? A. That is correct.

Q. Is that an inconsistency of any kind, Mr. Roth? A. It is.

Q. Can you explain it? A. The inconsistency is as follows: that both Mrs. Livorsi and Mrs. Giglio should have filed individual tax returns based on the information return of the Tavern partnership for their respective share of profits—of income.

Q. Well, if you filed an individual return for Mr. Giglio and Mr. Livorsi, picking up those figures, why didn't you change the partnership information return so that it wouldn't indicate that the wives were partners?

Mr. Stryker: I object to it as calling for a mental operation and conclusion, why.

The Court: I overrule the objection.

Mr. Stryker: Exception.

(1003)

The Witness: May I hear that question, please.

The Court: Read the question.

(Question read.)

A. The reason I didn't file—the reason I picked up the income of the wives on the individuals husbands' tax return, these taxes, the tax liability, the tax that was due, there was no money to pay, and it was never intended at that time to pay it; and in order to avoid the women having trouble with the Tax Department, we picked up the wives' income on the husbands' tax returns, so that all the trouble would accrue to the husbands.

Q. Mr. Roth, with regard to the Tavern information return, Exhibit 7, first of all, do you recognize the signature of the taxpayer? A. Yes, sir.

Q. Whose signature is that? A. William Giglio.

Q. And it is signed on what date, sir? A. September 12, 1947.

Q. And it is notarized? A. September 12, 1947.

Q. Do you know when that partnership information return was due to be filed? A. June 15, 1946, ninety days after March 31, 1946, or—excuse me—75 days after March 31, 1946.

Q. And it was in fact filed over one year late; is that correct? A. That is correct.

(1004)

Q. Had you obtained any extensions of time to file the return? A. No, sir.

Q. The Eatsum partnership information return, which is Exhibit 6, when was that due to be filed? A. August 15, 1946.

Q. And that was filed over a year late? A. Yes.

Q. Did you ever discuss with Mr. Giglio, Mr. Lawn or Mr. Livorsi, anything with regard to the time of filing the partnership information returns? A. The discussions were had with Mr. Giglio and not with Mr. Lawn or Mr. Livorsi.

Q. Well, first of all, when were such discussions? A. Well, discussions regarding the payment of taxes was a continuing discussion from the time the tax return was due to be filed, up to the time that it was actually filed. There just wasn't one discussion. It was a continuous discussion from time to time.

Q. Will you tell me what was said in the continuous discussion with regard now to the subject only of the time of filing partnership information returns? A. If the partnership information return was filed on June 15, 1946, the Government at that time would be apprised or have knowledge or some record that there is money due from

William Giglio, Margherita Giglio, Frank Livorsi or Dorina (1005)
Livorsi.

In order to avoid for the Government to have knowledge, the information return was not filed at that time, but was filed—but the information return was filed at the same time that the individual tax return was filed, one year later.

Q. Was there a discussion with Mr. Giglio or a series of discussions? A. A series of discussions, resulting in the fact of Mr. Giglio—Mr. Giglio pointed out to me that if we were to pay the taxes due to the Government at that particular time, there would be no money left to continue the extensive research, and based on conferences that we have had with Mr. Ronayne, the only thing that we would be subject to, or the partnership would be subject to, would be penalty and interest, and that could always be settled when the returns are filed. Mr. Giglio also felt that money to him is worth 6 per cent during the time that he owes, that he contemplated paying the Government a year later. (1006)

Q. When you say "penalty," what kind of penalty were you referring to in your answer? A. A 5 per cent late filing, 6 per cent interest on the tax indebtedness.

Q. That is a civil penalty you are referring to? A. Yes.

Q. Do you recall any discussion with Mr. Giglio at which Mr. Rabkin was present with regard to the question of filing extensions—of obtaining extensions in time to file the returns? A. Yes, sir.

Q. Was anybody else present besides Mr. Giglio and Mr. Rabkin? A. I think Mr. Portner was present, and Mr. Lawn may have been present at that time. I do not recall.

Q. First of all, who are Mr. Rabkin and Mr. Portner? A. Mr. Rabkin is a tax authority, also a professor of tax law, and the author of tax service books.

Mr. Portner is a certified accountant employed by Mr. Lawn to prepare his tax returns.

Both Mr. Rabkin and Mr. Portner were brought in by Mr. Lawn because Mr. Lawn used Mr. Rabkin on consultations regarding Canadian corporations and province tax

(1007)

law in Canada on some contemplated venture that existed at that time.

Q. Now, this Mr. Rabkin, is he of the firm of Rabkin & Johnson that puts out the tax service? A. Yes, sir.

Q. And that is a well known tax service used by accountants and lawyers? A. Not as well known as Prentiss Hall, but it is a reputable service.

Q. All right, sir. Now, would you please tell the conversation with regard to extensions that you just referred to? A. Mr. Rabkin pointed out that it is all right to get extensions to file tax returns, provided that there is no intent as a result of those extensions to evade payment of the taxes, and that the reason for the extensions is a substantial and correct reason and not a false reason.

Q. Is that the full conversation as best as you can now recall it? A. He also pointed out to us at that time the code under which there is a penalty in case you apply for extensions in filing your tax returns with the intent of not paying the Government taxes, that there is a criminal penalty attached to that.

Q. Is that the full conversation now as best you can

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recall it, Mr. Roth? A. Substantially.

Q. Was Mr. Rabkin's statement made in response to any questions asked of him? A. It was made in response

mainly to my question, because I was getting worried about the various extensions that I was getting, and also worried about the delay in filing the tax returns.

Q. Did you ever obtain any extensions for the Eatsum and the Tavern partnership returns? A. I do not recall obtaining extensions for the partnership information returns.

Q. What is the longest period of extension which can be obtained under the law as you know it as an accountant for filing a tax return? A. Within nine months after the calendar year or fiscal period ends.

Q. Is it nine months, Mr. Roth, or is it six months? A. Well, to the best of my recollection, it is six months after March 15th, but nine months after January 1st.

Q. I see. Now, did you obtain any extensions of time to file the individual returns of Frank Livorsi and William Giglio? A. I did.

Q. And to what period of time did you obtain ex-

(1009)

tensions? A. To the best of my recollection, it was either July, June or July, 1947.

Q. Do you know whether or not those extensions were attached to the return when filed? A. I do not remember.

Q. Now, did you also obtain extensions for American Brands Corporation——

Mr. Wessel: Strike that question.

Q. I show you, Mr. Roth, a series of tentative tax returns, which have been marked Exhibits 10, 11, 13 and 15 in evidence, and ask you if you obtained extensions of time to file those tax returns? A. Yes, sir.

Q. Can you tell to what period you obtained an extension, until what time, sir? A. To the best of my recollection, May 15, 1947.

Q. And that was the period of time to which you had obtained an extension with regard to the corporate returns? A. Yes, sir.

Q. Now, I ask you, Mr. Roth, with regard to all the returns I have shown you, and that is Exhibits 2, 4, 7, 6, 8, 10, 11, 13 and 15, whether all of those returns were filed late? A. I don't understand what you mean by the word

(1010)

"late."

Q. Had you obtained extensions of time to file any one of those returns as late as September, the middle of September, 1947? A. I do not recall of any that had extensions up to September 15, 1947.

Q. Now, with regard to this conversation with Mr. Rabkin, do you recall whether or not Mr. Rabkin furnished the name or a citation of a case with regard to the filing of extensions? A. I do not recall him furnishing the citation of a case, but I do recall him pointing out to me the section of the law where it is a penalty in filing the extensions as I just explained to you.

Q. Now, Mr. Roth, coming back to the thirty-two-odd thousand expense item in the Tavern return for C. Goldenberg, Engineer, I ask you whether you ever had any conversation with Mr. Giglio with regard to that expense? A. Yes, sir.

Q. When was the conversation? A. That conversation is no specific conversation, but a class of conversations that is had over a period of time in a business. It isn't one isolated conversation.

Q. Do you recall anybody else being present during this

(1011)

series of conversations that you are referring to? A. No, sir.

Q. Will you state what was said, please, Mr. Roth, in that connection? A. Excuse me, Mr. Wessel. Are you referring to the item or to all conversations?

Q. I am referring to all conversations which deal with expense accounts of the nature of the C. Goldenberg expense account referred to in that schedule. A. In a discussion Mr. Giglio told me that it is necessary for him to get more money out of the business than what is being shown to be drawn for him. I did not know what to tell him at that time, but at a later date I told him that the only way that you could do that, if he needs that money, is to take it out of the business, pay the taxes on it.

He says he wants to take the money out of the business and charge it to various expenses.

I devised distribution expense accounts under various captions, and the money that was drawn out, either based on instructions to my assistant or myself, I distributed these moneys to various expense accounts so that it looks good when an examiner comes down, a revenue agent comes down to examine the books.

(1012)

I also discussed this matter with Mr. Ronayne, and was assured by Mr. Ronayne, when a revenue agent comes down and examines the records, an assessment will be made, and all we will be subject to will be penalties if we cannot support those expenses, those moneys that were withdrawn out of the business.

(1012a)

Q. How much did those moneys come to during the period of the Tavern partnership? A. I could only estimate.

Q. Give us your best recollection, Mr. Roth. A. Do you mind if I run down these expense accounts?

Q. Go ahead, sir.

Mr. Stryker: If your Honor please, I object as to the estimate. I do not find any basis for that either in the indictment or the limited bill of particulars that we did get.

Mr. Wessel: I will withdraw the question and ask another question.

The Court: All right.

Q. Mr. Roth, do you recognize the two cabinets or the three cabinets sitting on the table opposite Mr. Giglio and Mr. Lawn? A. Those are transfer files, not cabinets.

Q. Well, do you recognize them in any way? A. Yes.

Q. What are they? A. Those transfer files look like the transfer files that I gave to Mr. Giglio when I gave up my 62 William Street office, which contained all papers in connection with his various enterprises, that I had in the files in my office.

Q. Is there any way you can estimate——

Mr. Wessel: Strike that.

(1013)

Q. Is there any record that I have shown you in the last—since you have seen me, that would refresh your memory in any way as to the amount of these drawings that we were talking about a moment ago? A. I can only go by specific items that are in my mind.

Q. Do you have any specific item in your mind, Mr. Roth? A. Yes.

Q. What? A. I have the C. Goldenberg specific item in my mind of $32,780.93, and as I explained to you earlier in the day, that if Mr. Goldenberg's salary was included in that account, then there is approximately $25,000 money drawn to the order of cash, checks drawn to the order of cash, or to William Goldenberg, which were arbitrarily charged as an expense—charged as an expense to that

account. Under the caption of "Selling Expenses," of $89,000, I remember distribution——

Mr. Stryker: If your Honor please, I would have no objection if you point out to me where this evidence, attempted to be elicited, is in any charge in the indictment or in any bill that we have?

Mr. Wesel: I will be glad to, if your Honor please.

Mr. Stryker: The bill of particulars. If you (1014)

show me that, I won't object. I said the indictment. Of course I meant the limited bill.

Mr. Wessel: I am reading from paragraph 2, specifically, of the indictment as to which no bill of particulars was furnished pursuant to order of the Court:

> "It was a part of the said conspiracy that the defendants would defeat and evade a large part of the taxes due and owing by the said defendants individually and by American Brands Corporation, American Brands Wholesale Corporation, American Trucking & Forwarding Corporation."

This testimony is relevant to that charge.

Mr. Stryker: I repeat that with the exception of those items that your Honor is familiar with, alleged concealment, a bill of particulars was furnished, which defines and amplifies the charge, and I would like to be shown any part of any of that bill under which this line of testimony is admissible. If it is, I won't object.

Mr. Wessel: Counsel very ably argued this motion before Judge Palmieri, at which time Judge Palmieri denied his application for a bill of partic-

lars with regard to the conspiracy charge. The bill of particulars relates to other charges in this case.

Mr. Stryker: If you are going into that argument——

(1015)

The Court: No, we are not. I am going to overrule the objection, Mr. Stryker. Each item of evidence as it comes in, I don't think we are going to fit in with the bill of particulars.

Mr. Stryker: I respectfully except.

The Court: I don't understand that the Government was told that it must give you particulars on this, or whether it couldn't produce it.

Mr. Stryker: Then, your Honor, as to avoid interruption or delay, may I have a general objection in regard to all evidence not contained in the bill of particulars? If I have that running I won't have to stand and interrupt the examination at all. May that be understood?

The Court: All right.

Mr. Stryker: Very well, sir.

Q. Will you continue, please, Mr. Roth, with your answer? A. Under the caption of "Selling Expenses," there is an item of hotel expenses and apartment hotel, a New York apartment. I recall checks drawn to the order of cash, in round amounts, and arbitrarily distributed to that account. On the item of "Traveling, Entertainment," $34,000—by the way, Mr. Wessel, without any books and records, I can only go by memory.

(1016)

Q. I understand, sir. A. I could be more, more exacting, or a little bit more definite on books and records, but like

this I just got to draw my memory back, based on conversations and procedure and happenings in the business.

Mr. Wessel: Just wait a minute, sir.

Mr. Stryker: I wonder, while I am not interrupting the Court, if you care to have before you—I don't know whether you have or not, your Honor—the bill of particulars?

The Court: I would be very glad to have it.

Mr. Stryker: I would be glad for you to have it so that I don't interrupt, and you can just follow it yourself and see whether I am right or not.

(Government's Exhibit 60 marked for identification.)

Q. Mr. Roth, I show you Government's Exhibit 60 for identification and ask you first if you can tell me if you can identify that book? A. This book is the accounts receivable, accounts payable ledger of Tavern Fruit Juice Company partnership.

(1017)

Q. Can that assist you in answering the question I asked you with regard to these accounts? A. No, sir.

Q. Do you know whether or not Tavern partnership had a complete set of double entry books? A. Yes, sir.

Q. Would you please state to the jury what such a complete set of books would include or did include? A. A general ledger, an accounts receivable ledger or section, an accounts payable section, a cash receipt book, cash disbursement, purchases, sales invoices, payroll book. That would about cover it——

Q. When was the last time—— A. Excuse me—checkbook, bank statements—I mean, that would about cover the set of records.

Q. When was the last time, Mr. Roth, that you saw those books, except for the one in front of you? A. I would say prior—not any later than December 2, 1947, or sometime prior to that.

Q. And when you saw them, where were they? A. They were in a—either in my room at 19 Rector Street, or shortly thereafter in the storage room of the building in 19 Rector Street.

Q. Do you know where they are today, Mr. Roth? A. (1018)

No, sir.

Q. Do you have any information as to where they are today? Just yes or no to the question. A. No, sir.

Q. Now, sir, would you continue with your answer to the question that I asked you about the Tavern expense accounts. A. I would like to answer the question this way, Mr. Wessel: I recall, aside from the salaries that Mr. Giglio drew and Mr. Livorsi drew, there was a check of approximately $2,500 drawn every week, or $2,000, because we are going back 10 years.

That check, the proceeds of that check were given to Mr. Giglio. I distributed that check into various expense accounts, so as to indicate that they were true expenses or true and legitimate expenses of the business.

Now, at this particular moment, I know I had a traveling and entertainment account, I know I had a selling expense account, I knew I had a number of accounts that I arbitrarily distributed this weekly expense check. I think that is the very best way I can answer that question.

Q. All right, Mr. Roth. Now, this Mr. Goldenberg (1019)

you referred to, do you know where he made his residence during the period he was employed by Tavern? A. He made his residence in two places that I know of. One is

at the New York apartment, at 94th Street and Park Avenue, and I think part time at a hotel in New York, which name I do not remember.

Q. I show you, Mr. Roth, Exhibit 59A for identification and ask you if you can identify that document for me, please?. A. Do you want me to read this letter?

Q. No, sir, I just want to know if you can identify the document.

The attachment is a certificate which I don't think should concern you. Can you identify the sheets, the photostatic sheets which are attached? A. These appear to be duplicate copies of social security returns that were filed for Tavern Fruit Juice Co.

Q. I don't want to interrupt you, Mr. Roth, but without regard to what they appear to be, do you recognize them yourself? A. Yes, sir.

Q. Do you recognize them? A. Copies of quarterly social secrutiy returns that were filed for Tavern Fruit Juice Co.

(1020)

Q. Do you recognize them? A. Yes, sir, on account of some of the names that are listed, names of the employees that are listed on those returns.

Mr. Wessel: I offer Exhibit 59A in evidence.

Preliminary Examination by Mr. Stryker:

Q. Mr. Roth, did I understand you to say that you recognized these photostats? A. On account of some of the names that——

Q. No, my question is, did you recognize them, just yes or no. A. Yes.

Q. Did you prepare this paper? A. I do not recall whether I prepared them or one of my assistants prepared it.

Q. Have you any recollection of preparing them or seeing them prepared or having them prepared by your assistant? A. Except that in the ordinary course of business of necessity they had to be prepared and I recognize the names on the social security, the names on the returns.

Q. Do you know whether these papers were filed or not? A. I would have to check the records to see if they were filed, but being I have them there, and they were prepared, it is ordinary to file them.

(1021)

Q. Well, that doesn't quite answer my question. Do you know whether these papers attached to Government's 59A for identification—according to my count, there are one, two, three, four photostats; can you tell us whether the originals of those papers were filed? A. To the best of my recollection, they were filed.

Mr. Stryker: Just a minute, your Honor.

The Court: Yes.

Mr. Stryker: I have no objection.

The Court: All right, received.

(Government's Exhibit 59A for identification received in evidence.)

The Court: All right.

Mr. Wessel: Exhibit 59A is a series of four pages, photostatic pages of documents, to which is attached a document on the letterhead of the Department of Health, Education and Welfare.

(Mr. Wessel read from Government's Exhibit 59A to jury.)

Mr. Wessel: Now, the attached documents appear to be social security returns for Tavern Fruit Juice Co. for various periods. You will note in looking at it—and the only name I am interested in

at the moment—on page 2 is the name William
(1022)
Goldenberg, taxable wages paid under Federal Insurance Contributions Act, $1,000, and the social security number next to that name is 289-20-542.

Then on page 3, another Tavern social security return for a different period is the name B. Goldenberg and the figure next to that of $2,000, for another period, and the social security number for B. Goldenberg is the same as the one I read for William Goldenberg, 289-20-542.

The third, the last page, also has the name William Goldenberg, earnings $500, and the social security number, 289-20-542 or -342.

(Handed to jury.)

By Mr. Wessel:

Q. Mr. Roth, with regard to the Schedule I in the Tavern return in the list of partners there, did you ever have a discussion with Mr. Giglio as to who the partners in the Tavern Fruit Juice Co. were? A. Yes, sir.

Q. When was that discussion? A. At the inception of the partnership.

Q. Will you tell me, was anybody else present? A. I do not recall anybody else present.

(1023)

Q. Would you state what was said and by whom, please? A. Mr. Giglio at that time brought out the interest of Tavern Fruit Juice Co., Inc. and contemplated organizing the partnership, and I suggested to him as a means of tax reduction to organize it in the form of a family partnership, including his wife as a partner, and Mr. Livorsi's wife as a partner.

He adopted that suggestion and that is the way the partnership was organized.

(1024)

Q. With reference to the schedule attached to the Tavern return, Exhibit 7, I show you the item "Legal Fees, $1,600," and ask you whether that is a correct item? A. That item requires explanation. I cannot answer it whether it is yes or no.

Q. Will you answer it then, please? A. Sometime during the operation of the partnership a check for $15,000 was drawn to Howard Lawn. My assistant, who worked on the books and records, did not know how to distribute that check as well as many other checks, where there was doubt in his mind as to the correct distribution. To the best of my recollection, when he called it to my attention I directed him to enter that as an expense, as a legal expense. Incidentally, all those checks that were placed on the side for the purpose of explanation, so that a distribution was made, were discussed with Mr. Giglio, and I in turn instructed my assistant to distribute it, and that item was charged to legal expense.

Q. Let me ask you this question at that point: you knew you were breaking the law, Mr. Roth, did you not? A. When?

Q. When you charged those items to expense? A. The $15,000?

(1025)

Q. No, you just interjected something about having talked things over with Mr. Giglio and then entered the items in the books after that discussion. Did you know that you were breaking the law when you did that? A. I was aware of it and I knew it.

Q. Continue with your answer, please. A. Can I get the last word, the last two or three words, please.

(Read by reporter.)

A. (Continuing) Many months later, when Mr. Lawn was about to file his income tax return, he wanted to know of me how the $15,000 item was carried on the books of the Tavern partnership. I told him it was carried on the Tavern partnership as a legal expense. He told me he had to furnish all this information to Mr. Portner, his accountant. Mr. Lawn advised me that I was in error, that it was not a legal expense, that it was a loan from Mr. Giglio. I discussed the matter with Mr. Giglio. Mr. Giglio told me at that time, "Regardless of whether it is an expense or not, it's my money. It was supposed to be a loan, and if you or your assistant made an error in carrying it on as an expense, it is incorrect."

I therefore made the proper correction on the books, taking it out of the expense account and putting it in as a

(1026)

loan receivable due from Mr. Lawn.

Mr. Lawn also advised me at that time that it is a loan, because he has just made one or two payments to Mr. Giglio in payment of that loan. Naturally—it is a partnership, and a partner can do whatever he wants with money that is drawn out. I had the records changed in accordance, accordingly, and carried that item as a loans receivable due from Howard Lawn.

(Government's Exhibit 61-A and 61-B marked for identification.)

Q. Do you recall, Mr. Roth, whether the change in the books was made before or after the closing of Tavern partnership's fiscal year for 1945-6? A. I do not recall

when the change was made, but in looking at the tax return here, the change must have been made prior to filing this tax return.

Q. Would you look at Exhibit 59-A and tell me whether or not it was made after the close of the fiscal year, 59-A being the work sheet of the schedule for the Tavern expenses,? A. I would like to answer it in this manner, if I may?

Q. Go ahead, sir. A. At the time this statement was prepared for the fiscal period ending March 31st, '46, which is the same period as the tax return, the books of record indicated that the $15,000 item was a legal expense. (1027)
The tax return was filed subsequent to the preparation of this report. Therefore, the difference.

Q. "This report" in your answer refers to Exhibit 58-A. I was incorrect when I said 59-A; is that correct? A. 58-A.

Q. Now 58-A has an item of legal expenses, "16,600;" am I correct, Mr. Roth? A. That's right.

Q. And the partnership, the Tavern partnership return, has legal expenses, $1,600. A. That is correct.

Q. Do you recall whether or not 58-A was prepared after the close of Tavern's fiscal year ending March 31, 1946? A. 58-A was prepared after the close of March 31, 1946.

Q. So the change in the books which you referred to, must have taken place after the close of Tavern partnership's 1946 fiscal year; am I correct, sir? A. Between the close and the preparation and the filing of the partnership tax return.

Mr. Stryker: Mr. Wessel, would you be good enough to tell me what 58-A is?

Mr. Wessel: 58-A is a statement of assets, liabilities, income, profits and loss, and supporting schedules in regard to Tavern Fruit Juice Company partners.

Mr. Stryker: Thank you. (1028)

The Court: Is this a good time to break?

Mr. Wessel: Yes, sir.

The Court: All right, we will take a five-minute recess.

(Short recess.)

By Mr. Wessel:

Q. Mr. Roth, I show you Exhibits 61-A and B for identification and ask you if you can tell me what those two are? A. 61-A is a check drawn on the account of Tavern Fruit Juice Company by William Giglio and signed by Frank Livorsi, to Howard Lawn, endorsed by Howard M. Lawn. 61-B is the stub of a checkbook—there are three names on it. The bottom one is Howard Lawn, $15,000, and in parenthesis "Bill G."

Q. Sir, do you recognize the stub, which is 61-B, and the check, which is 61-A, as the $15,000 to which you referred a few minutes ago in connection with Mr. Lawn's legal fee? A. Yes, sir.

Q. With regard to the check stub for check No. 640, the $15,000 check, can you tell me at what time the various entries on that check stub were made? A. The date the check was issued.

Q. Is that true with regard to the parenthetical notation, "Bill G."? A. I do not know. (1029)

Mr. Wessel: I offer in evidence Exhibits 61-A and B.

Mr. Stryker: Just a question or two.

Preliminary Questions by Mr. Stryker:

Q. In whose handwriting are the entries on Government's Exhibit 61-B for identification? I think you said it is the stub book. A. To the best of my recollection, those are Mr. Cerone.

Q. How do you spell Cerone? A. C-e-r-o-n-e.

Q. He was one of your employees, Mr. Roth? A. No, he was a bookkeeper employed by Tavern Fruit Juice.

Q. Would the same be true with regard to the check, the face of the check, payee of the check? A. The payee of the check and the amount?

Q. The handwriting is what I am asking about. A. The handwriting, that looks like William Giglio's handwriting.

Q. The maker of the check and the $15,000? A. Yes, the signature.

Q. They look like his handwriting, do they? A. Yes, sir.

Q. And this 61-B for identification, you have told me that that looked like the printing or the writing of Mr.

(1030)

Cerone, did you not? A. Yes, sir.

Q. And under that check stub or in that No. 640, which corresponds with the check itself, there is a parenthetical statement, "Bill G"? A. Yes, sir.

Q. Indicating it is for Mr. Giglio's account? A. Yes, sir.

Mr. Stryker: No objection.

Mr. Wessel: I have just one question.

By Mr. Wessel:

Q. Mr. Roth, would you identify Mr. Cerone a little more fully, please? A. You mean by physical description?

Q. What is his full name? A. I think it was Anthony.

(Government's Exhibits 61-A and 61-B for identification received in evidence.)

Q. One other question, Mr. Roth. Was Mr. Lawn on the Tavern Fruit Juice partnership payroll in any way? A. Yes, sir.

Q. Do you know what his salary was? A. I think it was approximately either $250 or $350 a week.

Q. Do you know what his duties were? A. I can give you his duties based on conversation both with him and Mr. Giglio.

(1031)

Q. Please do that. A. His duties were to develop the jelly product for consumer packaging purposes on a national scale, and at the same time his duties were interested in research, in finding a substitute for sugar.

Mr. Wessel: (To jury) Exhibit 61-A is the $15,000 check to Mr. Lawn, signed Frank Livorsi, and Exhibit 61-B is the check stub. The first two items mean nothing but the third is the check stub for that check.

Q. Mr. Roth, I show you Exhibit 6 in evidence, which is the Eatsum partnership return for the period ending May 31, 1946, and ask you if that is a tax return which you filed with the United States Government? A. Yes, sir.

Q. Specifically, sir, with regard to the first item, "Gross receipts from Business or Profession," 4 million 700-odd thousand dollars, is that a true and correct item? A. No, sir.

Q. In what respect is it not true, sir? A. It is not true in two respects. In one respect, one phase is an overstatement of sales, and one phase is an understatement of sales.

(1032)

Q. Would you explain, please? A. At the inception of the corporation, sales were made of merchandise which were carried over from Tavern Fruit Juice Co.——

Q. Mr. Roth, I don't mean to interrupt. But I have shown you the Eatsum Food Products Co. A. Excuse me.

Q. That is not a corporation, am I correct, sir? A. I was talking, thinking—excuse me.

On the 4,794,000, it is incorrect that the cash income or profits that resulted from the sale of corn syrup is not included as income to the partnership.

Q. Well, now, how much was that income or profit, do you know? A. I know by conversation, statement, testimony, but not by actual count.

Q. With whom were the conversations you have just referred to? A. One of the conversations was with Mr. Giglio to the extent——

Q. Don't give us the conversation yet, but just one of them was with Mr. Giglio? A. Yes.

Q. Was any with Mr. Livorsi or Mr. Lawn? A. No, sir.

Q. Did you also have working for you an accountant named Arthur Hausman? A. Yes, sir.

(1033)

Q. Did he have any duties with regard to corn syrup? A. He was in complete charge of the examination of the records for me of Eatsum Food Products Co., which included corn syrup cash, and candy cash.

Q. Did he ever report to you with regard to—and you can answer this yes or no, Mr. Roth—with regard to the amount of money or profits on corn syrup sales in Eatsum?

Mr. Stryker: One moment. I should think that was pure hearsay.

Mr. Wessel: I ask only for a yes or no answer, if your Honor please. Did he ever report to the witness with regard——

Mr. Stryker: That, in turn, is hearsay. Unless it was done by one of the defendants or in the defendants' presence, it is hearsay.

The Court: I will let him answer yes or no.

A. He reported to me from his working papers, which I haven't got.

The Court: All right.

By Mr. Wessel:

Q. Were his working papers made by him in the regular (1034)

and ordinary course of Eatsum's business and your business as an accountant? A. Yes, sir.

Q. And was it a part of the regular course of Eatsum's business and your business as an accountant, or Mr. Hausman, to make those reports? A. Yes, sir.

Q. Well, now, first of all, what did Mr. Giglio tell you with regard to the amount of income or profits on corn syrup sales? A. That the amount was $140,000, which was the excess of currency coming in over currency going out, and that was the amount that was left over in the cash box at the time that there was a termination of the corn syrup transaction.

Q. You mentioned the cash box, Mr. Roth. When, for the first time, did you learn of a cash box? A. At the beginning of the Eatsum partnership.

Q. Will you state how it came that you learned of that fact? A. In manufacturing corn syrup it was impossible to get the raw corn, and in order to have a supply—excuse me, Mr. Wessel, you must turn your mind back into 1946. I am talking now of 1946, and the conditions throughout the country in getting raw material.

(1035)

In order to be able to secure raw material you had to pay a certain amount of money per bushel of corn over and above the billing price.

Q. I don't want to interrupt you, Mr. Roth, but I think that is all in evidence and I don't want to repeat it now.

Isn't it the fact, Mr. Roth, that you were the one who was responsible for the setting up of the cash box? A. Yes, sir.

Q. When was that? A. At the inception of the corn deal transaction.

Q. Did you discuss that at all with Mr. Giglio, Mr. Livorsi or Mr. Lawn? A. My discussion was with Mr. Giglio, not with Mr. Livorsi or Mr. Lawn.

Q. When was the discussion? A. The discussion went during the course of the examination of the books and records of Eatsum Food Products as a single proprietorship up to the discussion, up until and after the partnership was organized?

Q. What was said in substance, Mr. Roth, please? A. In the examination of the individual proprietorship records, they bought a tremendous amount of merchandise, candies, glucose, other raw material products, let us assume for a moment, at 5 cents a pound, but they had to pay 3 cents a

(1036)

pound in black market. When Mr. Lubben, the proprietor of Eatsum Food Products Co., recorded the purchase invoice at 3 cents a pound, he made a notation on the creditor's invoice that he paid him cash 2 cents a pound; he drew a check to the order of the seller of 5 cents a pound, and a check to the order of cash for the difference, and recorded both transactions in his book.

Mr. Hausman had a separate memorandum of that particular operation, because in purchasing a business we go into it exhaustively, and I called that to Mr. Giglio's attention.

He said, "Well, we can't operate that way, because I am not in the habit, when I do business with individuals on a cash basis, to have such type of records where I will get them into trouble after they accommodate me in order to sell me merchandise. That will have to be eliminated in the partnership."

When we went into the corn deal we eliminated that.

The corn deal I am talking about is when the partnership was organized; we eliminated that particular method of recording the transactions on the corn deal operation.

(1037)

Q. When you say "we eliminated it," do you mean that you are the one that set up the cash box and its operation? A. Yes, sir.

Q. And did you in the regular course of your business assign Mr. Hausman as part of his duties to audit the cash in the cash box? A. Yes, sir.

Q. Did there come a time, Mr. Roth, when the Eatsum partnership was dissolved? A. Yes, sir.

Q. At that time did you have any discussion or did you hear any discussion at which Mr. Giglio was present with regard to the amount of money in the cash box, and its distribution? A. No, sir.

Q. Well, did you hear anything, any conversation in which Mr. Giglio participated, in which reference was made to the amount of money in the cash box? A. There was one conversation when Mr. Lubben returned from Cuba, and he desired to terminate his relationship as a partner, he wanted to get out.

Q. Are you talking about a conversation, Mr. Roth? I don't want to interrupt you, but are you referring to a conversation? A. I am referring to a meeting and a conversation.

Q. Was Mr. Giglio present at this meeting? A. Yes, (1038)
sir, it was in his office.

Q. Would you continue, please. A. And I think Mr. Livorsi was present at that time, and Mr. Lubben was present and I was present.

Q. Anybody else? A. I do not recall anybody else present. I will also say I am not a hundred per cent positive whether Mr. Livorsi was present, but to my recollection he was present.

Q. Please state what happened at that meeting, Mr. Roth? A. Mr. Lubben returned from either a business or a vacation trip from Cuba and prior to leaving he wanted to terminate his business association.

He came back, and one day I was called in to Mr. Giglio's room, and there was a discussion as to dividing the assets of the partnership and the paying out of David Lubben.

Mr. Lubben wanted the plant that was originally turned over to him as a proprietor to the partnership as part of his investment. He also wanted the merchandise inventory. When I say that, he wanted to purchase the merchandise inventory at a certain price and to be given time in order to pay for it.

There was pending at that particular time an uncom- (1039)
pleted contract for ten cars of corn syrup, on which there was an estimated profit of approximately $25,000, and Mr. Giglio, by arrangement and agreement with Mr. Lubben, permitted him to complete that contract, and he was to receive approximately one cent a pound for his effort to complete the contract, and the proceeds were to be turned back to the partnership.

Mr. Lubben started to talk about the cash box, and Mr. Giglio asked me to excuse myself, and I left his office, and went into my room.

About five minutes later—Mr.—within five minutes, Mr. Lubben——

Q. Don't say what Mr. Lubben said to you.

Continue. A. Within five minutes Mr. Lubben came to my room and asked me——

Q. Don't say what he asked you. A. Oh.

Q. Mr. Giglio wasn't present at this time; correct? A. No, not when he came into my room.

Q. Did he leave your room? A. Yes.

Q. Then what happened? A. Well, as Mr. Lubben was leaving my room, Mr. Giglio came to my room.

Q. Then what happened? A. I didn't hear you.

(1040)

Q. Would you now state what was said? A. Mr. Giglio says, asked me, "What did Dave Lubben want?" because he saw him walk out.

I says, "Mr. Lubben asked me if there was any OPA trouble while he was away. I told him I do not know of any."

He says, "Well, hereafter don't discuss those matters with him."

I think I answered your question.

Q. Incidentally, Mr. Roth, did you ever pay any bribe to any OPA officials? A. Yes, sir.

Q. Now, did you have a conversation again with Mr. Giglio about the corn box? A. About a day later I asked Mr. Giglio, or within two days after that, when I knew Lubben, David Lubben was out of the Eatsum partnership, Mr. Giglio told me that he sold him the merchandise at designated prices, and we billed it to General Confections,

and we got a $75,000 advance from a factor and also a series of notes for the balance that was due.

He told me that he gave him back his plant. He told me that I am to follow up the equity on the ten cars of corn syrup, see that the notes are collected.

I asked him, "What about the cash box?"

(1041)

He says, "Never mind, I took care of that."

Q. Did you follow up on the ten cars of corn syrup? A. Yes, sir.

Q. What happened with regard to those ten cars? A. I don't think the ten cars were complete. I only think about four or five cars were complete, and somehow or other the contract lapsed. I do not remember the reason, or what reason Dave Lubben advanced, but the partnership never received the benefit for the full, uncompleted portion of the contract.

Q. How much did the partnership receive the benefit of, Mr. Roth? A. I would say approximately four to five cars of corn syrup.

Q. Do you know how much money that involved? A. I could estimate.

Q. Would your estimate be pretty close to what the actual figures were? A. Usually a car was——

Mr. Stryker: Just a minute.

Mr. Wessel: This calls for a yes or no answer.

Mr. Stryker: Well, I object to his estimate, mere guessing. If this witness can say that he knows, of course, that is admissible.

(1042)

The Court: I think he is entitled to give an estimate or a guess. I will overrule the objection.

Mr. Stryker: Exception.

By Mr. Wessel:

Q. Let me ask you this way, Mr. Roth: What is your best recollection of the amount of money that the partnership received as the result of these four or five carloads of corn syrup which came in after Mr. Lubben left? A. Approximately $6,000 to $6,500 a car.

Q. Now, Mr. Roth, this $140,000 in the cash box, was that amount ever included in the Eatsum partnership return—— A. No, sir.

Q. —under gross receipts? A. No, sir.

Q. And was the proceeds from these four or five carloads of corn syrup ever included in the Eatsum partnership return at any time? A. No, sir.

Q. Do you know whether or not it was included in the individual returns of Mr. Giglio or Mr. Livorsi? A. I can't answer that with a yes or no.

Q. Well, let me ask you this question: Apart from the figure in the income tax returns of Mr. Giglio and Mr. Livorsi, on page 2, other income, $50,000, do you know

(1043)

whether those amounts are included in these two returns? A. I can't answer that yes or no either.

Q. Why don't you answer it any way you can, then, Mr. Roth, please. A. At the time these tax returns were being filed, Mr. Giglio was present in my office, together with Mr. Ronayne.

Mr. Ronayne was very particular to make sure that all the income of any of the enterprises were included, because it was his responsibility—this may not be responsive, but I am going by way of explanation, Mr. Wessel.

Q. Go ahead. A. It was his duty and it was his responsibility to take care of these tax returns when an examination would be made.

At the time of filing these tax returns, I think I called him in order to discuss the various pencil figures and memorandums.

Mr. Giglio said to him, "We have additional income on Eatsum Food Products Co."

Mr. Ronayne turned around and asked me, or Mr. Giglio asked me, "How much was the miscellaneous income the previous year?"

I told him $15,000.

(1044)

Mr. Ronayne said, "Make sure that you include all the income that you received from the cash box. Put it in miscellaneous income."

Mr. Giglio turned around to me and said, "Put in $50,000 on the miscellaneous income," adding $35,000 to the $15,000 that we usually had in previous years.

Q. When you said "usually had in previous years," when did you first start putting a miscellaneous income into Mr. Giglio's and Mr. Livorsi's personal return? A. 1944.

Q. Did that come about as a result of a conversation with Mr. Giglio? A. Yes.

Q. What was the conversation?

Mr. Stryker: One moment. I think that calls for a mental operation.

Mr. Wessel: I asked for the conversation.

Mr. Stryker: And it is before the indictment period, calling for something, some transaction, I don't know what, prior to the time alleged in the indictment.

Mr. Wessel: This conversation, in the first place, of course, is not operation of mind; it is fact.

In the second place, if your Honor please, this conversation is what led to the $50,000 in the indictment.

(1045)

The Court: Overruled.
Mr. Stryker: Exception.

By Mr. Wessel:

Q. Can you state the conversation of Mr. Giglio, please? A. In preparing the tax return, and asking Mr. Giglio whether he has any additional income besides that what was indicated on the tax return, he says many of his friends filed tax returns, and they put an arbitrary amount in, in order to cover any possible income that they may have overlooked to include. I think the first year it was $5,000—I am going by memory—in 1944, the miscellaneous income amount was $5,000. I think in 1945 it was $15,000. 1946 it was $50,000.

(1046)

Q. I ask you, Mr. Roth, apart from the $50,000 "Other Income" item in these two returns, were the proceeds or profits from the corn syrup sales put into Mr. Livorsi or Mr. Giglio's tax return, in any place? Do you understand my question? A. No, sir, I don't.

Q. As I understand your answer, it may or may not be that the corn syrup sales are in this $50,000 item; is that correct? A. I can only give you the conversation that existed.

Q. Is there any other place in these two tax returns where the proceeds of the corn syrup sales might be included? A. I do not know of any.

Q. Mr. Roth, with regard to schedule I, the partners' shares of income and credits for Eatsum, can you tell me whether the persons listed as partners in Eatsum actually received the amounts of money set forth next to their names? A. No, sir; and by that very same token, neither William or Margherita Giglio or Frank Livorsi receive the amounts of money that is set forth against their names.

That is a distributive share of income and has nothing to do with received. It has rather to do with earned.

Q. Now, sir, do you know what amount of money that.

(1047)

Mr. Ronald Stone earned from Eatsum partnership in the fiscal year ending 1946? A. I can only answer that question as a result of the examination of the general ledger that I made about a week ago and made a summary of all those items.

Q. Well, I won't ask you that. Do you know when Mr. Ronald Stone left the partnership? A. I would say about four months after he—four months after he came into the partnership.

Q. Would that be before the end of Eatsum's fiscal year? A. Yes, sir.

Q. Was the distributive share set forth next to his name, the distributive share for the entire fiscal year of Eatsum's operations?

Mr. Wessel: I don't think I have made myself clear.

The Witness: I lost you.

Q. Well, let me ask you another question. Now, Mr. Loperfido, when did he leave the partnership? A. About December, about December 1946.

Q. And when did Mr. Lubben leave the partnership? A. About March 1946.

Q. And when did—— A. No, excuse me. I got the years wrong. Mr. Loperfido, about December 1945.

Q. Mr. Lubben? A. About March or April 1946.

(1048)

Q. And Mr. Hankermeyer? A. Simultaneously with Mr. Lubben.

Q. Were any of the persons whose names I have just mentioned, partners during the entire fiscal year of Eatsum, ending May 31, 1946? A. No, sir.

Q. Am I correct that the only partners during the entire fiscal year of operations were Mr. and Mrs. Giglio and Mr. and Mrs. Livorsi? A. Yes, sir.

Q. Now, sir, I ask you whether the distributive shares set forth in Schedule I, are not based upon a full year of operation? A. It is based on a full year operation in proportion to the percentage of their share of the limited partnership, designated at the inception of the partnership.

Q. And do you know whether or not the persons whose names I have mentioned were entitled to receive the distributive share I mentioned? A. No, sir.

Q. You don't know? A. Well——

Q. Do you know? A. They were not entitled to receive. That was my answer.

Q. I show you, Mr. Roth, Exhibit 46, and ask you first if you can tell me what that document is, 46 for identification? Can you tell me what it is? A. It is an affidavit that I submitted to the Treasury Department in Brooklyn, re-

(1049)

citing the fact——

Q. Without regard to its contents, Mr. Roth——A. Without what?

Q. Without regard to its contents, is it an affidavit which you signed? A. Yes, sir.

Q. And to whom did you give it? A. It was submitted to the—I don't know who I gave it to, but it was submitted to the Treasury Department in Brooklyn, in connection with Frank Loperfido's income tax returns.

Mr. Wessel: I offer it in evidence.

Mr. Stryker: I have no objection.

(Government's Exhibit 46 for identification received in evidence.)

Mr. Wessel: (To jury) Exhibit 46 is an affidavit dated May 8, 1950, signed by Louis J. Roth. It reads in part: (Reads from exhibit to jury and then hands to jury.)

Q. Mr. Roth, when you filed Exhibit 6, the Eatsum partnership return, did you know that the partners whose names were set forth in Schedule I were not entitled to receive the sums of money set forth next to their names? A. I did.

Q. Did you have any discussion with Mr. Giglio on that subject? A. Yes, sir.

Q. When and where? A. The discussion I had with (1050) Mr. Giglio was prior to filing the tax return, and I indicated to him the respective shares that was due to the partners. I told him—I pointed out to him what shares each one of the partners were entitled to, based on the partnership agreement, what they received, and what their distributive share would be.

He said, "File it in accordance with the partnership agreement. If and when there will be any kicks, I am responsible for David Lubben's tax return. I don't expect any difficulty from Frank Loperfido. As far as Frank and my return, Jim Ronayne will take care of all those items; when we receive an examination there may be surcharges by the revenue agents, but it will be taken care of by Jim Ronayne."

Q. Was anyone else present at this conversation? A. I do not remember.

Mr. Wessel: If your Honor please, I think this would be an excellent time to stop. I can start a new

subject, but I have finished—perhaps I should start another one.

The Court: Well, if we can seven minutes work done somehow; we can get some papers marked.

Q. Mr. Roth, I show you Exhibits 2 and 4 in evidence, which are the individual tax returns for Mr. Giglio and (1051)
Mr. Livorsi, and ask you if you prepared and filed those returns? A. Yes, sir.

Q. I notice, Mr. Roth, that your signature does not appear on those returns. Can you tell me why you failed to sign those two returns?

Mr. Stryker: I object to the mental operation of the witness in that regard.

The Court: Overruled.

Mr. Stryker: I except.

A. Whenever I am doubtful about the contents of a tax return, I never put my signature on it; or——

Mr. Stryker: Just for information, Mr. Wessel, what return are you talking about?

Mr. Wessel: Just a minute. I will explain. This is Giglio's and Livorsi's personal return. Counsel will have opportunity to cross-examine.

Mr. Stryker: Thank you.

Q. You had said "or" Mr. Roth. A. These two particular returns, at the time that I filed it, I knew it was wrong and I did not want to put my signature on it because I knew there was evasion on it, in hope that I would not involve myself by putting my signature on the tax return.

Q. Is that also true of the Eatsum return, which is (1052)
Exhibit 6? A. Yes, sir.

Q. I notice, Mr. Roth, that you did sign the American Brands Corporation consolidated return. Was there in your mind any difference between that return and the ones you have just referred to, which you did not sign?

Mr. Stryker: Pardon me. I have the same objection. It calls for a mental operation.

The Court: Same ruling.

Mr. Stryker: Exception.

A. On the American Brands tax return, at the time that I prepared it from the books of records—is this 1946—I did not think it was fraudulent except for the affiliations or consolidation schedule.

Q. Do you know, Mr. Roth, whether the affiliation or consolidation schedule in Exhibit 8 was prepared in a different place than the return itself, that is, the sheets of Exhibit 8 on the outsides?

The Court: Read the question back.

(Question read.)

A. Yes, sir.

Q. Where was that affiliation schedule prepared? A. To the best of my recollection that was prepared in Mr. Ronayne's office.

(1053)

Q. Mr. Roth, I want to ask you with regard to each—well, first with regard to Exhibit 2, which is Mr. Giglio's tax return, was any payment made with the return when it was filed? A. I do not remember any payment being made at the time the return was filed.

Q. Was any payment made with regard to Mr. Livorsi's return when it was filed? A. I do not remember any payment being made when Livorsi's return was filed.

Q. Was any payment made in connection with Exhibit 8, the American Brands Corporation consolidated return, when it was filed? A. No payment was made at that time. May I call this to your attention, Mr. Wessel: When Exhibit 8 was filed, this consolidated return, simultaneously other papers were filed with the Government, with the hopes of deferring payment.

Mr. Stryker: I move to strike that out, a mere mental operation of what he says somebody's hopes were. His conversations with any of the defendants, of course, are admissible.

Mr. Wessel: All right.

Q. Was any paper filed when you filed American Brands Corporation consolidated return?

Mr. Stryker: Have you ruled on my motion?

The Court: Yes, motion granted and the jury is (1054) instructed to disregard it.

Mr. Wessel: I join in the motion.

Mr. Stryker: Will your Honor instruct the jury to disregard it.

The Court: I already have.

Q. Was any paper, other paper, filed at the time you filed the American Brands Corporation's consolidated return? A. Yes, sir.

Q. What paper was that? A. It was a paper indicating to the government that American Brands Corporation is suffering an operation loss, the consolidated American Brands Corporation was suffering an operation loss during the year 1947 and at that time it was not necessary to pay the tax that was due on the 1946 return, but to apply it

against the anticipated loss that would occur in 1947, in other words, what is commonly called a "carry-back."

Q. I show you, Mr. Roth, Exhibits 17-A through D in evidence, and ask you if those are declarations of estimated tax which you filed on behalf of William Giglio? I am not referring to the two sheets in between. A. These two declarations I filed in behalf of Mr. Giglio.

Q. And that is Exhibit 17-A and Exhibit 17-D; is that correct, Mr. Roth? A. That's right.

(1055)

Q. Did you have discussions with Mr. Giglio in connection with the filing of those returns? A. Yes, sir.

Q. And when I say "returns" I mean estimated tax returns. Would you state what those discussions were, please, Mr. Roth? A. I pointed out—the first estimated—the first return of the declaration of estimated tax, I pointed out to Mr. Giglio the approximate amount of tax liability. At my suggestion the first declaration I prepared was in the amount of $4,000, and on the quarterly basis a thousand dollars was paid.. The second declaration I recall preparing in the amount of $10,000—excuse me, $11,000—deducting the first thousand, leaving a $10,000 balance, and $2,500 to be paid. In discussing it with Mr. Giglio he told me to disregard it; we will duplicate the first declaration. At the third declaration I did the same thing, and we disregarded the increased amount. However in the declaration that was filed in January 1947, I insisted that an amended declaration be filed, and I did file an amended declaration in the amount of $26,000 as the estimated amount of tax liability, against which a $3,000 payment was made, leaving a balance at that time to be paid of $23,000. However, Mr. Giglio only wanted to send them additional—send the Treasury Department an additional

(1056)

$1,000. I pointed out to him that we are going to get into difficulty. He figured the only thing is that he needs the money at that time for the operation of the business, for research, and based on his knowledge, his advice, the only thing he would be subject to is interest and a penalty for incorrectly estimating—for incorrectly filing his declaration on the estimated amount of tax liability.

Q. I am not entirely clear on parts of this, Mr. Roth. When was the first amended declaration filed, amended declaration? A. The first amended declaration that was filed was January 1947.

Q. And these two other $10,000 declarations, that you suggested to him, were never filed? A. Were prepared but never filed.

Q. Did you know what the requirement was for paying on estimated tax declarations? A. Yes, sir.

Q. What was that requirement? A. Approximately 25 per cent of your tax liability, to be spread over quarterly periods of the year.

Q. Did you advise Mr. Giglio of that requirement? A. Yes, sir.

The Court: Would this be a good time to break?

Mr. Wessell: I think so.

(1057)

The Court: All right. We will recess to 10:15 tomorrow morning, and don't discuss the case.

(Jury excused.)

The Court: Could I see counsel on motions in chambers?

(The following took place in the robing room:)

The Court: You have a motion now, Mr. Wessel?

Mr. Wessel: First, if your Honor please, there

has been some colloquy with regard to various exhibits, checks, some of which were in evidence and some of which were excluded. The checks I am referring to are Defendants' Exhibits S, T, U, V, W, X, Y, Z, AA, BB, CC, DD, EE, FF, and GG.

I wish at this time to renew my objection to all those checks, some of which are in evidence—most of which are in, some of which are not in evidence—on the grounds that there is in evidence two pages of the Eatsum general ledger which charge those checks according to the books; that the testimony of Mr. Lubben does not in any way relate those checks to any issue in this case, and therefore they would serve merely to confuse the record and are not—there is no proper foundation for them.

The Court: Mr. Stryker?

(1058)

Mr. Stryker: When those checks were offered, you recall the setting in which they were offered, was a statement by Mr. Lubben as to what he said he got from the partnership—machinery, and so on; and I asked him if that is all he got and he said that was so.

I then proceeded to show that statement was not true by offering, and your Honor receiving in evidence, a group of checks aggregating I should think $60,000, or something like that.

Mr. Wolfram: That was the amount that was received in evidence.

Mr. Stryker: That is the amount, approximately that, received in evidence.

I also offered a considerable number of other checks, I think signed by David Lubben, as I remember it, and I think many of them—and I am

speaking now from recollection—making him the payee and the endorser.

Now Mr. Lubben's credibility in this case is certainly one of the very vital issues in this case. He had testified on direct about the termination of the partnership, and this was one approach that I had that seemed to me directly relevant as bearing upon his veracity in that important aspect of the case. That is why they were admitted, those that were, and I

(1059)

felt that your Honor understood it when you did do it. It seemed to me that you did; and I frankly could never understand, although it is your job to order and mine to obey, why you didn't admit the others. I think frankly they should have all gone in.

The Court: Let me try to explain my position, and if I am wrong, you can clear me up.

Now I never let those checks in on the question of credibility. The question that you brought out was, I think, in cross-examining him to his testimony before Kefauver. He didn't say on direct "All I got out of the corporation was some lousy machinery." He said that he got his regular drawing, and he described in some detail his dissolution agreement. Then you questioned him about the Kefauver testimony, and down there he made that statement that "All I got was some lousy machinery."

Now I think, and this would be a matter for argument—but I think—and I think the cross examination still leaves it open, that he was referring to what he got on dissolution and not what he got during the going period of the partnership. But that is a matter for your examination of the testimony.

But regardless of how you take his testimony, I (1060)
don't think it is then proper, having asked him that on cross, to bring back a lot of checks to show that his answer on cross was inaccurate. But even if it was, we will go one step further; assuming for the sake of argument that it was, these checks don't show that he took that money for his personal purposes. We know apparently that they did business in cash, and all you have here is a series of checks drawn to Lubben.

Now what he did with them we don't know. Some of them went into his account, his personal account, but that group that I sustained, that I reversed myself on, didn't. At that point it seemed to me that Lubben was simply being faced with a series of checks which he had signed and drawn to himself, he not now remembering why, and at that point I said that they meant nothing, and his speculation as to them meant nothing, and at that point I think you put in the ledger, and I think the ledger covers this, unless you think somehow that ledger is wrong.

Mr. Wolfram: May I say a word, your Honor?

The Court: Yes.

Mr. Wolfram: On the first point, Lubben testified on his direct examination that at the Ronayne conference he was shown the partnership information return and he said to Mr. Ronayne, "I never (1061)
got that $100,000." Now——

The Court: Wait a minute now. The hundred thousand dollars——

Mr. Wolfram: That was shown on the——

Mr. Stryker: His share of the partnership return.

Mr. Wolfram: Now I think a very vital issue in this case is whether what Lubben got and what Giglio got——

The Court: Mr. Wolfram, let me clear that up. I agree with you on that. Now that to me is not an attack on Lubben's credibility, although that may be incidental. If you are going to show that this hundred thousand dollars went out of the Eatsum partnership to Lubben as an expense of the partnership, why that is something different, but to me these checks don't establish that. There are a whole series of invoices that Lubben can't now remember what they are for, and I think you have got to establish it through the ledger.

Mr. Wolfram: Now, if your Honor please, I think the only way you can establish what those checks went for is to show them to the man who drew them, and in many cases they were drawn to his order. In many cases they were endorsed by him and I think we are entitled to explore the entire

(1062)

field to see whether he did or did not receive them. If all he has to do is come here and say, "I don't remember," and that forecloses all questioning——

(1062a)

The Court: It forecloses your cross examination of him, I think.

I mean, what you did, you showed him something like 50-odd checks, ten years old, and he told you that some of them went into his account, from the endorsement. Others he did not know what they were for.

He said that there were records which were part of the Eatsum partnership records, which showed in detail what each of these checks were for. He no longer had them; he left them with the defendants.

Now, at that point, I don't think you can go any further with that witness. That is not to say you can't establish, by other witnesses or any other way you can, that these moneys were expenditures of the corporation.

Now, maybe the ledger establishes it for you. I have not compared the ledgers and the checks.

Mr. Wessel: If I may explain for a moment, Mr. Wolfram, I think it is really a tempest in a teapot.

If I recall the Eatsum general ledger, I am quite sure of this, there is indicated close to $200,000 of drawings by Lubben—in that area. It is an awful

(1063)

lot of money, there is no question about that. That is in evidence now. If these checks are somehow to be related to the amount of his drawings, rather than the issue of credibility referred to before, then there must be some foundation that they in fact were drawn, as distinguished from some other partnership expense.

That foundation is not there.

The Court: That is the point that is the basis for my ruling.

Mr. Stryker: How can I do it? How can I at least start to do it, except from the man who got the checks?

Mr. Wessel: He doesn't know. He said he wasn't the accountant.

Mr. Stryker: He is the payee.

You show me a check that I signed, drawn to my order, and deposited by me in the bank. That is the only way you can start that I know of.

Mr. Wolfram: There is one specific group of checks that your Honor excluded, where Lubben was the drawer of the check. He signed the check. The check was either made out to cash or to his order, and deposited in his personal bank account in the Manufacturers Trust Company.

(1064)

The Court: I don't recall excluding any such checks.

Mr. Wolfram: They were, your Honor, and I can show you the checks. I think we have them here.

The Court: He wouldn't say they were in his own account. He said "They were deposited in the Manufacturers Trust Company, but I don't know whether they were in my account or not."

Mr. Wessel: Those checks are drawings, and they are in the books.

Mr. Stryker: Wait a minute, Mr. Wessel. This is the way I see it, anyway: Now, lay aside credibility, which I think at least is vital here. I have done what I could about it as far as we have gone. We are not through yet.

Here are partnership transactions. Here is something occurring in the ordinary course of business in the partnership, and here are these groups of checks, as Mr. Wolfram has just stated.

Now, am I to have those checks out of evidence —if he can show that he gave them to the Ladies

Christian Union or something, that is up to him. Prima facie, there they are.

(1065)

If he has some other explanation than that that he cares to advance under oath, I personally would be delighted to hear it. That is as far as I can go with him.

When we come to the ledger, I think you are talking about the Eatsum ledger?

Mr. Wessel: Yes.

Mr. Stryker: Now, when you come to the ledger, that ledger, as I understand it, was kept during the administration of the distinguished witness we now have on the stand—and you will get a little better view of him before we are through, I think.

Mr. Wolfram: I don't know whether he kept it or Bercu.

Mr. Stryker: I don't know whether Roth or the other accountant. Now, am I going to be left with some accountant like Roth or Bercu, when I have the actual checks there?

Mr. Wolfram: And the witness.

Mr. Stryker: And the witness who acknowledges his signature.

Mr. Wolfram: You see, your Honor, the fallacy —excuse me.

The Court: Let me just make that clear. As I

(1066)

see it, Mr. Stryker, you are not quite in that position. The witness' testimony is that you not only have the checks, you have got all the records that explain them.

Now, you are pulling out fragments of the records which you have, and which the Government

can't call on you to produce, and you are questioning Roth—I mean, Lubben, as to these checks. I mean, you have got checks with invoices in the files, check stubs, ledgers, and your records explain where they go. You pull out the check out of that context and say to Lubben, "Here is a series of checks which you drew ten years ago; tell us what they are for, and if you can't tell us what they are for, inasmuch as you are the payee you are going to be charged with them."

Now, I don't think that holds up.

Mr. Stryker: Well, now, I will tell you, Judge, in interrogating him, I asked him to state what ever record he meant, what ever record he thinks I have, and I think I said if he mentioned it I would produce it if I had it.

I think I said that.

Mr. Wolfram: Well, I think the record that (1067)

everybody is referring to is the record that the Government had and did produce and told us that here is what we are bound by.

Mr. Wesesel: That is right.

Mr. Wolfram: In effect, they said, "Here are the ledger pages and this is what the account of Lubben looks like and there it is."

The Court: I gathered, Mr. Wolfram, that as I recall Lubben's testimony—and I am not too accurate on this—I got the impression that there were invoices and slips which explained each check. Now that is what I remember.

In other words, is a system of files.

Mr. Wessel: To explain the books, I said, as I recall, when I produced it, "Here is the only book the Government has and here it is."

The general ledger, as I think it is clear from the testimony already in this evidence, is nothing more than a general summary of a lot of underlying books. The underlying books would, of course, handle particular detailed transactions and their conclusions are transferred to the general ledger.

We do not and have never had, so far as I know, the underlying books, and then, under the books themselves, (1068) are the various vouchers, and the vouchers themselves note what a particular check is for.

Mr. Lubben was referring to the voucher. He doesn't even know where the books are.

The Court: I think your check stubs—I don't know what you call them—in a simple set of books, those check stubs would tell you what those checks are for.

Mr. Wessel: In more complicated books, check stubs are transferred into various ledger accounts, journals.

Mr. Stryker: Well, your Honor is aware that the Government took our books in the summer of 1952. I think you ought to get these dates a little bit in your mind. I don't think you have had them.

In the summer of 1952, when they subpoenaed the defendants themselves, they had all of the books that we could find, being told, "Bring this up overnight in a station wagon." About two tons of stuff went up.

All right. Now, the Government had those books steadily from sometime around July of 1952 until straight into, well, take it by stages, March, 1953. (1069)

Now, there was an interval there between the time that I made the motion and Judge Goddard finally granted—I think I made the motion in January. There was a small interlude there of—is that wrong?

Mr. Wolfram: No, I think you are right.

Mr. Stryker: — of about six weeks or so, when Mr. Leone permitted us to have our accountants come up and start work.

It is interesting to note, I think, that one of them was Mr. Roth himself.

When Judge Goddard granted my motion, which I think was about March 27—I am pretty close to it—well, then the indictments were gone, and there was nothing more to investigate; there really weren't any charges, and no investigation went on.

However, by a stipulation I permitted all the books illegally taken, as well as those which might have been legally taken, like the corporate books, to remain in the Government's custody.

I think I signed a stipulation to that effect. I believe there was an order. And they did so remain down until, I think, November of last year, when I made the motion before Judge Palmieri.

(1070)

It was about that time—and I would say it was in November that then the books illegally taken from us, the partnership and personal records, were returned to us.

Is that about, the chronology, Mr. Wolfram?

Mr. Wolfram: I don't know the dates exactly but it was about that.

Mr. Stryker: Well, approximately correct.

Mr. Wolfram: Approximately.

Mr. Stryker: All right. Now, during all that time the Government had an opportunity to examine it, and partly an opportunity that they should not have had but they did have it, and here comes this witness and I find these checks.

I start this inquiry for a number of purposes, but here are checks drawn by the witness, made payable to the witness in many instances, many instances endorsed by him personally or by one of his people.

Mr. Wolfram: And used for his purposes.

Mr. Stryker: And used for his purposes.

The Court: We don't know whether they are used for his purposes.

Mr. Wolfram: Cheel, Altman, the salary checks.

Mr. Stryker: Just thake those whole bunch (1071)

of checks for Cheel and Altman.

The Court: Now, Cheel is in, I think.

Mr. Stryker: Yes.

The Court: They are in. And two Altman checks are in.

Mr. Wolfram: Mr. Wessel's motion would include them.

Mr. Stryker: Would include them. And Altman—certainly not a partnership transaction—I think they aggregate—well, I don't know; I think $40,000 or something.

The Court: Well, now, the ledger shows—how does it show those checks?

Mr. Wessel: It shows, I believe, that those items were charged to Mr. Lubben. That is the sum of it.

The Court: Your objection there is merely cumulative?

Mr. Wessel: The only thing I am afraid of, if your Honor please—and, of course, I wouldn't be making the motion unless I had some concern about it—is, adding things up before a jury, a general ledger of 180,000 and then taking 60,000 more in checks and then saying "Here is $240,000," when there is no foundation for that; it isn't so.

(1072)

Mr. Stryker: Let's take it up in branches.

I think this—if I am not talking too much—let's take three items, three categories: Cheel, his own construction out there; B. Altman, the same; the salary checks, I think they are about $500 a month—I forget what they aggregated.

Mr. Wolfram: $500 a week.

Mr. Stryker: It came to eighteen, twenty thousand.

The Court: Excuse me, would it disturb you—just so I am clear—are those the checks that are in, the salary checks that is the batch that I started to strike out and then I reserved decision?

Mr. Stryker: Yes, sir. You have three categories to start with.

The Court: Those are in now.

Mr. Stryker: Salaries, Cheel, Altman. Those are in. Now, let's take this motion piecemeal, if that is a good way to do it.

The Court: Yes.

Mr. Stryker: I can't see any reason in the world, any possible reason for striking those.

I think in many instances—I think in many in-

(1073)

stances there were invoices or bills or something that went with some of those checks, and——

Mr. Wolfram: There was also a check for $10,000 to Ronald Stone which the witness identified as something that he drew and paid to Stone.

Mr. Wessel: And which went into evidence.

Mr. Stryker: Off the record.

(Discussion off the record.)

The Court: On those three categories, the only objection—incidentally, this is the first time that it has been clear to me that that batch of checks that I started to strike out are salary checks.

Now, if the ledger shows them as such——

Mr: Stryker: He said so, Judge.

The Court: Is that what he said?

Mr. Wolfram: He acknowledged his salary and told us in effect that that total was the total amount of his salary, and I don't think that the ledger sheet referring to Lubben's salary was marked in evidence. I am quite sure it wasn't.

Mr. Wessel: If it wasn't, it was because counsel did not make it, because it is there; it is partners' salary. I don't recall whether it was or not.

(1074)

There is a ledger sheet saying partners' salary.

Mr. Stryker: They fit, the witness' own testimony as to the amount of salary he got, and I didn't understand there was any controversy at all, even with the witness, about those $500 checks.

I think one or two of them is in smaller amounts, mostly $500.

Mr. Wessel: We are in a fairly difficult and technical accounting field. There will be, unfortu-

nately, a good deal of expert testimony both, I think, on the Government's side and, if I know what Mr. Holzer is doing in court, on the defendants' side.

Salary doesn't have any meaning in a partnership. Drawings don't have any meaning in a partnership. They can only have a meaning when related to the amount of money that the partner originally put up.

If Mr. Lubben came into the partnership and originally put in plant worth $80,000 and drew out $80,000, he had no income. If he drew out $100,000, he had $20,000 income. If he drew out $60,000, he had no income, he still has a $20,000 credit.

(1075)

That is precisely what happened in this partnership.

Mr. Lubben put up $33,500 as his half, and the defendants put up their $33,500.

In addition, Mr. Lubben also, you might say, in effect, loaned the partnership all of his plant and equipment. And then during the course of the year he had drawings, some of which were incorrectly called salary checks, and I objected to the use of the word "salary" when it was used. They are drawings.

The total amount of those drawings, less the total amount of his contribution, his capital excess contribution, which would be the value of the plant or the extra thing that he put in, less the $33,500 that he put in, would be his income, and that is a very technical matter.

I don't know whether the jury will understand the underlying accounting details. I think they will believe the experts when the experts are through

testifying. But to add in all these checks, which I don't believe have in any way been related to those particular areas of testimony, would serve, I believe, to so confuse the jury by the time counsel is through

(1076)

summation, that they will have no idea other than there is an awful lot of money here, and something must be wrong.

Now, I don't think the checks are properly in evidence with regard to the amount of Mr. Lubben's drawings from the partnership because the link as to his drawing has not been laid.

They may be in evidence on credibility, but I don't think there is any question of credibility in this connection, and that is the reason that I press the objection.

I think maybe I ought to also say at this time with regard to the partnership books—and I have never said anything, and I will not say anything in this trial with regard to the production of documents by the defendants other than to advise your Honor now that the partnership books were not, it is my information, within that group of documents produced in 1952, and to state also that since the time of Judge Goddard's decision there is a letter in the file offering to return those documents to counsel at any time.

The stipulation was the result of a letter he sent to the Government saying, "I would rather not have them back now."

(1077)

Mr. Wolfram: Mr. Wessel, there is one period you overlooked. That became true quite some time later, but if you recall, the Government took an appeal from Judge Goddard's decision and, pending

that appeal, requested us to stipulate that they would not have to return the books to us, because they, the Government, advised us that if there was a reversal they would have to get the books back again, and we agreed——

Mr. Stryker: We acquiesced to that.

Mr. Wolfram: We acquiesced to that.

Mr. Wessel: I am referring to Mr. Kilsheimer's letter which was also in the affidavit before Judge Palmieri, in which Mr. Kilsheimer, sometime in 1953, offered to return the documents, and the letter back said, "No, not now. I am going to make a motion."

Mr. Wolfram: Right.

Mr. Wessel: I also offered to return the documents by letter, which offer was not accepted until a later time.

Mr. Stryker: I can clear that. The reason that we did not take them back again, after the appeal, was that in our motion before Judge Palmieri, one of the things we asked for was that the books be

(1078)

returned in the presence of a judge, so they would see what books we were getting, so we could inquire of whoever had custody whether we were getting them all or not.

That comes back to me.

Is that correct, Mr. Wolfram?

Mr. Wolfram: And to follow up on any leads or clues the Government might have gotten.

Mr. Stryker: They were used in this case. Now, I am getting kind of tired. Do you want to reply to Mr. Wessel what he said or not?

The Court: I don't want to tire you—as a matter of fact, I don't want to prolong the argument, Mr. Stryker.

What I would like to know—and I don't care who tells me—is, what facts which will establish expenditure from the partnership do you want to establish by these checks which are not established by the ledger accounts? If you can tell me that, then I will know where I stand.

Mr. Wolfram: The trouble with remitting the defendants to the ledger for proof is this, your Honor, that when Lubben draws a check to cash —and I am just giving you a hypothetical situation——

(1079).

The Court: Limit this first to the three categories, the salary checks, the B. Altman account and the Cheel Engineering Company.

Mr. Wolfram: I can't answer the question because I didn't make an actual comparison between the checks and the ledger.

The Court: Would you do that?

Mr. Wolfram: I will ask our accountants to do that if your Honor wishes us to, but may I state a general objection to that particular course, and it is this, that when Lubben drew a check to cash, and took the cash—and I am giving you a hypothetical situation—what the practice was, I believe, was for the accountant to come to Lubben, or somebody to come to Lubben and say to Lubben, "What was this for?" and Lubben would tell him what it was for, and that. Lubben's explanation, would go into the ledger, not the fact; not necessarily the fact, I must say.

The Court: That is true in any business, isn't it?

Mr. Wolfram: That is true, yes.

Mr. Stryker: It is true.

Mr. Wolfram: Our point is, your Honor, that

(1080)

we should not be confined to what the ledger says; we should be permitted and we should have been permitted to question Lubben about the check.

The Court: If Lubben had remembered, but he didn't, and I wasn't going to take the checks in evidence just because they were made to his name.

Mr. Wessel: That is precisely the foundation I am talking about.

Mr. Wolfram: Well, now, I don't think there is any point in arguing what was excluded, because Lubben isn't here and we haven't got the checks and that issue isn't before us.

The Court: At least as to those three categories where they are still in, will you make that—because I honestly don't want to deprive you of any fact which you can establish to show a proper expenditure from—or, for that matter, an improper one, if it bears on the relevance of the tax liability of your defendants—but I don't want to get a lot of checks which may be ambiguous in the record when you have got a record which will be unambiguous.

Now, on the further point of just the cumulative effect of these checks, I don't perhaps go as far as

(1081)

as Mr. Wessel, but I do think that this case is going to be complicated enough for the jury, and I think I have an obligation to keep out documents which merely encumber them, and which may have a misleading effect.

Now, checks which are—for instance, that group of salary checks—and I would like to have your analysis on this, Mr. Wolfram, Mr. Stryker—if they do combine a return of original investment with current income, then I think they do have a confusing aspect, to which the jury should not be subjected, but if you—we don't have to decide this now, we have got, apparently, plenty of time before this is going to the jury.

Mr. Wolfram: If your Honor please, on the confusion element of the return of capital, the only way to do that is to take the total amount that Lubben received and subtract his capital contribution of $33,000 or $35,000.

The Court: The ledger accounts won't help you on this.

Mr. Wessel: Oh, yes, the ledger accounts—that is the way we have worked it out.

The Court: As a matter of fact, if you both

(1082)

make a comparison of your checks and your ledger accounts, and let me know exactly what is the narrow issue now between us, then we will settle it.

Mr. Wessel: May I state for purposes of the record, Exhibit EE was excluded and I am not sure of the grounds, but my objection is on the basis, this basis that has been mentioned now and not with regard to the best evidence rule.

The Court: What is EE?

Mr. Wessel: EE is a group of other checks which are not in evidence.

Mr. Stryker: The ones we offered.

Mr. Wessel: Ones that were offered by counsel for defendants.

The Court: The best evidence rule—I think I did say something about that, and that was an inaccurate reference. I mean, the best evidence rule technically is not involved here. As I regard that, it only relates to writings—well, let's not expose my lack of understanding any further than it is already exposed.

Mr. Stryker: My objection goes to the very heart. I did not intend to make an objection on that ground.

(1083)

The Court: I think I stated here this afternoon the reason that governed by ruling, and if I am wrong on any of those aspects, I would like to have it pointed out to me.

Mr. Wessel: May I refer to two other things, if your Honor please, which are short.

The Court: Yes. On these documents, now, there was an Altman's account——

Mr. Wessel: Yes.

The Court ——and a Cheel's account, which included payments from sources other than the partnership.

Mr. Wessel: Those are not in evidence.

The Court: They are not in evidence, fine.

Mr. Wessel: Exhibits Y and Z, I think.

The Court: I did not think they should be. All right.

Mr. Wessel: There are two other items. First is a request to counsel and to your Honor.

I don't know how long this witness is going to be on the stand, but I anticipate in view of prior experience that it will be sometime. Many of the people that will be testifying, I believe—and I am subject

to correction—will be accountants. I hesitate to (1084)
have them sitting in the court for a long time and interfering with their earnings.

What I would like to be able to do is to have as the next witness Mr. Present who would start his testimony—he is the Government's expert witness—so that somebody will be available to fill in until we can get some more witnesses here.

I don't want to complete Mr. Present's testimony after Mr. Roth, because I couldn't—a good bit of his evidence will be based on other evidence in the record. What I am asking is this:

Instead of keeping people waiting around the courtroom until Mr. Roth finishes, I would like to finish Mr. Roth, start with Mr. Present, and then go ahead with my regular order of witnesses by interrupting Mr. Present and then coming back and concluding.

Mr. Stryker: I haven't any possible objection in any case—this or any other—in aiding counsel—I like to be aided myself—on the convenience of witnesses. It is a tough job at best.

The only point I want to make on that is if Mr. Present gets on the stand, then at this stage of the picture, the basis on which he expressed an opinion (1085)
or gave his charts, whatever he is going to do, I don't know, wouldn't be complete.

Mr. Wessel: I think the part that I would refer to would be complete. Of course, his testimony will cover many different matters.

Mr. Stryker: That is something I don't know.

By the way, there is a witness due me back that I have almost forgotten—years and years ago you called somebody from—where was that, Harold?

Mr. Wolfram: The Custom House. I have got a note of it.

Mr. Stryker: And I want him back.

Mr. Wessel: I don't think he is due back.

Mr. Wolfram: Mr. Wessel is supposed to give us the result of the examination of the Custom House file to let us know if there is any record of extensions.

Mr. Stryker: There is something in that record.

Mr. Wessel: Yes. But I believe there is no record.

Mr. Stryker: I want to ask him about something in the record that he produced. It will take me about—I think I should do it.

(1086)

Mr. Wessel: He is subject to subpoena.

Mr. Stryker: He is your witness and I think you said you would bring him back.

Mr. Wolfram: No, Mr. Wessel only promised to make an examination of the records of the Custom House, to let us know if there were two applications for extensions.

Mr. Wessel: Off the record.

(Discussion off the record.)

Mr. Stryker: All right, if you say you didn't promise to bring him back, I will take your word. I have no desire to call him as my own, but if I have to, I will do that.

The Court: As I remember, they were going to make the search for Mrs. Livorsi's and Mrs. Giglio's extensions.

Mr. Wessel: And we were unable to find them.

Mr. Wolfram: You did not find them, all right.

Mr. Wessel: One other thing, which relates to sealing of documents which counsel referred to yesterday.

In the first place, I have searched for a statement Mr. Lubben gave, possibly, to an Assistant

(1087)

United States Attorney by the name of Mitchell, and I have been unable to find any case in which he was involved or in which he gave a statement to Mr. Mitchell or anything Mr. Mitchell had to do with the subject.

Mr. Stryker: I think he said he was before Mitchell, didn't he?

Mr. Wessel: He didn't recall. That answers that question.

Mr. Stryker: You haven't got it. That's that.

Mr. Wessel: Secondly, the witness referred at page 863 of this testimony, when asked about statements that he had given, he said, "Statements regarding issues in this case," and that, I believe, is what was being refererd to in the testimony.

Counsel's demand at page 864, however, was not limited in any way to the issues involved in this case, but was of a general kind relating to all statements and everything else.

Now, I think the record should be clear that all that the Government is required to seal are statements in this case, but I wanted to be absolutely certain.

The Court: Statements relating to any of the

(1088)

transactions which he testified to here.

Mr. Wessel: There are lots of others.

Mr. Stryker: That is all I guess I have a right to look at. That is all I claim.

The Court: I should think so, yes.

Mr. Wessel: That is all.

The Court: All right. I guess we are all set. At some point you and Mr. Wessel are going to let me know what it is that you want from the checks that you won't get from the ledger, and then we will carry it up.

Mr. Wolfram: Not necessarily tomorrow?

The Court: I think a week from tomorrow will probably be time enough.

(Adjourned to January 27, 1955, at 10:15 a. m.)

(1089)

New York, N. Y., January 27, 1955, 10:25 o'clock a.m.

Trial resumed.

(Jury present).

LOUIS J. ROTH, resumed.

Mr. Wessel: May I hand to the Court the sealed documents referred to, I believe, Tuesday, in connection with Mr. Lubben's testimony?

The Court: All right.

Direct Examination Continued By Mr. Wessel:

Q. Mr. Roth, have you ever been threatened by Mr. Giglio? A. Yes, sir.

Q. At what time, sir? A. One of my counsel, former Justice Ferdinand Pecora, was with me at the District

Attorney's office prior to the first indictment for the purpose of cooperating with the Government, which at that time the investigation of this tax matter was pending.

Mr. Leone was the Assistant District Attorney and took

(1090)

testimony for about five minutes, and it was adjourned, and within about 36 hours thereafter I received a telephone call from Mr. Giglio, and I met him, and he says, "I understand that you are talking to the Government about these tax matters."

I said, "I am following the advice of Judge Pecora."

He says, "All I can tell you is this: Be careful what you say to them, and make sure you tell them all the facts, and even if they hold you incommunicado"—he put his hand around my shoulder, and he said, "You have an older son."

And I repeated that threat that he made at Mr. Stryker's private office, I would say about a year later, during a conference in which Mr. Rosenblum was present, Mr. Corson, Mr. Stryker, Mr. Wolfram, Mr. Giglio, Mr. Livorsi, Mr. Holzer.

There was a discussion at that particular time regarding the records that I turned over to Mr. Giglio, and an arrangement was made between Mr. Rosenblum and Mr. Stryker that those records will be produced in his office, and I could examine them at that time in his library.

At that particular time I told Mr. Giglio, how could I

(1091)

cooperate and work on a common defense when I have been threatened by Mr. Giglio, and I repeated the threat.

Mr. Giglio pointed and says, "I threatened you?"

There was a lull, nothing was said by anybody, and either Mr. Rosenblum or Mr. Stryker continued on another subject of discussion.

Q. Did you ever have a discussion with Mr. Giglio in connection with Mr. Lubben's testimony in this court? A. Yes, sir.

Q. When? A. Well, I had a discussion with Mr. Giglio —I don't know whether it was about the testimony in this court.

Q. Was it with regard to testimony by Mr. Lubben of any kind? A. At a conference in Mr. Ronayne's office, which was subsequent to a number of conferences that Mr. Giglio told me he had with Mr. Lubben at the Waldorf-Astoria, at which time Mr. Lubben wanted to be paid $25,000 for the taxes that was due him on the contract, because he owed the Government income tax money, and he made a demand for the money, Mr. Giglio arranged an appointment for me, Mr. Lubben, and Mr. Giglio, to meet at Mr. Ronayne's office with Mr. Ronayne.

(1092)

Mr. Giglio at that time—Mr. Lubben at that time threatened that if he doesn't receive the $25,000 in order to settle up his own tax indebtedness, that he was going to go to 253 Broadway and tell them all about the operations.

I called that to Mr. Giglio's attention a day or so later. He says, "What are you worrying about the threats? Lubben will never reach the witness stand. Don't worry about his threats about going to the Tax Department."

Q. Did you ever threaten Mr. Lubben? A. Yes, sir.

Q. Now, Mr. Roth, yesterday, at page 978 of the transcript, you made reference to having received certain cash income from Tavern partnership, and also Tavern, Inc.

Did you, in addition to that cash, receive anything else from Tavern, partnership or incorporated? A. Mr. Wessel, I think you are in error, begging your pardon. I never remember receiving cash in the Tavern partnership.

(1093)

Q. Excuse me. The payments were from Tavern, Incorporated, I beg your pardon, and reference to page 978 of the transcript is Tavern Fruit Juice Company, Inc. I asked you if you received anything in addition to the cash payments you referred to yesterday? A. I received approximately, I would say, three to $400 in checks from Tavern Corporation, payment to my order, payment to me.

Q. Did you ever discuss with Mr. Giglio what those checks were to represent? A. I told Mr. Giglio I am doing the accounting work and receiving currency and there is nothing in the record to indicate any payments for accounting. I told him it is advisable for the records to show that payments for accounting services are being made, and I told him I will draw nominal amounts from time to time, and I think over a period of six months I drew checks in the area between three and five hundred dollars as accounting services.

Q. Did you discuss with him what the purpose of drawing such nominal checks was? A. I thought I answered. Well,——

Q. Well, if you answered the question, don't— A. The purpose was to show—I couldn't show the cash, the weekly cash that I received. Somebody was working on the books

(1094)

and somebody was recording the transactions on the books, and there was nothing in the books to indicate payment for that service. The purpose was to indicate payment for that services and hide the fact that I am receiving currency.

Q. Now at page 983 of the transcript yesterday I asked you what appears to be an ambiguous question. It reads:

> "Q. Do you know whether or not Mr. Giglio knew there was a closing inventory in Tavern Fruit Juice Co. partnership at the end of the fiscal year of operation? A. Yes, sir."

I now ask you, did Mr. Giglio know there was a closing inventory in Tavern Fruit Juice Co. partnership at the end of the fiscal year operation? A. Yes, sir.

Q. Did you discuss that matter with Mr. Giglio? A. Yes, sir.

Q. When was the discussion? A. To the best of my recollection it was approximately October, November, 1945.

Q. Was anybody else present? A. I do not recall anybody present.

Q. Would you say what was said by Mr. Giglio and (1095)

by you? A. I drew a schedule of income of Tavern Fruit Juice Company, and indicated to him the estimated amount of tax liability that the individual partners would have to pay. At that particular time one of the corporations was just commencing to operate, American Agar, and I knew, based on tax regulations that operating a corporation in the year 1946 would result in less of a tax as result of the cancellation of the excess profits tax commencing January 1, 1946; and I suggested whatever sales it is possible to transfer over into the corporation will result in a lesser tax due to the Government than making the sales under the partnership; and inventories was manufactured except in a warehouse; sales were made on the American Brands Corporation commencing January 1, 1946 of the merchandise that was not declared as an inventory on the Tavern partnership from October, November, December, 1945, or November, December 1945.

Q. What merchandise was it, what kind of merchandise was it that was stored in this warehouse? A. Well, it was the merchandise that was being manufactured by Tavern Fruit Juice Company.

Q. What was that? A. Imitation Jelly.

Q. Was that readily salable on the market at that time? A. Yes, sir.

(1096)

Q. Do you know whether or not on any other occasion during the war years there was ever a storage of jelly in a warehouse by Tavern? A. I do not recall of any.

Q. Yesterday, several times, Mr. Roth, you made reference to research without describing what that research was. I wonder if you would state generally for the Court and jury what the research was you made reference to? A. I could only discuss research to the extent of my knowledge of the research and what has been told me.

Q. Well, who was it that told it to you? A. It was a general discussion—my main discussion of research was with Mr. Giglio, but Mr. Lawn discussed research with me also, because he was vitally interested in its ultimate outcome.

Q. Would you please describe that research, Mr. Roth, just in general terms. I don't want details. A. The purpose of the research was to find a substitute for sugar from waste product of sugar refining companies, such as black strap molasses, and certain fruits, etc. Now the research was supposed to extract from this waste material the sugar content, and if the research was successful this sugar would have a cost of possibly two or three cents a pound after the process was developed than 6 or 7 cents a pound that sugar

(1097)

in bags would normally cost. That is what this research is or was.

Q. Were the expenditures by the various Giglio companies for research entered on the books as expense items? A. Yes, sir.

Q. Was any part of the $2000 to $2500 drawing you referred to yesterday by Mr. Giglio from Tavern a research expense? A. To my knowledge, no.

Q. Was any part of the corn syrup cash box, $140,000 profit, used for research? A. To my knowledge, no.

Q. Yesterday at page 1025 of the transcript, in the middle of an answer, you made the following statement:

> "Incidentally, all those checks that were placed on the side for the purpose of explanation, so that a distribution was made, were discussed with Mr. Giglio, and I in turn instructed my assistant to distribute it, and that item was charged to legal expense."

I wonder if you would explain somewhat greater detail how that distribution was discussed with Mr. Giglio and what was then done? A. I could only explain to you the distribution of all the items, because the method of distribution applied to all the items that were set aside and not just

(1098)

that specific item.

Q. This is the method of distribution that was done by you in the regular course of your business? A. Yes.

Q. Would you explain it, please? A. Not just that particular item.

Q. Would you explain it, please, sir. A. My assistant used to go down to the Tavern offices about twice a week or three times a week in order to write up the books of record. They employed no bookkeeper to write up all the records, and every time he came across an unusual disbursement that he didn't know where to allocate or how to distribute, he used to record it in the net cash column of the cash book and did not make a distribution, but kept a memorandum on the side until he could speak to me about it. That may have been the same day or within two or three or four days later. The items of cash of approximately $2000 or $2500, after the very first or the second discussion with Mr. Giglio about

distribution, it was unnecessary to discuss those items further with him, because we just followed the method of distributing those checks. Regarding an unusual item like $15,000 that you refer to, I discussed it with him and distributed based on that discussion to legal expense.

(1099)

Q. Was there any discussion with Mr. Giglio at any time with regard to having vouchers for the various distributed expenses? A. Yes, sir.

Q. When and who else was present? A. There comes to my mind two occasions of discussions about vouchers.

Q. Will you try and fix the time, Mr. Roth? Who was present, and then state what was said. A. Up to the time that Mr. Ronayne was employed as tax counsel for the Giglio interests, I discussed supporting vouchers for expenses with Mr. Giglio. Those expenditures that were made, for which I received vouchers, having in mind two chemists, they submitted their vouchers every week to ten days, and other expenditures that had vouchers. I informed Mr. Giglio on the money that was being taken out that we are going to get into difficulty by withdrawing that money if I haven't got supporting vouchers to cover those expenditures. After Mr. Ronayne was employed as tax counsel, and I informed him about the money being drawn out, he said also, "It is all right to take out the money. Make sure that you get vouchers to support it."

At that conference discussion of vouchers was once had between Mr. Ronayne and myself, and a discussion of sup-

(1100)

porting vouchers at one time was with Mr. Ronayne, Mr. Giglio and me present.

Q. Did you ever get vouchers to account for the $2000 to $2500 Tavern drawings you mentioned? A. No, sir.

However, I did get a great many vouchers and a great many other expenditures.

(1100a)

Q. Other expenditures on the Tavern books or other books. A. Well, other checks drawn to the order of cash I received supporting vouchers.

Q. Now, at page 1030 you referred to the $15,000 check to Howard Lawn as having been in Mr. Giglio's handwriting.

Did you ever discuss with Mr. Giglio that check being in his handwriting? A. Yes, sir.

Q. When was that discussion and who was present? A. I can only time that discussion within a week or ten days after the check was drawn, and in discussing the check with Mr. Giglio, the unusualness of him drawing a check, and the unusualness of Mr. Livorsi signing the check, I asked him about it.

He says where unusual and special items are drawn, he writes out the check, and he has Frank Livorsi sign it so that at some future date, if there is a discussion about a check, both he and Mr. Livorsi have their writing and the signature on it, so as to indicate that they both knew what the check represented.

Q. Did you ever borrow any money from any of Mr. Giglio's companies? A. Yes, sir.

Q. Was that done pursuant to any discussion with

(1101)

Mr. Giglio? A. It was.

Q. Would you state when the discussion took place, who was present and what was said? A. Commencing about the middle of 1946, I advanced to Mr. Giglio money for a loan for a few days, and when it came to pay it back—no, excuse me, sir, may I correct myself.

Q. Go ahead. A. Mr. Giglio needed some money. I advanced it to him, and when it came to give it back to me, he says, "Draw it out of the corporation, charge it to you as a loan," which I did, and that method of advancing in partial repayment continued over a period of a year, and the reason we did it that way—and that money was never repaid on the books that I charged to myself as loans receivable—the reason we did it that way was because if Mr. Giglio were to draw $5,000 out of the business, he says he has to account for all moneys coming out of the business with Mr. Livorsi, so at the end of the month he would have to give Mr. Livorsi $5,000, but it is all right for me to take a loan, because he will explain to Mr. Livorsi that he lent the money to me.

Q. Did Mr. Giglio ever discuss with you the relationship between himself and Mr. Livorsi in these companies?

(1102)

A. Yes, sir. The only discussion he had with me is that "Mr. Livorsi and I are 50-50 partners on everything."

Q. When was that discussion? A. I would say that discussion goes back sometime at the very inception I started to do work for Mr. Giglio.

Q. Now, did you ever discuss this $15,000 check to Mr. Lawn with Mr. Lawn? A. Yes, sir.

Q. When, where and who was present? A. I received a subpoena to testify in New Jersey regarding Mr. Lawn, and I got in touch with Mr. Giglio, and I told him I was served a subpoena to testify.

We made an appointment to meet at the Pennsylvania Station, which was a very usual meeting place between Mr. Giglio and myself and Mr. Lawn, about two or three days prior to the time that I was to testify there, and Mr. Lawn told me that "They are going to ask you questions at the grand jury regarding my personal income tax and the item

of $15,000." He wanted to know what I remember about it.

I told him that on the books it was originally indicated as an expense, then it was changed around into income.

Q. It was changed around into income? A. No, it was (1103)

changed from an expense of the partnership to a loans receivable due from Mr. Lawn, and the manner in which I explained it to him, he told me is incorrect, that is not the way that happened. He was very vehement about it. We had a very vigorous argument or discussion. Mr. Giglio was with him.

And while I do not consider it a threat, but we were at the 31st Street exit of the station, up against the arcade, and he grabbed a hold of my arm vigorously and said that I am all wrong and that the manner in which I am explaining it to him will positively put him in jail.

I said, "Well, that is the way it happened."

That was the end of that conversation.

Q. Did you have any further discussion with Mr. Lawn on that subject after you testified? A. There was some additional discussion at that particular time because he told me that Mr. Richmond, the then United States Attorney, is going to be the one that is going to ask me questions before the grand jury, and not to be concerned about it because he was very friendly with him.

About a day or two after I testified before the grand (1104)

jury, I met Mr. Lawn; he asked me what I testified to; I says, "I just want to forget the whole thing."

He says, "It doesn't make any difference because Mr. Richmond is a friend of mine; I will know what was done and what was said."

Q. Did you ever have any discussion, Mr. Roth, with regard to your—that is, with Mr. Giglio—with regard to your duties in so far as taxes were concerned? A. My responsibility for taxes from the time that Mr. Ronayne was employed was zero, because Mr. Ronayne was specifically employed to handle, take care, adjust, advise in every respect to all tax problems, because that is one of the main reasons he was employed, because he was a CPA, because he was a tax attorney, because he worked for the Intelligence Unit, because he had knowledge, because he had open doors and knew revenue people, and because he was a professor of tax law and considered an authority.

I did the preparation of the book work. I did the preparation of tax returns. I made many suggestions. The final okay was by Mr. Ronayne and the final decision of what to do rested with Mr. Giglio.

Q. Now, I notice, Mr. Roth, in examining the returns

(1105)

filed by you in September, 1947, that they were filed in the Third Collection District. I notice that the declarations of estimated tax that you referred to were filed in the Second Collection District. Did you ever discuss that subject with Mr. Giglio? A. No, sir.

Q. Did you ever discuss it with Mr. Ronayne? A. Yes, sir.

Q. Would you state what that discussion was, please? A. At the time of filing those tax returns, Mr. Ronayne suggested that I file them in the Third District because when an examination would come through from the Third District he is in a better position to take care of the tax examination from the Third District than he is from the Second District.

Q. Now, sir, yesterday you discussed the $50,000 other income item in the personal returns of Mr. Giglio and Mr.

Livorsi, and I asked you various questions about whether that included the Eatsum profit on corn syrup sales.

Specifically, I am referring to the transcript at page 1047. I ask you whether there was any discussion in Mr. Giglio's office when Mr. Ronayne was present as to the amount of the profit from the corn syrup sales? A. Not the

(1106)

amount, except that Mr. Giglio called to Mr. Ronayne's attention that there was profit from the corn syrup which they took, and Mr. Ronayne said, "Make sure that you include all the cash that you took on your income tax return."

Q. Yesterday, Mr. Roth, at page 1056 of the transcript, you testified with regard to certain estimated tax declarations filed by you in connection with Mr. Giglio's personal taxes.

I ask you whether the estimated taxes which you set forth in the declaration were based upon the books of the companies? A. They were based on my estimate of what Mr. Giglio's tax liability would be, both from books and what other knowledge I had at that time.

Q. Now I show you Government's Exhibit 17A in evidence, which is the declaration filed March 15, 1946, estimating taxes for 1946 at $4,000, and ask you whether on that occasion you believed that Mr. Giglio's tax liability for the year 1946 would be $4,000? A. I knew it would be more.

Q. Then I ask you again, sir, whether the estimate that you filed was based upon the books and records of the companies? A. No, sir.

(1107)

Q. How did you arrive at a figure of $4,000? A. I have to possibly go back and give you an explanation, then come to the arrival.

Q. Go ahead. A. Mr. Giglio's enterprises were right in the midst of expending tremendous amounts of money for research.

In a general discussion, in patent, in operation, we wanted to hold on to as much money as possible in order to have available funds to continue the research to its ultimate conclusion.

In my assistance to carry out that particular program, my very first estimate, my very first declaration of estimated tax was a pure guess of $4,000, and we sent the Government a quarterly check of $1,000.

The second declaration was prepared for $10,000—excuse me, was prepared for $11,000, against a payment of $1,000 which left a balance of $10,000, and the second declaration we would send the Government or contemplated sending the Government a check for $2,500.

Mr. Giglio said, "Well, don't amend the tax return. Let's send them the $1,000 on the original declaration."

The third quarter, I prepared an amended declaration again and deducted the $2,000 that was paid on account up

(1108)

to that time, still leaving a balance of $10,000—the corrected, amended amount was $10,000—deducting the $2,000 payment, left $10,000 for a quarterly check to go forward to the Government of $2,500.

Mr. Giglio says, "Let's file it on the same basis as the original declaration, and send the Government a check for $1,000."

When we reached January, 1947, I insisted that I do not want to go along on those declarations because they are 'way out of line, because now this is the last declaration that we got to file for the income for the year 1946, that we will not get any more of a chance in order to correct the estimated tax against the estimated—estimated tax on declaration against the tax liability that will be due.

At that time I prepared the estimated income tax for the year 1946 in the amount of $26,000, deducted the $3,000 that

was paid on account, and left a balance to be paid in January, 1947, of $23,000, and I told Mr. Giglio, I think he should send the check away to the Government.

He said; "We need the money for research. If you insist on filing the declaration, file it, but I am only going to give (1109) them a check for $1,000," and that is what happened.

Q. Are you finished, sir? A. Yes, sir.

Q. Did you discuss with Mr. Giglio the possibility of using the moneys that were being drawn in the amount of $2,500 a week to pay these tax estimates? A. No, sir.

Q. Did you know whether or not there were funds available at the time these estimates were filed, both in Mr. Giglio's companies and Mr. Giglio personally to pay these estimated taxes? A. I don't know about his personal funds, but as far as the various interests, it is my recollection that there was a sufficient amount of money to pay those declarations at the time they were filed.

Q. I will show you, Mr. Roth, Exhibits 58A through G in evidence, and ask you if you can tell me from those exhibits the total amount expended by Mr. Giglio's companies in connection with research up to, say, about March 31, 1946?

When I say "research," I am referring to legitimate research expenses. A. I could only give you—without books or records, I could only give you the items that I (1110) can point out by memory, that I think are the legitimate research expenses.

Please do that and tell me approximately at what point in time those expenditures were made; in other words, whether before or after March 31, 1946, when the estimated tax was filed? A. Mr. Wessel, I don't think I could give

you dates. I could just go—because these are statements——

Mr. Stryker: If your Honor please, I submit that this falls within the rule that your Honor made.

When I cross examined Mr. Lubben, or tried to, about checks, I think your Honor ruled that I could not do that if there was anything in the books, that I must have the books. I may not state your ruling with perfect accuracy, but that is my recollection, and if it is correct, I should think the same rule would apply here.

The Court: I don't think that is quite correct.

Now, what was the question?

(Question read.)

The Court: These exhibits are the statements of assets and liabilities and the income accounts?

(1111)

Mr. Wessel: Yes, sir.

The Court: No, I think this is quite——

Mr. Stryker: If your Honor will pardon me a moment more, if you read the witness' answer you will see the point of my objection.

(Answer read.)

The Court: What company is this?

Mr. Wessel: All the companies referred to in Exhibit 58, Tavern, Eatsum, American Brands Corporation, American Brands Wholesale, American Agar, American Sweets, I believe, American Trucking & Forwarding.

The Court: I see, yes. And as to which of these companies does the Government have the books?

Mr. Wessel: Well, as to the corporations, the Government has, I believe, the books, I think.

By Mr. Wessel:

Q. Is that correct, Mr. Roth, do you know? A. Excuse me, sir.

Q. Let me ask you this question, Mr. Roth: Have you been shown certain books in the last several weeks, three weeks, four weeks? A. Yes, sir.

Q. Are there any of those books that you have seen which would assist you to answer my question? A. Yes, sir.

(1112)

Q. Which books would you like to see? A. The disbursement book of American Brands.

Q. Anything else? Do you mean American Brands or American Agar, Mr. Roth? A. I think I looked at the disbursement book of American Brands Corporation.

Q. Is there any other book that would help you in answering the question that I asked, and that is with regard to the research expenditures by the various Giglio companies up through March 1946? A. I understood, Mr. Wessel, for you to say after March, '46, up to the point of the filing of the declarations.

Q. Wasn't the first declaration filed in March 15, 1946, Mr. Roth? I show you Government's Exhibit 17-A and ask you if that is the fact? Do you have my question now in mind, Mr. Roth? Do you know when the first estimate of Mr. Giglio's personal tax was filed? A. March 12, 1946.

Q. All right. What records would you like to have that would assist you in answering my question as to the total amount of research expenditures by the various Giglio companies up through March 31, 1946? A. I would need the Tavern general ledger.

Q. Do you know where that is? A. I saw it down your

(1113)

office.

Q. Tavern or the Eatsum general ledger you are referring to? A. Either the Eatsum general ledger and the American Agar disbursement book—that is all I can think of—where research was made up to March 31, 1946, of the books that I looked at.

Q. You mentioned the Tavern general ledger; did you look at Tavern general ledger in my office? A. No, sir.

Q. When did you last see the Tavern general ledger? A. Sometime before December 2, 1947.

Q. I now show you Defendants' Exhibit GG, and ask you first if you will identify that book for me? A. Eatsum Food products Company general ledger.

Q. Was that a book kept in the regular or ordinary Eatsum Food Products' business? A. Yes, sir.

Mr. Wessel: I offer it in evidence.

The Court: Show it to Mr. Stryker, although I think he has already seen it.

Mr. Wessel: Two of the pages in the book are already in evidence.

Mr. Stryker: Your Honor, this is a book, I should think, 75 pages in length, many figures.

The Court: I understand that your accountant (1114)

has already been over it, Mr. Stryker, and you saw it before the trial.

Mr. Stryker: I believe they have, but I want to get sufficient information in order to determine whether or not I care to object, and if you look at at you will see I can't do that in two minutes.

The Court: I understood the purpose of this advance exchange was to—all right, we will recess now and——

Mr. Wessell: If I may say this, your Honor——

Mr. Stryker: I think you are nearly at the recess hour anyway.

Mr. Wessell: Perhaps I can expedite this whole problem during the course of this witness's testimony. Of course I am going to offer in evidence a great many books, all of which have been examined by defendants' accountants, and I suggest perhaps they can determine during the course of the next recess or two recesses, what objections they may have. They are voluminous and to examine them all will occasion a great deal of delay.

Mr. Stryker: If you have that plan, Mr. Wessel, perhaps you can let us see them now so that I would not hold up the Court.

(1115)

Mr. Wessel: The books have been available to the defendants at all times since sometime in October of this year, or last year, and of course they are welcome to look at them at any time they wish to.

Mr. Stryker: Your Honor, I am not an accountant, as you may have observed.

The Court: We suffer from similar lacks of training.

Mr. Stryker: These books, I think they have been described as about two or three tons of books and papers that were delivered by Mr. Giglio in response to the subpoena, which caused the construction of the indictments. Now I grant it the accountants have been looking at them since sometime in September or October of last year. I am very frank to tell you that I haven't. Also, I may add, if I did, I don't think it would do much good. So just to enable me to determine what I should do here, I think it would be fair to let us see whatever you plan

to put in evidence so that I can find out what the point is from the accountants. Frankly, I don't know.

The Court: All right.

Mr. Wessel: I think the jury should be advised that the comments and counsel's statements are not (1116)

evidence and not fact.

Mr. Stryker: I am only responding to the Court's statement. I don't see anything else I am doing.

The Court: All right, I will so advise the jury that none of our statements is evidence or fact.

Mr. Stryker: I suppose that goes both ways?

The Court: It goes three ways. My statements as to the facts are probably the least reliable of all. So be sure to disregard those.

Mr. Stryker: I wouldn't say that.

The Court: Now I don't want to hold up the line of examination.

Mr. Stryker: I don't want to, either.

Mr. Wessel: I don't have to offer this book.

The Court: Look at such pages of the ledger you need now and we will take a little extra time for lunch today. I have problems that are going to require that anyway, unrelated to this case completely, and I think that perhaps Mr. Wessel and Mr. Stryker can work out some system over the luncheon recess, and if they have any points they intend to raise, they can be raised this afternoon.

Mr. Stryker: I hope that your Honor's suggestion will contain a little more lunch period than we (1117)

have had, and I was going to say on that, with the

elevators being what they are, I would be glad if we could have a little bit more.

The Court: All right. The only problem is, that what you pick up at one end you lose at the other. I don't want to hold the jury over a long period of time.

Mr. Stryker: I think you save time this way. May I suggest that in order to enable us to do so, that possibly Mr. Wessel will go ahead as well as he can without them, and say possibly at twelve, and if I have got to look at these and try to understand language of accountants, I would have that much time.

Would that be all right?

The Court: I am going to shift the hours a little bit, because I don't know what business apppointments the jurors may try to use their lunch hour for, and we will quit at quarter of one as usual, but we will adjourn to say two-thirty, which will give you time to have your lunch and also to talk with your accountants.

These are just delays that are necessary during the trial.

Mr. Stryker: All right, we will do it that way.

Mr. Wessel: All right.

(1118)

By Mr. Wessel:

Q. Would you examine this Eatsum ledger, Mr. Roth, and then state the total amount of research expenditures in that company, legitimate research expenditures, up to March 31, 1946?

Mr. Stryker: Just so I may be clear, I don't think I have any objection, I assume that counsel is re-

ferring to expenditures in the company, the ledger or whatever it is he has before him, relates to; am I right? If I am, I don't want to object.

The Court: This is the Eatsum ledger, as I recall it, and I didn't hear——

Mr. Stryker: I thought the expenditures—I just wanted to be sure what the question was—I think it relates to Eatsum.

The Court: So there is no mystery about my ruling, let me make it clear that if you have the records, let us work from them rather than ask for somebody's recollection of what happened ten years ago. If we don't have the records, why, we will do the best we can.

Mr. Wessel: To be perfectly clear, your Honor, I thought this record summarized it, but I was wrong.

The Court: As a matter of fact, this is quite different from looking at a series of individual checks. This is Mr. Roth's summary that he pre-

(1119)

pared of these items, and I think we can work from that if that is the best we have. If looking at the books will give us a more accurate answer, fine, otherwise go ahead from Exhibit 58.

Q. Let me ask you this question, Mr. Roth, just to interrupt your looking through that book: Exhibit 58-B, which appears to be—which is a series of statements in connection with Eatsum Food Products Company, was that prepared on the basis of your examination of the Eatsum books, all the books? A. Yes, sir.

Q. And does that accurately summarize what the books show with regard to the various expense accounts in the books? A. Yes, sir.

Q. Can you tell me why it is you need the general ledger to assist you in answering my question as to the total amount of research?

Mr. Stryker: Just a minute.

Mr. Wessel: I haven't finished my question.

Mr. Stryker: Counsel says, "in the books." Could I have more clarification of what books he means?

Mr. Wessel: They were described yesterday.

Q. But supposing you tell me, Mr. Roth, the books which Eatsum Food Products Company partnership maintained (1120) in the regular and ordinary course of business? A. Yes.

Mr. Stryker: All right.

The Court: Just to save repetition, Mr. Stryker, isn't it enough for your purposes that Mr. Roth tells that the books referred to are the books of the company, respective companies, for whom these respective statements were prepared; is that correct?

Mr. Stryker: Well,——

The Court: Or do you want a catalogue of the particular books kept by each company?

Mr. Stryker: No, I just want to understand what is going on.

Mr. Wessel: Well, I was beginning to frame another question, Mr. Roth.

Q. Can you tell my why you need to look at the Eatsum general ledger to determine the total amount of Eatsum research expense through March 31, 1946? Let me ask you a little differently. I don't think I am very clear. Is there something in the general ledger that is not in this schedule 58-B? A. No, there isn't, Mr. Wessel, but I notice in some of the statements there were research, and

for the moment I thought that I have to identify research by the various statements, and I wanted to identify it more (1121)

clearly from the books. It just so happens on Eatsum Food Products Company, 58-B, there does not appear any research expenditures at all, so I do not need to look at the general ledger as far as Eatsum Food Products Company is concerned, because there does not appear any research expenses on their expense accounts.

Q. All right. Now—— A. Excuse me a moment.

Q. Certainly. Go right ahead.

Mr. Wessel: I should state that I also am not an accountant.

Mr. Stryker: I couldn't hear, Mr. Wessel.

The Court: Mr. Wessel confesses to not being an accountant, too.

Mr. Stryker: All right, I don't object to the comment.

The Court: All right.

A. (Continuing) Based on the statement of Eatsum Food Products Company, which is in accordance with the general ledger, I find no research expenses.

Q. Now what other companies, statements of which are in Exhibit 58-D, had research expenses through March 31, 1946? Well, let me ask a different question, Mr. Roth.

Mr. Wessel: Strike the last question.

(1122)

Q. Would you state which companies of the companies in Exhibit 58, had any research expenses, and by that I mean legitimate research expenses? A. The following three companies had research expenses up to March 31, 1946: American Brands Corporation, American Agar

Corporation, Tavern Fruit Juice Company, limited partnership.

Q. I had changed my question a little bit, Mr. Roth. First of all, did Loraine Food Corporation at any time have any legitimate research expenditures? A. No, sir.

Mr. Stryker: Just a minute. If your Honor please, I don't think Loraine is even mentioned in this bill of particulars or the indictment, and I don't see how, since there is no charge against us with respect to that, why a question concerning it is relevant to the issues in this case.

Mr. Wessel: Does your Honor wish me to explain?

The Court: Yes, go ahead.

Mr. Wessel: Loraine Food Company is one of a series of companies, if your Honor pleases.

Mr. Stryker: Just a minute, your Honor. If there is going to be——

The Court: Come up to the bench here.

(1123)

Mr. Stryker: I don't want to deprive the jury of anything.

The Court: I don't think the jury would mind being deprived. As a matter of fact, we will take our mid-morning recess now, and we will excuse the jury.

(Jury excused.)

(Discussion at the bench off the record.)

(Short recess.)

(1124)

(Discussion at the bench not recorded.)

The Court: Mr. Foreman, ladies and gentlemen, Mr. Pollock is a Root Tilden Scholar of New York University, and he is down here to supervise the mistakes that counsel and Court made on the law of evidence. Now we will give him a bad example.

All right, Mr. Wessel, you go ahead; you go first.

Mr. Wessel: I will try to make it a little less complicated.

By Mr. Wessel:

Q. Mr. Roth, can you tell me when it was that Mr. Livorsi and Mr. Giglio purchased their homes in New Jersey? A. I would say to the best of my recollection the latter part of 1945 or the early part of 1946.

Q. And do you know where they obtained the moneys for which they purchased those homes? A. I can answer the question by recalling some of the checks drawn out of the corporations or the businesses that were charged to their account.

Q. And was that at or about the time that you filed estimates in the amount of $4,000 tax liability? A. It would be approximately that date.

(1125)

Q. Now, sir, yesterday at page 1,033 of the transcript you said that the $140,000 income or profit on the corn box was not entered in gross receipts in the Eatsum partnership information return, and at page 1043 you said substantially the same thing.

Do you know whether any part of the gross amount which went through the Eatsum cash box was ever entered in gross receipts in the Eatsum partnership information return, which is item 1? A. I do not know of any.

Q. Do you know what that gross amount was? A. $140,000.

Q. No, the $140,000 was the net amount that remained after the close of the corn box operation. A. That is correct.

Q. Do you know the gross amount, the total amount of money that went through the corn box during the period of the corn deal? A. From approximately $400,000 to $500,000 in currency.

Q. Now, yesterday you also referred to Mr. Lubben leaving the partnership about March of 1946. What happened after that with regard to the Eatsum partnership, Mr. Giglio and Mr. Livorsi being the partners that were (1126)

named, and their wives? A. We continued the partnership but not from a business operation point of view, but rather from a liquidating point of view.

When Mr. Lubben left, I was given authority to sign checks as an authorized signature; a special account was opened, and all moneys collected and disbursed went through the special account.

There may have been checks or deposits to the old account, but I do not recall any.

Q. Was any money drawn out of the Eatsum account, bank accou. , for the purchase of supplies during that period after Mr. Lubben left? A. Yes, sir.

Q. Will you state how that was accomplished, Mr. Roth? A. By drawing checks to the order of cash and cashing them and charging them to purchases and supplies, despite the fact that there were no sales during that particular period.

Q. And were there any purchases during that particular period? A. I do not know of any.

Q. Who got the money from these checks to cash—— A. All moneys, in all instances, of all companies, were 99 per cent turned over to Mr. Giglio, and one percent to one

of his messengers that may have gone along with me to the
(1127)
bank or was authorized to go to the bank to cash a check.

Q. Do you know whether any part of those moneys went for research expenditures? A. I do not know if any of those moneys went for research.

Q. Can you estimate the amount of those moneys taken out of Eatsum during that period, that is, after Mr. Lubben left? If you can't, say you can't. A. I can't give you a close estimate.

Q. Did Howard Lawn have any part to play in the corn deal in Eatsum Food Products? A. He played one part that I am aware of.

Q. What was that? A. At one particular time he either negotiated the sale of corn syrup or the purchase of corn from the farmers.

That particular transaction resulted in a lesser amount of profit that the partnership would ordinarily earn on account of his what Mr. Lubben at that time described as interference, and from that point on he didn't handle any cornsyrup transactions that I know of.

Q. Did you ever have any discussion with Mr. Giglio in connection with tax liability regarding the $140,000 corn
(1128)
box profit? A. The only conversation that I could recall was at the time that I mentioned a while back, during Mr. Ronayne's presence, of making sure that he includes all the money in his tax return that he took from the corn box.

Q. At the inception of the Eatsum partnership, Mr. Roth, did you have a discussion with Mr. Giglio and Mr. Lubben in regard to bringing in other persons as Eatsum partners? A. Yes, sir.

Q. When was that discussion, where and who was present? A. Approximately one week before we were at the attorney's office, Mr. Max Goldhill, who drew the limited partnership papers, I suggested to Mr. Giglio at that time to have as many active partners for his 50 per cent share as possible, because that would reduce—as long as he contemplated earning a great deal of money in the partnership—that would reduce the ultimate tax liability that he would have to pay if he would be the only 50 per cent partner or divide his 50 per cent only with Frank Livorsi.

Based on that suggestion, Frank Loperfido was given either a 5 or a 10 per cent interest in the partnership for his activity in the partnership.

(1129)

Mr. Giglio, in turn, told Mr. Lubben of the suggestion that I made, and recommended that he do the same thing, because in the long run, by having, by distributing his income into so many divisions, than having it all alone, it will result in a lesser tax.

Mr. Lubben brought in his uncle, one Roy Hankermeyer, and he also brought in Ronald Stone, who had either a 5 or a 10 per cent interest of Mr. Lubben's 50 per cent share.

Q. Now, Mr. Roth, who were Michael Cohen and Mario Betancourt? A. Michael Cohen was a broker of food products. I know him for many years. He recommended me to Mr. Giglio. I prepared his tax returns at the end of every year. He did not have a regular set of books or accounting. It was just one visit annually.

He did a lot of business with Mario Betancourt who was the proprietor of Commodity Trading Company. He recommended me to Betancourt, and I installed a system for him and one of my assistants, Mr. Starr, went down monthly to do the write-up and the auditing work for Commodity Trading.

Q. Did Mr. Cohen and Mr. Betancourt handle any part of the sales of the Eatsum corn syrup? A. They handled (1130)
a very substantial amount of the corn syrup sales of Eatsum.

Q. And did you as accountant handle their books in connection with those transactions? A. Yes.

Q. Will you describe for the Court and the jury how you handled those books? A. Well, there were not books to handle for Michael Cohen, because at the end of a year I went down to his office and took the 12 bundles of bank checks, cancelled checks and bank statement, made an analysis of cash receipts and disbursements, asked Mr. Cohen the estimated amount of currency that he used for himself, which was not deposited to the bank account, and in that manner prepared his tax return.

As far as Mr. Betancourt is concerned, my assistant went down once a month, did the audit, drew down trial balances, and whatever the income disclosed from the books and records and working papers, that was what was supposed to be reported.

Q. Are you finished? A. Well, you asked me the work that I did.

Q. Have you finished your answer? A. Yes, sir. (1131)

Q. Did you file tax returns on behalf of Mario Betancourt and Michael Cohen? A. I did.

Q. Were those false returns? A. Yes, sir.

Q. In what respect were they false, and I am referring to the year 1946 now—1945, excuse me, 1945? A. Michael Cohen and Mario Betancourt acted as a joint venture enterprise though they had independent businesses.

The majority of the sale of corn syrup cleared Mario Betancourt's books, because they were his customers, and Michael Cohen was only used to secure the corn syrup from Eatsum Food Products Co.

It was necessary for Betancourt to cash a tremendous amount of moneys to give to Michael Cohen, who in turn gave it to Eatsum to cover the overages of unit price besides the billing price.

In preparing the tax return for Mario Betancourt, I instructed Mr. Starr to eliminate as a cost of purchase checks drawn to the order of cash to Michael Cohen in the amount of about $50,000 or $60,000, thereby making it unnecessary for Michael Cohen to report it on his cash tax return.

Michael Cohen in turn—then it being unnecessary for

(1132)

Michael Cohen in turn reporting it, that he gave the money to Eatsum Food Products Company.

Q. Did that result in an overstatement of Mr. Betancourt's income? A. To the extent of $50,000 it did.

Q. Do you know whether or not Mr. Giglio ever had the Eatsum corn syrup cash box? A. To my knowledge from time to time he had it during the absence of Mr. Lubben and during the absence of Mr. Loperfido.

Q. Do you know where he kept it? A. He kept it in a closet in his room. I am not positive about that. I think he kept it there.

Q. Did you ever see it there? A. To the best of my recollection, just once or twice.

Q. Did that closet have a key, a lock? A. Well, the closet had a lock, but there was an inside concealed safe at the space with a concealed panel for valuables.

Q. Incidentally, Mr. Roth, do you recall whether or not Howard Lawn was present when the Eatsum partnership papers were signed? A. I do not recall him being present in Mr. Goldhill's office.

Q. Now, sir, who was Bernard Bercu? A. Bernard Bercu was the accountant that was employed by Mr. Lubben

(1133)

on his proprietorship enterprise, and also the accountant for Eatsum Food Products Co.

Q. Were you also the accountant for Eatsum Food Products Co? A. I was the accountant for Eatsum Food Products Co. to this extent: After Mr. Bercu was through with his monthly audit and submitted the financial statement or a copy of the financial statement to Mr. Giglio, the financial statement was turned over to me, and I verified all the transactions during that month as if Mr. Bercu did not make an audit.

Q. Would it be fair to state that Mr. Bercu was the primary Eatsum accountant and that you audited his work, or were the secondary accountant? A. I am not going to say primary, secondary. I just explained to you the capacity that I did the accounting work.

Q. Well, in any event, Mr. Roth, do you know whether or not Mr. Bercu had the regular kind of accounting work papers relating to Eatsum partnership's business? A. He did.

Q. Would you describe what those work papers consisted of? A. I could describe in a general way what the (1134) accountant's working paper consists of during the course of a monthly audit.

Q. Let me ask you this, first: Do you know whether or not Mr. Bercu had the regular kinds of accounting working papers? A. Yes, sir.

Q. Would you describe those, then, please? A. Besides working papers indicating monthly trial balances——

Mr. Stryker: Just for clarification, is the witness describing something he knows, or is he giving his system? It is not clear. If it is something he personally knows, of course I have no objection.

Mr. Wessel: I think the evidence is clear that he said——

Mr. Stryker: It isn't to me, and I am just asking for clarification.

Mr. Wessel: I haven't finished my statement, counsel. I think the evidence is clear that the witness stated that he does not know exactly what papers Mr. Bercu had; he just knows that he had the regular kind of accounting work papers, and he is now describing what the regular kind of accounting work papers are.

(1135)

Mr. Stryker: I submit that is a curious way to try to introduce the fact. This witness either knows or he doesn't know.

For him to go off on a tangent and describe what he thinks is the general system, and then characterize it, surely is not evidence. If he saw it, knows it, then he is a witness.

Mr. Wessel: I will lay some more foundation questions.

By Mr. Wessel:

Q. Mr. Roth, as an accountant over the 30 years you said yesterday, I think, how many companies' books have you audited? A. I would say a few hundred.

Q. And during the course of those audits, have you worked with other accountants? A. I have.

Q. How many would that be, approximately? A. How many accountants?

Q. Accountants. A. Would that include my employees?

Q. Yes, sir. A. Including my employees, approximately 25.

Q. Now, in working with those accountants, did you (1136) have an opportunity to observe whether they in general kept the same kind of work sheets and work papers relating to their audits? A. In the ordinary business, where is what we would commonly call a cut-and-dried audit, the working papers are just ordinary, and the working papers are cut and dried, but in the instance of Eatsum Food Products Co., besides the ordinary working papers, what I term as cut and dried, there were summaries and analyses of perpetual inventory unit records.

Q. Now do you know there were such summaries and analyses? A. Mr. Hausman, my assistant, told me that Mr. Bercu is keeping a perpetual inventory record of the candy operation at the factory, and he continued keeping that perpetual inventory record from the time that he did the work for Mr. Lubben as proprietor.

Mr. Stryker: If your Honor please, I hate to interrupt, but it is very clear that what the witness is now giving is pure hearsay of what somebody else by the name of Hausman told him. That is not evidence and I ask your Honor to strike it out and confine this witness to whatever may be legal evidence.

Mr. Wessel: I don't care about the perpetual (1137) inventory. I will be glad to have it stricken.

Mr. Stryker: And will your Honor instruct the jury to disregard it?

The Court: Yes, I so instruct.

By Mr. Wessel:

Q. With regard to the papers, other than any perpetual inventory, and I am referring now to regular accounting

papers, would you say that the accountants you worked with over the years in audits, and yourself, have had the general kinds of trial balance and other work sheets, the same general kind of trial balance and other work sheets relating to the business that they audit? A. Yes, sir.

Q. Is it the regular course of business of the accounting profession when an audit——

Mr. Stryker: If your Honor please——

Mr. Wessel: I haven't finished my question.

Mr. Stryker: Your question is wrong already, in my view. The general practice of other accountants has no relation to any issue in this case.

If this witness saw the accounts kept by Bercu and wants to say something about it that relates to Mr. Giglio, adverse or otherwise, that is evidence.

(1138)

Mr. Wessel: Let me ask another question.

By Mr. Wessel:

Q. Did you ever see any partnership accounts, papers, kept by Mr. Bercu? A. Yes, sir.

Q. Where did you see them? A. At 19 Rector Street, during a discussion of differences in the final monthly audit between Mr. Hausman and Mr. Bercu, and he referred to his working papers.

Q. Did you ever see them again? A. Yes, sir.

Q. Where? A. In Mr. Bercu's office.

Q. Who was present? A. Mr. Giglio, Mr. Lubben, Mr. Bercu, myself, and one of Mr. Bercu's assistants.

Q. What was said and by whom? A. Mr. Giglio at that time told me that he has an appointment with Mr. Lubben to go up to Mr. Bercu's office in order to get all the partnership papers; I should go along with him, in order

to identify the partnership working papers. I did go along with Mr. Bercu—with Mr. Giglio to Mr. Bercu's office, met Mr. Lubben, met Mr. Bercu, to identify all the working papers of the Eatsum Food Products partnership.

Q. Then what happened? A. Mr. Giglio wanted those (1139)

papers returned. We adjourned into another room, between Mr. Lubben, Mr. Bercu and myself; Mr. Bercu had under his arm one or two red folders, legal folders, containing all his working papers, and Mr. Giglio asked, "Are these all the working papers of the Eatsum Food Products Co.?"

He said, "Yes."

He says, "Louie, take a look at them."

I did look at them, and he says, "I want them," and he pushed Mr. Bercu's hand off the folders and he put his hand on, he says, "This is the property of the partnership; this is not property of yours."

Bercu says, "I want to hold on to these papers in case something comes up in the future, I will have something to refer to."

Mr. Giglio says, "Nothing will come up. It's my property, I want them."

As a compromise, it was decided that I would destroy those working papers in the presence of Mr. Bercu's assistant.

We adjourned into the men's washroom, tore up the papers, and flushed the contents of the folders down.

Q. Did Mr. Giglio ever have a discussion with you (1140)

subsequent to that time with regard to your own work papers? A. I do not recall any, except at the time that I turned over the transfer files to him.

You mean my personal working papers?

Q. Yes, sir. A. The last conversation I had with Mr. Giglio was about five weeks ago, about my personal working papers.

Q. What was that conversation? A. Mr. Giglio telephoned me that he would like to make an appointment, in Mr. Rosenblum's office, or in Mr. Stryker's office, for the purpose of going through my personal records in order to determine, to see what moneys he received from me, and what records I have indicating the moneys that I advanced to him.

I spoke to my attorney about this matter. He says he will communicate with Mr. Stryker and let me know what to do.

A few days after that he told me, it is unnecessary for me to turn over my working papers to Mr. Stryker—to Mr. Giglio, and just to hold on to them.

Q. Did you ever have a discussion with Mr. Giglio in connection with working papers at a time when Mr. Dominick Gangi was present? A. In my office, I had two paper

(1141)

cartons of working papers. They may have been cancelled checkbooks, stubs, folders. I do not recall what were in those two cartons, and after a visit that I had with Special Agent Cordes, who visited me at my office, he discussed the matter, the investigative matter, with me for a few minutes —I am skipping over everything of the discussion, but come down to the working papers—and he says, "One of the gravest errors that you ever made was to destroy partnership working papers."

I told him, "I am sorry I did it. I realized afterwards."

I discussed the matter with Mr. Ronayne, within an hour after that, told him that Mr. Cordes was there to see me.

He asked me, "What did Mr. Cordes say to you, what did you say to him?"

I told him.

That night or the next day, Mr. Giglio telephoned me, and he came to my office, and he told me that I was very foolish to tell Cordes that I destroyed any working papers. He asked me if I got anything, any working papers, books or records——

Mr. Stryker: Pardon me. Just a minute. Will (1142)
you let me make an objection?

Here, again, we have a pure hearsay statement of this witness about what somebody said to him. He is talking about a conversation he had with Mr. Ronayne, who is not a party to this lawsuit, so far, at least, has not been a witness, and it would be quite impossible to keep these issues straight, if we have to go into hearsay.

Mr. Wessel: Counsel is interrupting a conversation between Mr. Giglio and the witness.

Mr. Stryker: If I am wrong, I will withdraw the objection. I thought he was talking about a conversation with Mr. Ronayne.

(1143)

Q. The present conversation you are now testifying to, Mr. Roth, is that one you had with Mr. Giglio? A. Within a day after the visit of Mr. Cordes to my office.

Q. Go ahead and answer, please.

Mr. Stryker: If he did not say Ronayne, I am mistaken. I withdraw the objection.

Q. He came to my office with Dominick Gangi; asked me if I had any books and records. I showed him two cartons, and he instructed Dominick Gangi to take them out, and at the same time he told me I was very foolish to

tell Cordes that I destroyed the working papers in Bercu's office.

Q. Have you finished, Mr. Roth? A. Yes, sir.

Mr. Wessel: May I state to the Court, in part of the answer the witness did refer to the conversation with Mr. Ronayne.

The Court: There were three conversations, one with Cordes, one with Ronayne, and one with the defendant Giglio.

Mr. Wessel: If counsel wishes to strike those, I will oppose the motion on the ground that this witness of course is a co-conspirator and his statements are admissible against other co-conspirators.

(1144)

Mr. Stryker: I raise the same point, and I had understood that this man is no longer a defendant in this case.

The Court: It doesn't affect conversations at the period he is describing. I will overrule the objection.

Mr. Stryker: I respectfully except.

Q. Mr. Roth, yesterday, at the end——

Mr. Wessel: Strike that, please.

Would you mark these two sheets for identification, please.

(Marked Government's Exhibits 62 and 63 for identification.)

Q. I show you, Mr. Roth, Exhibits 62 and 63 for identification, and ask you if you can identify those papers for me? A. These two sheets, to the best of my recollection,

are accounts receivable or accounts payable ledger sheets of Eatsum Food Products Company.

Q. When did you last see them, Mr. Roth? A. I would say December 2, 1947, or prior.

Q. Do you know what the home residence of Michael Cohen was in 1945 and 1946? A. I think it was Sullivan Place, Brooklyn.

Q. And do you know what is located at the address, 3152 (1145)

Brighton, Brooklyn, New York? A. That address don't indicate anything to my mind.

Q. Did you and Mr. Cohen take regular steam baths weekly together at Coney Island? A. Yes, sir.

Mr. Stryker: That is very interesting. I won't object.

Q. Did you, sir? A. Yes, sir.

Q. Do you know what the address of that steam bath was? A. No, sir. I can just give you the name.

Q. Can you state, Mr. Roth, what address you put down for Mr. Cohen on the Eatsum partnership books? A. I do not remember.

Mr. Wessel: I offer Exhibits 62 and 63 in evidence.

Mr. Stryker: Pardon me a minute.

Preliminary Questions By Mr. Stryker:

Q. What do you say these papers were that have been shown to you, Exhibit 62 for identification? A. These are accounts receivable or accounts payable ledger sheets of Eatsum Food Products Company.

Q. Did you keep these records yourself? A. No, sir.

Q. Whose handwriting are they in? A. May I——

Q. Sure. A. ——see the sheets of paper? (After looking) (1146) I can only recognize one handwriting, Mr. Stryker.

Q. Well, you mean that one handwriting covers the whole, all the two sheets, or do you mean one item? A. No.

Q. One item you recognize? A. No.

Q. Tell me what you do mean. I don't know. A. I will tell you, sir. One, two, three, four, five, six, seven.

Q. All right, on the sheet 63 for identification, you recognize some handwriting on that sheet? A. Yes, sir.

Q. All of it or only some? A. No, there is seven items, as I indicated to you.

Q. The seven items under debits, seven items from the top, one, two, three, four, five, six, seven—that is the figure 4170? A. The last item, 4170.10.

Q. Is that in a different handwriting from the rest? A. It appears to be, yes.

Q. Whose handwriting would you say that appears to be in? A. That handwriting I recognize as being Miss Feldman, the bookkeeper for Eatsum Food Products Company.

Q. You don't recognize any of the other entries on these two sheets? That is, you don't recognize the handwriting (1147) on any other entry, is that right? A. I only recognize some handwriting on this sheet as being of Miss Feldman's.

Q. All right. Let's see. This sheet is 62, Government's, for identification. Just point out to me—I don't think the figures will mean anything to the jury at this time—just give me—count down the column and point out any figures that you say are in Miss Feldman's handwriting? While you are doing that, I will step back. A. Under the item of "Debits," starting with the fourth number, fourth figure, the fourth, fifth, sixth, seventh, eighth, ninth, tenth item

appear to be in Miss Feldman's handwriting. On the other side of the sheet, under the heading of "Credits,"——

Q. Yes. A. —the fifth item from the bottom appears to be in Miss Feldman's handwriting.

Q. One, two, three, four—that is 651? A. The fifth ink figure from the bottom.

Q. That is 651.56; is that right? A. No.

Q. All right, give me the figure, whatever it is. A. Excuse me. You are correct, sir. The sixth—you are correct, sir. The sixth figure from the bottom, $1,821.31, appears to be in Miss Feldman's handwriting.

Q. What you have given us now is all of the handwrit-

(1148)

ing that you can identify, is that right? A. That I could recognize.

Q. All right. Now, who is Miss Feldman? A. She was the bookkeeper for Eatsum Food Products Company.

Q. Were these books kept with the punched hole in the side, regular ledger punched holes? A. May I see that sheet, sir?

Q. Yes, surely. Look at the other one, too, if you want to. I made that statement—you can correct me—I see no punched holes there, are there? A. Well,——

Q. Are there? A. No, sir.

Q. All right. A. I do not recall the type of binding that was on the accounts receivable or accounts payable ledgers.

Q. Now the partnership, as I understood it, began when? A. About May, May 1945.

Q. Well, the first item on Exhibit 62 for identification is April 11, isn't it, right there? A. Yes, sir,

Q. That item then was some transaction before the partnership began; is that right? A. I do not know the exact da : when the partnership began, unless I refer to the

(1149)

legal records indicating the date of the first transaction. It may very well be April 11th, and it may be May 11th. I am giving you my memory.

Q. It might be anything at all. Do you know when the partnership began? You have given us a good deal of testimony about it. Can you tell us that? A. The legal operation of the partnership began at the time—May 1st, 1945.

Q. All right. Well, there is an item on there prior to May 1, 1945, is there not? A. Yes, sir.

Q. Well, then, this record that you have was apparently not entirely an Eatsum partnership record; that's right, isn't it? A. I do not agree with that statement.

Q. All right. When did you last see these papers?

Mr. Stryker: Strike that.

Q. Did you see these papers while you were working there for Eatsum? A. I do not recall this specific paper or hundreds of other ledger sheets that I saw.

Q. I am talking about two papers now in question, 62 and 63 for identification; did you ever see those two papers? A. I did——

Q. Pardon me. Now offered by the Government in evidence. Did you ever see those while you were working

(1150)

for the Eatsum partnership? A. I do not recall specifically seeing those two, seeing those two individual papers, no more than hundreds of other customers' ledger sheets.

Q. Now I will ask you when you first saw these papers that we have been talking about? A. When?

Q. That is right. A. I do not recall when I first saw these papers.

Q. Give us your best recollection? A. I cannot recall identifying any customers' ledger sheets when there were hundreds of other customers.

Q. Have you seen these papers before they were offered to you this morning by Mr. Wessel? A. I may have seen those papers while working on the books of Eatsum Food Products Company during '45 and '46.

Q. I am sorry, but you may have done, I suppose, anything. I am asking you if you didn't see them during the partnership, when you first saw them? If you don't know, then I can't pursue that.

Mr. Wessel: I object to the form of the question.

The Court: Sustained.

Mr. Stryker: What is that?

The Court: I sustained the objection as to form. He did not say he did not see them. He said he can't recall whether he saw them or not.

(1151)

Mr. Stryker: All right.

Q. You can't recall ever seeing these papers while you were the accountant there during the partnership period, can you? What is your answer? A. The same answer I gave you before, Mr. Stryker.

Q. The answer is no? A. No, that wasn't my answer.

Q. Let's hear the answer. What is it now?

Mr. Wessel: I object. This is not cross examination, although counsel thinks it is.

Mr. Stryker: I have a right to inquire——

Mr. Wessel: The question has been answered, I think, quite clearly by the witness.

Mr. Stryker: Maybe it is clear to you.

Q. So we will have it once and for all so even I will understand it, did you or did you not see these two papers while you were working for the Eatsum partnership? That is clear, I think. Will you give me an answer to that? A. I could only answer that question in the following manner:

these two sheets are one—two of hundreds of customers' and creditors' ledger sheets, and I do not recall seeing, remembering those two sheets specifically in the customers' or creditors' ledger.

Q. Well, when did you see them before Mr. Wessel (1152) showed them to you this morning?

Mr. Wessel: I object to the form of the question. I think it has been answered.

The Court: Sustained.

Mr. Stryker: Well, maybe your Honor can supply the answer, because I am frank to say I don't know what it is.

Mr. Wessel: I will be glad to supply the answer.

The Court: The witness said he doesn't recall seeing those specific sheets; he can't say now that he ever saw those two specific sheets, so he can't say when he saw it.

Mr. Stryker: Well, that would follow, I agree.

Q. Well, had you been in business with Mr. Cohen before the first entry on this document? A. I do not understand by who you mean by "you"?

Q. I mean you. A. Yes, I did work for Mr. Cohen prior, in 1945.

Q. How long before the first entry on this sheet?

Mr. Wessel: I object to the question on the ground it is beyond the scope of what counsel thinks is voir dire.

The Court: Sustained.

Mr. Stryker: I think I have a right to inquire (1153) every circumstance about this paper before I either have or have not an objection to it.

Mr. Wessel: I think if counsel has an objection he can now state it.

Mr. Stryker: I would prefer to have a basis on which I can make a sound objection if I can, or if I can't, I won't make it.

The Court: I will sustain the objection.

Mr. Stryker: Your Honor won't permit that?

The Court: I don't see that that has anything to do with the point.

Mr. Stryker: Well, then, in view of the examination which I have had—and don't think I am criticizing the Court's ruling—but in view of the ruling I can't proceed with it, and in view of it I am going to object to the introduction of the document.

The Court: I think on the basis of the record so far, I will sustain the objection.

Direct Examination Continued By Mr. Wessel:

Q. Mr. Roth, yesterday at the conclusion, toward the end of the session, I had shown you the American Brands consolidated return which is Exhibit 8 in evidence, and I ask you if you will specify, Mr. Roth, in what respect that consolidated return was a false return?

(1154)

Mr. Stryker: I think, if I am not mistaken—it is hard to follow so much evidence—I believe that question was asked and answered yesterday. If I am wrong, why, I withdraw my objection.

The Court: It could very well be.

Mr. Wessel: I had thought I had not asked that question, but——

The Court: I think you asked him about several, but I can't be sure whether we have got the consolidated or not.

Mr. Stryker: The record is getting to be over a thousand pages, and that is my memory, that is my recollection.

Mr. Wessel: I recall having asked the witness why he signed, and that is at pages 1052 and '53, or thereabouts, but I don't recall having asked the witness that specific question.

Mr. Stryker: Your Honor, to save time, I won't stand on the objection. I will withdraw it and let him answer.

The Court: All right.

The Witness: May I hear the question?

The Court: Read back the question.

(Question read.)

(1155)

A. It is false to the extent that it should never have been a consolidated return. In addition, there is an overstatement of sales under item 1.

Mr. Stryker: Wait a minute until I follow you.

Mr. Wessel: I think counsel will have an opportunity at a later time to cross-examine and should not interrupt the witness.

Mr. Stryker: I think you are quite right. Go ahead.

A. (Continuing) And it is false to the extent that I recall expenditures that were not true, expenditures of the business, but used as a deduction from income. It is false to the extent that in the consolidated arithmetical figure there was included the loss sustained by Lawn International Corporation, though that name is not mentioned on the affiliation schedule.

Mr. Stryker: I really do hate to interrupt, but I just want to be clear for the record. If I have a continuing objection to matters not contained in the bill of particulars, I won't interrupt. If your Honor will glance at it, if you have it before you, you will see I am right that it is not.

Mr. Wessel: Let me state for counsel's benefit that substantially all the evidence I am now eliciting

(1156)

from the witness is in regard to the conspiracy count, and accordingly, since there is no bill of particulars on that count, counsel's continuing objection can be understood and to continue to this whole line of testimony.

The Court: All right.

Q. Will you continue, please, Mr. Roth. A. Without a further examination of the books and records and its respecting supporting data, I cannot determine what else is wrong at this time.

Q. I show you, Mr. Roth, Exhibit 10 in evidence, which is the corporation tax return of Lawn International, Inc., and ask you first when you filed that return? A. September 26, 1947.

Q. Did you have any discussions with Mr. Giglio or Mr. Lawn in connection with the filing of the Lawn International return at a later time than the American Brands consolidated return? A. Yes, sir.

Q. What was that discussion and who was present? A. The discussion was with Mr. Lawn, that at the time the consolidated return was filed he pointed out to me that Lawn International has nothing to do with the American Brands Corporation; that this is a strictly fifty-fifty corporation between him and Mr. Giglio, and should not be included in

(1157)

the consolidated tax return. The name, "Lawn International" was omitted from the affiliation schedule, but erroneously not omitted from the consolidated figures that had already been drawn up on working paper.

Q. Now I show you, Mr. Roth, Exhibits 11, 13, and 15 in evidence, which are individual tentative returns for American Brands Corporation, American Brands Wholesale Corporation, and American Trucking & Forwarding Corporation, and ask you why it was that you filed individual tentative returns when you filed a consolidated final return? A. At the time that the individual tentative returns were filed, they were individual corporations.

Q. And what kind of corporations——

Mr. Wessel: Strike that.

Q. And were these corporations individual corporations at the time the final consolidated return was filed? A. Yes, sir.

Q. Let me ask you, Mr. Roth, the affiliation schedule which is attached to the corporation consolidated return, list the stock of Wholesale Trucking, Sweets and Agar as being wholly owned by American Brands Corporation; is that true? A. At that time, no.

(1158)

Q. Did you know that it was not true at the time that you filed the return? A. It was not true at that time, but I think, Mr. Wessel, an explanation is in order, if you will permit me?

Q. All right. A. In drawing up the profit and loss statements for the year 1946 on the various corporations, the corporations of American Brands Corporation, American Brands Wholesale Corporation, and American Trucking & Forwarding Corporation, was operating at a profit. The other corporations, American Agar Corporation,

American Sweets Corporation, was operating at a loss. The working papers that I drew up at that time indicated a tax liability for the three corporations. We could not apply the losses of the other two corporations to the three unless they were truly consolidated corporations.

Mr. Giglio and I had a discussion. Mr. Giglio told me if we were to pay the money out to the government, which at that time on American Brands, in my opinion, to my recollection, amounted to a tax liability of approximately 125 to $150,000, we would not have enough money to continue the research. So commencing with about June, 1947 it was thought of filing the tax returns on a consolidated basis.

(1139)

Not being familiar with consolidated tax returns—and this is the first one I filed—I communicated with Mr. Ronayne. He came to the office. We discussed the problem of consolidated tax returns with him. He advised us at that time——

Q. When you say "us," do you include yourself? A. Mr. Giglio and myself.

Q. Yes? A. He advised us at that time that the only way a consolidated tax return could be filed is if the parent corporation owned at least 95 per cent of the stock of the affiliated corporation since its inception. Mr. Giglio told him that these corporations are all affiliated corporations, because we are taking money from one to another; we are transferring assets and liabilities from one to another. He is in control of the stock of all the other corporations. It isn't a question that he has got to go to strange stockholders in order to draw his stock, and it is mere mechanics in order to effect American Brands being the owner of 95 per cent of the stock of all the other corporations.

He also said at that time that Mr. Rossbach, the attorney who drew the corporation papers, should have been in the first place—should have put all the stock in the name of American Brands. Despite the fact that I knew that the

(1160)

stock was not, that American Brands was not the owner of 95 per cent of the stock since its very inception, I filed on a consolidated tax return basis, anticipating that the changes would be made whereby American Brands became the par-

(1160a)

ent corporation.

Q. What did you understand, Mr. Roth, Mr. Giglio mean by the, I think you used, "mere mechanics"? A. Mere mechanics to me meant that as long as he was in control of the stock of the corporation, of changing the names of the stockholders from themselves, Mr. Livorsi, Mr. Giglio, and Mr. Lawn, from themselves, individually, to that of the corporation, dating it back to the inception of the corporation.

Q. What books would have required changes in that connection? A. I imagine—I think the minute book, the stock certificate book, and the stock transfer book.

Mr. Stryker: Just a minute, your Honor.

Pardon me, Mr. Roth.

There is a typical illustration of a request for a conclusion, what would have happened is a pure mental operation. It is not evidence from this witness.

The Court: I will overrule the objection. This is the man who set up the books, and kept them, supervised their keeping.

Mr. Wessel: Do you have the question in mind, Mr. Roth?

Q. What books would have required changes to show (1161)
the proper consolidated stock interest? A. From my experience, none of the accounting books, but just the legal books, which were in control of—which were in Mr. Lawn's office. The stock certificate book would require changes, the stock transfer book would require changes, and the minute book would require changes.

Q. Now, you said a moment ago that Mr. Giglio told Mr. Ronayne that the stock interest in all these corporations was substantially the same. Was that the fact? A. Well, except for American Agar Corporation, in which Mr. Lawn had a 25 per cent interest, that 75 per cent of American Agar, and all other corporations, were 50-50 between Mr. Livorsi and Mr. Giglio.

Q. Now, with regard to the American Agar Corporation, was that the corporation which had the substantial losses? A. Yes, sir.

Q. Do you recall the amount of those losses? A. I can only estimate, Mr. Wessel.

(Marked Government's Exhibit 64, 65, 66, 67, 68 and 69 for identification.)

By Mr. Wessel:

Q. I show you, Mr. Roth, Government's Exhibits 64 (1162)
through 69, and ask you if you can identify those documents for me? A. These documents are tax returns prepared for the purpose of filing them as individual corporations, instead of on a consolidated basis.

Mr. Wessel: I will stop at this point, your Honor.

The Court: All right, we will recess for lunch.

Will 2:30 give us time to go over these?

Mr. Wessel: It won't take the Government very long, if your Honor please. I don't know how long it will take the defendants to determine what their objections are.

The Court: Will it serve everybody if we make it 2:20?

Mr. Wessel: I would think, if your Honor please, the books which the Government is referring to are clearly identified. I don't know how long the defendants might take.

The Court: Let's try for 2:20. If it takes longer, we will do it.

Mr. Stryker: What time did you put it to?

The Court: 2:20. All right, don't discuss the case.

(Adjourned to 2:20 o'clock p. m.)

(1163)

AFTERNOON SESSION (2:35 p.m.)

(Jury in box.)

LOUIS J. ROTH, resumed.

(Government's Exhibits 69-A and B; 70-A, B and C; 71-A, B, C, D and E; 72-A and B; 73-A, B, C, and D, all marked for identification.)

Mr. Stryker: If it is proper, could it be stated to me as we go along, what these exhibits are? I don't know what they are. I may want to discuss them as we come to them. Is that all right?

The Court: When they are offered, Mr. Stryker, they will be shown to you.

Mr. Stryker: I know they will, but it will help—all right, let it go.

(Government's Exhibits 74, 75, 76-A, B and C; 77-A and B; 78; 79-A, B and C; 80-A, B and C; 81-A, B and C; 82-A, B and C; 83-A and B; 84-A, B and C; 85-A, B and C; 86-A, B and C, all marked for identification.)

Direct Examination Continued by Mr. Wessel:

Q. Mr. Roth, when we recessed for lunch, I had shown you Exhibits 64 through 69, which you identified as some papers which you prepared. I now show you Exhibit 69-A for identification and ask you if you can tell me what that is? A. May I look at these, please?

(1164)

(After looking.) 69-A is a tax return prepared for the individual operations of American Brands Corporation.

Q. 64 then would be a copy of a consolidated American Brands Corporation return? A. Yes, sir.

Q. With regard to the returns, 64 through 69-A for identification, can you tell me when those papers were prepared by you? A. Between the period of July or August, 1947.

Q. Between that period and what? A. July 1st or up to about August 31st.

Q. Now Exhibits 65 through 69-A, were those returns ever filed, or copies of them, or originals, of which they seem to be copies, or any documents in any way the same as those? A. No, sir.

Mr. Wessel: I offer in evidence Exhibits 64 through 69-A.

Mr. Stryker: No objection.

(Government's Exhibits 64 through 69-A for identification, received in evidence.)

Mr. Wessel: Ladies and gentlemen, Exhibit 64 is a copy of the consolidated American Brands return, and Exhibits 65 through 69-A are unconsolidated returns which were prepared but never filed (handing to jury).

(1165)

Q. Mr. Roth, I show you Exhibits 11, 13 and 15, and ask you whether you prepared and filed tentative returns on an individual basis for American Brands Corporation, American Brands Wholesale and American Trucking & Forwarding Corporation? A. Yes, sir.

Q. I notice in those returns, Mr. Roth, that you estimated the tax liability of those three companies at $100 each; was that a fair estimate based upon your analysis and examination of the books? A. That $100 was not an estimated tax liability, Mr. Wessel. The $100 was the nominal amount, a check sent along with the tax return, for the purpose of securing a receipt from the Treasury Department when the tax return was filed, a tentative return was filed for those respective corporations.

Q. The final figure, which is item number 38 in each of the tentative returns, reads "Balance of income tax due," then there is a typewritten word, "Estimated" and next to that the figure $100. Was that a true statement? A. No sir.

Q. Did you discuss that with Mr. Giglio, Mr. Lawn or Mr. Livorsi? A. Only with Mr. Giglio.

Q. When did you discuss it with him and what was said? A. At the time I filed these returns I told him that

(1166)

I was going to attach a nominal, a check for a nominal amount to the tentative tax returns. He agreed that that was satisfactory and that is what I did.

Q. Did you know what the legal requirement was for estimating taxes? A. To the best of my recollection, approximately 25 per cent of the tax that was due.

Q. Did you know that at the time you filed the tentative returns? A. Yes, sir.

Q. Mr. Roth, I show you Exhibit 69-B for identification and ask you if you can tell me what that is? A. That is a tentative tax return for Loraine Food Corporation, together with a check in the amount of $100.

Q. Did you prepare and file that return? A. Yes, sir.

Mr. Wessel: I offer it in evidence.

Mr. Stryker: Let me see it. (After looking) If your Honor please, I object to this document on the ground that it relates to Loraine Food Corporation, concerning which nothing is alleged in the indictment. We claim surprise with regard to those matters which are introduced here as to which we have had no bill of particulars. We have had none with respect to this matter.

The Court: Overruled.

Mr. Stryker: Exception.

(Government's Exhibit 69-B for identification received in evidence.)

(1167)

Mr. Wessel: Exhibit 69B, ladies and gentlemen, is a tentative return for Loraine Food Corporation, filed March 15, 1947, estimating taxes in the amount of $100.

(Handed to jury.)

By Mr. Wessel:

Q. Mr. Roth, did you ever have any discussion with Mr. Giglio, Mr. Lawn or Mr. Livorsi with regard to

whether or not Loraine Food Corporation should be included in the consolidation? A. I do not recall any discussion——

Mr. Stryker: Pardon me just a moment.

So that I will not interrupt unnecessarily, will your Honor grant me a continuing objection upon the grounds already stated with respect to those matters concerning which we asked for but did not obtain a bill of particulars?

The Court: All right.

Mr. Stryker: If that is understood, I will try not to interrupt you.

The Court: Very well, Mr. Stryker.

Go ahead.

Mr. Wessel: Would you read the answer back, please.

(1168)

The Court: I'd like to hear the question, too.

(Question and answer read.)

A. (Continuing) —regarding Loraine Food Corporation as part of the consolidation with either Mr. Giglio, Lawn or Livorsi.

Q. Do you know as of the period March, 1947, to September, 1947, who the stockholders were of Loraine Food Corporation? A. I can only answer that to the best of my knowledge.

Q. Well, would you give us your best recollection, Mr. Roth. A. My best recollection, from conversation with Mr. Giglio, was that Mr. Giglio was a 50 per cent owner of Loraine Food Corporation, and Mr. Louis J. Damaro was a 50 per cent owner of Loraine Food Corporation.

Q. Now, did you have any discussion with Mr. Giglio in 1947 with regard to the stock ownership in Loraine Corporation? A. I do not recall any specific discussion.

Q. I will come back to that subject in a moment, Mr. Roth.

Mr. Wessel: Would you mark this for identification, please.

(1169)

(Marked Government's Exhibit 87 for identification.)

By Mr. Wessel:

Q. I show you, Mr. Roth, Government's Exhibit 87 for identification and ask you if you can tell me what that is? A. Without reading in detail the contents of the three sheets of paper, this is a Dun & Bradstreet's report of American Brands Corporation.

Q. Do you recall having had any conversation of any kind with the Dun & Bradstreet representative in 1947 in connection with the various companies owned by Mr. Giglio and Mr. Livorsi?

Mr. Stryker: Objection as immaterial, whether he did or not. Hearsay, not binding on any of the defendants.

Mr. Wessel: I will rephrase my question.

By Mr. Wessel:

Q. Do you recall having had any conversation with a Dun & Bradstreet representative in 1947 regarding consolidations at which Mr. Lawn was present?

I should say 1946 and not 1947, Mr. Roth. A. Yes, sir.

Q. Was anybody else present besides Mr. Lawn and the

(1170)

representative of Dun & Bradstreet? A. I do not recall

anybody else being present besides Mr. Lawn and the Dun & Bradstreet representative.

Q. Would you state where the conversation took place, when, and what was said? A. The conversation took place in Mr. Lawn's private office, at which time he handed him a financial statement purported to be the operations of American Brands Corporation for the purpose of securing a Dun & Bradstreet rating.

That is all the conversation that took place between the representative, Mr. Lawn and myself.

Q. Did you on any other occasion discuss with Mr. Lawn the information to be furnished Dun & Bradstreet? A. Yes, sir.

Q. When, where, who was present and what was said? A. During 1946, to the best of my recollection, approximately the months of August and September, Mr. Lawn was engaged in attempting to negotiate some large foreign import and export transactions.

He discussed the matter with Mr. Giglio and myself, that as he appears before the representatives of these large

(1171)

foreign companies, and he mentions the fact that he is representing American Brands, there is no rating for American Brands Corporation.

It would stand him in very good stead, in negotiating deals for the import and export of various types of merchandise if he could have a million dollar organization so the representative, in discussing the matters with him, would know that he represents a million dollar company, and it is very essential for him to get that type of rating in order to assist him to do business.

Furthermore, it would be very advantageous to have a million dollar rating. There would not be the necessity of

supplying either domestic or foreign letters of credit, if and when a deal was negotiated.

I told Mr. Lawn that I am hesitant about preparing that type of a statement, because we are not seeking any credit from anybody; practically 95 per cent of the merchandise that we buy is on a cash basis; we are receiving payment within 10 days on approximately 95 per cent of our sales.

He says—he indicated the purpose of the statement is not to seek credit from tradespeople in order to eventually defraud them for not paying the invoice, but rather giving (1172)

him financial standing when he talks to these representatives.

I prepared a statement dated June 13, 1946, in an arbitrary manner, under the name of American Brands, indicating that the capital stock of the combined corporations, and this particular dynasty was a million dollars worth of stock and $500 worth of surplus in order to give him standing with foreign people.

He turned this statement over to a friend of his, who was a reporter for Dun & Bradstreet's, in order to have a good report made and a good rating established.

Q. You used the word "dynasty" in your answer, Mr. Roth.

Had you ever before that time had any discussion at which Mr. Lawn was present in which the word "dynasty" was used? A. Yes, sir.

Q. When was that, who was present, and what was said? A. Mr. Lawn was instrumental in organizing these corporations in January, 1946, in anticipation that this process of substitute sugar would be effected, and we organized a corporation called American Candy Corporation, because the substitute of sugar is used in candy. American Sweets

for maraschino cherries because sugar is used in that prod-
(1173)
uct. A trucking corporation, a finance corporation, American Brands Corporation, American Brands Wholesale Corporation, American Agar Corporation for research.

At that time he said, "The only time that I know that we will be successful is when the Department of Justice—when we have to defend ourselves against the Department of Justice on an antitrust lawsuit, and we are going to have a small dynasty within our organization."

Q. Had you ever before that time had any discussion with Mr. Giglio, Mr. Lawn or Livorsi with regard to organizing various corporations? A. I had a discussion with Mr. Giglio——

Q. When was that, where, who was present, what was said? A. Just Mr. Giglio and myself at the time the corporations were contemplated being organized. From an operational point of view I had a discussion with Mr. Giglio to the effect that it was his plan that if he organized American Candy Corporation to get an efficient candy manufacturer to work in the Candy Corporation and share in the profits of the Candy Corporation, the parent corporation who would have owned the process would supply them with
(1174)
the sugar. The finance company would finance it. The trucking company could do all the trucking.

This same principle applied to American Sweets Corporation, to get a man who is very experienced in manufacturing maraschino cherries. The purpose of all these corporations, wherever sugar was to be used, it was Mr. Giglio's thought by discussion to get an efficient production man to operate that corporation and for the parent corporation to supply them with the ingredients.

Q. Mr. Roth, I show you Government's Exhibit 79A for identification and ask you if you can tell me, first, what that is? A. These are the general ledgers for the years 1946 and 1947 of Loraine Food Corporation.

Q. And now I am going to turn to account Nos. 14A, B, C and D, and ask you whether those refresh your recollection in any way as to any conversations you had with Mr. Giglio in 1947 with regard to Loraine Food Corporation? A. The conversation in connection with these accounts had to do with the receivership proceedings.

(1175)

Q. Well, now, first of all, before you get to that, what receivership proceedings are you referring to? A. Of American Brands Corporation, American Brands Wholesale Corporation, American Trucking Corporation, American Sweets Corporation—all the corporations except Loraine Food Corporation.

Q. Was Loraine Food Corporation ever in receivership? A. To my recollection, it was originally in receivership, but upon motion of the attorney the receiver eliminated them from the receivership proceedings.

Q. Who was the attorney to whom you are referring? A. I don't know which attorney, but there were two attorneys involved, representing the American companies.

Q. What were their names? A. Originally one attorney by the name of Louis Goldberg, represented the corporations in the receivership proceedings, and then an attorney by the name of Walter Kohn, a member of the firm of Wexler & Kohn, entered at a later date in the receivership proceedings.

Q. And what conversation do you recall having with Mr. Giglio with regard to Loraine Food Corporation at that time? A. In the receivership proceedings there was a loan—the receiver's accountant indicated loans receivable

due from officers, Mr. Giglio, Mr. Livorsi, myself and perhaps Howard Lawn. I am doubtful whether there was a

(1176)

loan account on the books for Howard Lawn. The receiver's accountant indicated a balance due on these loan accounts of approximately 180 to $200,000. The report also indicated moneys received by the American companies from Loraine Food to an amount of approximately 150 to $175,000, and also moneys received by the American companies from Eatsum Food Products Company to approximately $50,000.

It was necessary to indicate to the receiver that the moneys on the books of Loraine Food Corporation were due to William Giglio, and in turn that the money that American Brands Corporation received from Loraine Food actually came from William Giglio and is an offset against loans receivable. Therefore, it is an item that is not subject to suit for recovery on the part of the receiver.

At that particular time I instructed, to my recollection, the assistant bookkeeper at that time, by the name of Sklar, to indicate on these various ledger sheets loans receivable due to William Giglio, because he told me that he was taking over the stock of Louis Damaro and that he was a hundred per cent owner of Loraine Food Corporation.

Q. Have you finished your answer, sir? A. Yes.

(1177)

Q. Let me see if I can ask you some questions about that, sir. There came a time in 1947 when the various companies you named went into receivership; is that correct? A. Yes, sir.

Q. Was that a State receivership as distinguished from a Federal bankruptcy? Well, let me ask you this—— A. I think it was in the State of New Jersey—State receivership.

Q. Let me ask you, who was the principal creditor of the various companies? A. United States Government for taxes.

Q. And if I understood you correctly, the books of the various companies showed that Mr. Giglio had borrowed a great deal of money from the companies; is that correct? A. Yes, sir; the accuarte amount you can get from the accountant's report or from the books.

Mr. Wessel: I ask that this paper be marked with the next exhibit number for identification.

(Marked Government's Exhibit 88 for identification.)

Q. I show you Exhibit 88 for identification, and ask you if you can tell me what that paper is, Mr. Roth? A. This is a financial report from the receiver's accountant of American Brands Corporation, et al.

(1178)

Q. Does that refresh your recollection as to the amount of moneys which the receiver said were owed by Mr. Livorsi, Mr. Giglio, Mr. Lawn and yourself to the various companies in the receivership? A. Yes, sir.

Q. What were these amounts, Mr. Roth? A. On the consolidated statement of financial condition of American Brands Corporation, American Brands Wholesale Corporation, American Sweets Corporation, American Agar Corporation, American Trucking & Forwarding Corporation, on December 2, 1947, under the caption of "Loans Receivable," William Giglio, $107,553.25; Frank Livorsi, $34,558.33; Louis J. Roth, $18,500; Others, $6,645.71. Special Drawings, $11,500. Total, $195,852.54.

Q. The sheet that you are looking at is a consolidated sheet. Do you know whether or not, Mr. Roth, there is any difference between a consolidated statement of that kind

and a consolidated tax return? A. A great deal of difference.

Q. Will you explain that difference to the Court and jury, please? A. A consolidated income tax return must be filed in accordance with Treasury Department regulations. A consolidated balance sheet can be drawn up at the request of the managing officers of a corporation, of cor-

(1179)

porations, where they have interest, for the purpose of eliminating contra items and transactions that exist between the corporations.

Q. If I am correct in what I say, Mr. Roth, a consolidated accounting statement such as the one you hold in your hand, is done in order to eliminate intercompany transactions and show a true over-all profit picture from all the companies, is that correct? A. A profit and asset-liability picture.

Q. And a consolidated tax return must be filed in accordance with section 141 of the Internal Revenue Code? A. That's right.

Q. And that requires that there be, the parent corporation owns 95 per cent of the subsidiary during the entire period of consolidation; am I correct about that? A. That's right; that is what I said this morning.

Q. Now, Mr Roth, was any change made in the Loraine general ledger, which I have handed you, Exhibit 78-A, account No. 14, to eliminate from the receivership the question of the receiver suing for the loans on the books to Mr. Giglio, Mr. Livorsi and yourself? A. The change was made identifying these accounts as moneys due to William Giglio, personally, instead of moneys due to the various corporations.

(1180)

Q. Now, referring to Exhibit 79-A, account Nos. 14, 14-A, 14-B, 14-C and 14-D, the first line in each one of

those pages has the name of the corporation; can you identify the handwriting of the person or the person or the persons whose handwriting that corporation's name is in? A. That handwriting looks to me as if it is the handwriting of one of my assistants, Mr. Starr.

Q. Now the line beneath it, the second line with regard to each one of the accounts I have mentioned, whose handwriting are those wordings in? A. To the best of my recollection, that is the handwriting of a bookkeeper by the name of Sklar, that was employed during 1947 by one of the companies.

Mr. Wessel: At the moment I offer in evidence only account No. 14 and the subdivisions I have mentioned of Exhibit 79-A for identification.

Mr. Stryker: I object—it is part of my continuing objection, but I would like to make it a little more specific. I object to this Government's Exhibit 79-A for identification on the ground that it purports to be a general ledger of the Loraine Food Corporation, 1946-1947. There is no count in the indictment concerning which a bill of particulars has been given relating to Loraine, and if I think I am correct, there is no count that mentions it except the conspiracy count. As to that also we have been

(1181)

denied a bill of particulars as to what the Government's charge is with respect to these various items, and the items, the overt acts, the part of the conspiracy, all the parts of that conspiracy count, are as vague and undertermined as all of the allegations concerning assets.

Now, as your Honor knows, we made a motion for a bill of particulars. It was denied. We claim

surprise, and we say that under those conditions the document is not admissible.

Mr. Wessel: May I make a brief statement, if your Honor please? The books which counsel is examining have been available——

Mr. Stryker: Pardon me. I want to be corrected. I said that Lorraine was named in the conspiracy count. Mr. Wolfram corrects me and says that it is not. I stated that but apparently it was not.

Mr. Wessel: I think you were correct, Mr. Stryker. As a matter of fact, the conspiracy count I am now referring to said "with divers other persons to the grand jury unknown."

Mr. Stryker: That doesn't tell me anything as to how to prepare for trial.

Mr. Wessel: In any event, if I may explain, because I think counsel has raised some confusion on this subject, Loraine of course is not named as a

(1182)

defendant in this case and is not a defendant in this case. Loraine was used, as I think the testimony shows, to hide from the Government the fact that these defendants owed money to the corporations in issue in the case, so that the Government would not, through the receivership or otherwise, be able to collect those loans. That is precisely what I am doing with Loraine at this time.

The Court: All right, I will receive it.

Mr. Stryker: I except.

Can I ask your Honor to instruct the jury to disregard what seemed to me an ex parte speech on the part of Mr. Wessel?

Mr. Wessel: I think I would make the same request, if your Honor pleases. I make the same request with regard to the statement that preceded it.

The Court: All right, I will tell the jury now, and I will tell you again, that facts stated by counsel are for my benefit in deciding whether I will show something to you or not. They may or may not be accurate, but I have to decide on relatively short notice whether we are going to look at something or whether we are not. At least we are going to look at it. That is all I have decided. That is my problem,

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not yours. So disregard anything counsel says.

Mr. Wessel: To save the clerk and perhaps the Court's time, if counsel has no objection, I can offer the book at this time. I intended to do it later. There is no foundation laid, but I will do as counsel suggests.

Mr. Stryker: If there is no foundation, I suppose you are not entitled to the book. I don't know.

The Court: Well, I think we will take a brief recess now and perhaps we can go ahead and get these additional documents marked for identification.

Mr. Wessel: They are marked, if your Honor please.

The Court: Are they all set?

Mr. Wessel: It is going to take quite some time to lay a foundation for the books.

The Court: I just wanted to know if we had anything to do without the jury.

Mr. Wessel: I don't think so.

The Court: All right, we will take a very brief recess and be back shortly.

(Short recess.)

(1184)

(Government's Exhibits 79A-14, 79A-14A, 79A-14B, 79A-14C and 79A-14D for identification received in evidence.)

Mr. Wessel: Ladies and gentlemen, the only pages of this book that are in evidence now are pages 14 and 14A, B, C, D, and I think it is improper to look at anything else at this time.

Those four pages are headed "American Agar Corporation" in one handwriting, and underneath the words "Loans Receivable to William Giglio."

The second page, "Eatsum Food Products Company," and underneath, "Loans Receivable to William Giglio."

Third page is "American Sweets Corporation," and underneath, "Loans Payable to William Giglio."

Fourth page is "American Brands Corporation," underneath, "Loans Receivable to William Giglio."

Fifth page is "American Brands Wholesale Corporation," underneath, "Loans Receivable to William Giglio."

The "Loans Receivable" handwriting is different from the handwriting above it.

(Handed to jury.)

(1185)

By Mr. Wessel:

Q. Mr. Roth, before luncheon, I had asked you which one of the Giglio companies sustained the greatest losses in 1946. Do you know the answer to that question, Mr. Roth? A. American Agar Corporation.

Q. I show you Exhibit 67, and ask you if you can tell me the amount of losses sustained by that company? A. $242,058.26.

Q. Now, as I recall your testimony this morning, Mr. Roth, you stated that Lawn International was not in the consolidation and that a separate return was filed the end of September, 1947, because you were advised that in that company Mr. Lawn had a 50 per cent interest.

What was the interest that Mr. Lawn had in American Agar? A. A 25 per cent interest.

Q. Did Mr. Lawn have any stock interest in any of the other Giglio companies? A. I do not know of any.

Q. Did you ever have any discussion with Mr. Lawn, Mr. Giglio or Mr. Livorsi as to why American Agar was in the consolidation and Lawn International was not in the consolidation? A. Because American Agar was an affili-

(1186)

ated group, was an affiliated company in connection with the manufacture of jam and jellies and research.

Lawn International was a separate and distinct operation, having nothing to do with the manufacture of jam and jellies and research work, but rather a corporation used for the purpose of potential earnings on import and export of various other products.

Q. I should have asked you, with whom was that conversation and when? A. The Lawn International conversation was with Mr. Lawn.

Q. And when? A. Prior—I would say approximately September 1, 1947, prior to filing the tax returns.

Q. Now, I neglected to ask you, Mr. Roth, this morning, whether or not the books of the various American Brands corporations were changed to reflect the required stock ownership for a consolidation. A. I do not know whether they ever have been changed.

Q. Well, isn't it the fact that you know they were not changed? A. I know they were not changed.

Q. Did you ever have any discussion with either Mr.

(1187)

Giglio, Mr. Lawn or Mr. Livorsi on that subject? A. Only with Mr. Giglio, to the effect that all the corporate minute books were in Mr. Lawn's office, and as an attorney he was to instruct him to make the necessary changes. Whether that ever occurred or not, I do not know.

Q. Did you ever discuss Special Agent James Twohig with Mr. Giglio? A. Yes, sir.

Q. When was the discussion, where, and what was said? A. There were a number of discussions about Mr. Twohig.

Q. With Mr. Giglio? A. With Mr. Giglio.

Q. During what period of time and where? A. I would start dating that from May 20, 1949, which is an outstanding date in my mind, up to the time that I employed Judge Pecora as one of my counsel, which was in 1952.

Q. What happened on May 20, 1949, without regard to conversation; just what happened that made it an outstanding date in your mind? A. Well, Mr. Twohig's superior visited my office, Mr. Cordes, in connection with books and records that he wanted of Michael Cohen, and at that particular time he told me——

(1188)

Q. Well, let's not get into what Mr. Cordes told you. A. Oh.

Q. Did you after that time have discussions with Mr. Giglio? A. Yes.

Q. What were those discussions with regard to Mr. Twohig? A. That it is impossible for Jim Ronayne to have Twohig transferred off the case, and he is holding on to it like a bulldog and you can't do anything with him.

That discussion substantially took place about three or four times, because Mr. Ronayne was using every effort in order to get him off the case.

Mr. Stryker: I object to that. I move to strike it out, mere conclusion.

Mr. Wessel: I take it the words "because Mr. Ronayne" on are what you are referring to, counsel?

Mr. Stryker: Yes.

Mr. Wessel: I will agree with the motion.

The Court: Yes.

Mr. Stryker: Will your Honor instruct the jury to disregard it.

The Court: Disregard the conclusion after "because."

(1189)

By Mr. Wessel:

Q. Mr. Roth, I want you to understand—I am asking only for conversations that you had with Mr. Giglio or Mr. Lawn or Mr. Livorsi. Do I make myself clear? A. Yes, sir.

Q. Now, was there any other conversation with any one of those three gentlemen with regard to Special Agent Twohig? A. I do not recall any conversations with Mr. Livorsi, nor do I recall any conversations with Mr. Lawn.

Q. Have you given us the full conversations on that subject with Mr. Giglio? A. The conversation I had with Mr. Giglio was that he informed me that Jim Ronayne can't get Twohig off the case or have him transferred, because he is holding on like a bulldog and he can't reach him.

Q. All I asked you was whether there was anything else besides what you have already told us about, Mr. Roth. A. That was substantially the conversation.

Q. Mr. Roth, Exhibit 87, do you know whether or not that is the Dun & Bradstreet report based upon the conversation with Mr. Lawn and the Dun & Bradstreet representative you referred to before?

(1190)

Mr. Stryker: I object to the form of the question.

Mr. Wessel: I will rephrase the question.

By Mr. Wessel:

Q. Do you know, Mr. Roth, whether Exhibit 87 is based in any way upon the conversation you had with a Dun & Bradstreet representative?

Mr. Stryker: It seems to me that is the same trouble. I mean, he can identify the document, but whether it is based on something else or not is a mental operation, I should think.

Mr. Wessel: I asked the question "Do you know . . ." Perhaps the witness will say he doesn't know.

The Court: I think I will sustain the objection as to form.

By Mr. Wessel:

Q. Did you ever see Exhibit 87 before January of 1955, and in that connection I refer you to the reverse side of the last page? A. Yes, sir.

Q. When did you see it? A. Mr. Miller, president of the Pennsylvania Exchange Bank, showed it to me at one time when I wanted to effect discounts of merchandise in a warehouse for American Brands.

(1191)

Q. Do you know when that paper, Exhibit——

Mr. Wessel: I will rephrase the question.

Q. Did you see that after the conversation you had with Mr. Lawn and the conversation you had with the Dun & Bradstreet representative? A. Yes, sir.

Mr. Wessel: I offer it in evidence.

The Court: How long after was that?

The Witness: About six or seven months, sir.

By Mr. Wessel:

Q. Does Exhibit 87 purport to set forth the conversation and the facts that you stated to the Dun & Bradstreet representative? A. I didn't state any facts to the Dun & Bradstreet representative.

Q. I will reframe my question, Mr. Roth.

Does it purport to set forth an analysis of the financial statement you gave——

Mr. Stryker: The document is either admissible or not. I don't know yet.

Mr. Wessel: All right.

Mr. Stryker: Whether it purports to show what this witness thinks it shows certainly is not evidence. It is admissible or not without his commentary.

(1192)

If you will give me a minute I will tell you whether I object to it or not.

Mr. Wessel: I will withdraw the question.

Mr. Stryker: I am sorry, your Honor, but I have to look at it.

Mr. Wessel: I think I should limit the offer to a document as a report and not for the truth of the matters in the document. I should have explained when I offered it that was the purpose of the offer.

Mr. Stryker: Are you offering the paper attached to it, Mr. Wessel?

Mr. Wessel: I intended to offer the entire document as a report and not with regard to the truth of the contents in it.

Mr. Stryker: All right, I just wanted to know. Well, I object to it on the ground——

The Court: If you object to it, I will sustain the objection, Mr. Stryker.

Mr. Wessel: I should state this is the document I had understood was referred to in counsel's opening.

Mr. Stryker: I was referring to the original. (1193) That is not it.

The Court: Well, I will sustain the objection. All right.

By Mr. Wessel:

Q. Mr. Roth, did there come a time when American Brands Corporation organized a division? A. There was no organization of a division but rather an opening of a branch checking account.

Q. What was the name of that branch? A. American Brands Corporation-Michigan.

Q. Do you know when that was organized or when it was created? A. I would say toward the end of the year 1946. That is my best recollection.

Q. I show you Exhibit 72A and B for identification and ask if you can tell me what those two books are? Would you look at them, please, sir. A. A record of the disbursements from the Michigan check account, and a record of the purchases that were applicable to the Michigan operation, and

a general ledger summarizing all these transactions that I just enumerated.

Q. Did this Michigan—would it be proper to call it a branch?

Mr. Stryker: What is your question, Mr. Wes- (1194)
sel? I didn't quite get it. Was it properly called a branch?

Mr. Wessel: I am trying to find the proper term to call this.

A. I would rather—it was American Brands' operation, but we opened up a separate check account for research in the State of Michigan.

Q. Now, did this operation succeed the activities or the work of American Agar Corporation? A. Not entirely, but it was a new avenue in order to accomplish the result in attempting to find a substitute for sugar.

Q. Did you have any discussions with Mr.Giglio in connection with this operation; that is, the Michigan operation? A. Mr. Giglio discussed with me, not from a technical point of view, that the operation of finding the substitute for sugar at the American Agar plant and pilot plant is unsuccessful, and they have found a new way in order to accomplish that through an ion method, i-o-n, which evidently is a chemical term, and they were—and he found a sugar plant of the Isabella Sugar Company. They did not use their physical facilities 12 months a year, only approximately three or four months, and it had the necessary physi- (1195)
cal facilities for an ion operation, and they attempted to find the substitute for sugar through an ion method.

Q. Now, did Mr. Lawn have any interest in this Michigan operation? A. None that I know of, because that was

run under American Brands Corporation, of which Mr. Livorsi and Mr. Giglio had a 50 per cent interest.

Q. Did you have any discussions with Mr. Giglio about, first of all, Mr. Lawn's interest in American Agar Corporation? A. Well, Mr. Lawn's interest in American Agar Corporation was 25 per cent. That operation wasn't successful. They were going to continue research work under American Brands, where he has 50 per cent of the stock, and Mr. Livorsi has 50 per cent of the stock.

(1196)

Q. My question, Mr. Roth, was—let me rephrase it. Prior to the organization of American Agar Corporation did you ever have any discussions with Mr. Lawn and Mr. Giglio in connection with the organization of a research corporation? A. I have got to get the question again. May I hear it, please?

(Question read.)

A. Mr. Giglio informed me that they are going to organize American Agar Corporation for research and give Howard Lawn a 25 per cent interest, because he was instrumental in bringing in his brother-in-law, a chemist, who worked at a pilot plant in his home, and another chemist by the name of Warshaw, who worked on it.

Q. What was Mr. Lawn's cousin's name, his cousin? A. I don't know the relationship, whether it was a cousin or uncle, I do not recall.

Q. What was his name? A. I could recognize the name.

Q. Davis Schwartz. Would that be correct? A. Yes, sir.

Q. Would you continue, please? A. And being he was instrumental in making on this research, bringing in the chemist, a great deal of work, he should share the benefits

of that research if and when it becomes successful. Therefore he's got a 25 per cent interest in American Agar Cor-
(1197)
poration. That substantially was the conversation prior to the organization of American Agar, in connection with Mr. Lawn's interest in American Agar.

Q. Did you ever have any discussion with Mr. Giglio about Mr. Lawn having an interest in any other corporation, specifically American Brands Corporation-Michigan operation? A. No, he never got an interest in American Brands-Michigan operation because that was a different method of accomplishing or trying to accomplish the process, and being they were not successful in organizing and accomplishing it in American Agar, they are going to use new money under American Brands and keep the benefits under American Brands.

Q. Did Mr. Giglio ever say anything about Mr. Livorsi not wanting Mr. Lawn to have an interest in the company other than American Agar? A. Yes, because Mr. Lawn had absolutely nothing to do in the production of profit, in manufacturing jelly of the original Tavern, American Brands Corporation, American Wholesale; therefore he is not entitled to any stock, only as an employee.

Q. When was that discussion? A. The discussion as to whether he is entitled to any stock in American Agar?

Q. In any of the other companies? A. I would say prior to the opening up the Michigan branch checking ac-
(1198)
count.

Q. Mr. Roth, Exhibit 88 for identification, can you tell me when you first saw that document or any copy of it? A. To the best of my recollection, I had to pay for the photostatic copy of this document to Mr. Walter T. Kohn, the attorney, in order to get a copy.

Q. Do you recall when you got it? A. I would say December 2nd——

Q. Let me ask you this question: do you recall having received that document or a copy of it some time during the receivership, which you referred to earlier in your testimony? A. Yes, I mean prior to my appearing to testify in the receivership proceedings, I would say, about a week or ten days before that.

Q. You did testify in the receivership proceedings? A. Correct.

Q. That was in the State court in New Jersey? A. Yes.

Q. When you testified, had you read the contents of that document? A. Yes, sir.

Q. Did you tell the truth in that proceeding? A. No, sir.

Mr. Wessel: I offer it in evidence. Again, I should say I offer it as a report.

(1199)

Mr. Stryker: Whatever you offer it as, I have no objection.

The Court: Received.

(Government's Exhibit 88 for identification received in evidence.)

Mr. Wessel: Ladies and gentlemen, Exhibit 88 is the report of the accountant for the receiver in a State court receivership, in the Chancery Court of New Jersey. It is a fairly long document and I will read just a few portions. The date of the report, the letter report, is April 24, 1948, and it indicates the receivership commenced September 2, 1947.

(Mr. Wessel then read from Government's Exhibit 88 to the jury.)

Mr. Wessel: There are a great number of schedules attached, and I suggest you not concern yourself with them all at this time. There will be expert testimony in that connection. I want to refer only to a sheet which is entitled "Exhibit B," and the title is "Consolidated Statement of Financial Condition as at December 2nd," and it lists American Brands, Wholesale, Sweets, Agar and Trucking, and over on the lefthand side, under "Assets" it lists "Loans Receivable, number of loans, Giglio $107,000; Livorsi, $34,000; Roth, $18,000, and some other ones (handing to jury).

(1200)

I ask that these documents be marked with the next exhibit numbers for identification.

(Marked Government's Exhibits 89 and 90 for identification.)

Q. I should ask you, Mr. Roth, do you recall ever having had any conversation with Mr. Giglio in connection with his becoming a large taxpayer? A. I don't follow your question, sir.

Mr. Wessel: Would you read the question back, please.

(Question read.)

A. I do not recall any specific conversation about Mr. Giglio becoming a large taxpayer.

Q. Do you recall any conversation about his not becoming a large taxpayer? A. No, same thing.

Q. I show you Exhibits 89 and 90 for identification and ask you if you can identfy those two documents for me? A. Document No. 90, I could identify. It was filed for the purpose of extending time for payment of taxes by

the corporation. I prepared it; signed by Mr. Giglio and Mr. Lawn, and notarized by my office.

Q. Can you identify Exhibit 89? A. This is the document prepared, to the best of my recollection, in Mr. (1201)

Ronayne's office, for a claim for a $300 refund, or prepared by Mr. Holzer, but notarized by what appears to be Mr. Ronayne's secretary, under American Brands Corporation, for a $300 refund, which was made with the tentative tax return that was filed for the individual corporations.

Mr. Wessel: I offer Exhibits 89 and 90 in evidence.

Mr. Stryker: No objection.

The Court: Received.

(Government's Exhibits 89 and 90 for identification received in evidence.)

Mr. Wessel: I won't delay the proceedings.

The Court: Do you want to tell them about it tomorrow?

Mr. Wessel: I might as well tell it to them tomorrow.

The Court: All right, fine. We will adjourn now until ten-fifteen tomorrow morning, and don't discuss the case.

(Adjourned to Friday, January 28, 1955, at 10:15 o'clock a.m.)

(1202)

New York, January 28, 1955,
10:20 o'clock a.m.

Trial resumed.

(Jury in box.)

LOUIS J. ROTH, resumed the stand.

Direct Examination Continued by Mr. Wessel:

Q. Mr. Roth, yesterday at the conclusion of the session I had shown you Exhibit 90 in evidence, which is the Form 1138, requesting extension of time to pay American Brands Corporation losses. Now there appears there a net operating loss estimated for the year 1947 of $350,000. I ask you upon what you base that estimate of loss for the year 1947 for the consolidated corporations? A. I myself made that estimate.

Mr. Stryker: Will you talk up a little bit, please.

A. I myself made that estimate, having in mind the losses of the corporations during 1947 up to the time of filing this form. In anticipating what the additional losses will be for the balance of the year 1947, I used an arbitrary figure of $350,000.

(1203)

Q. Do you know what the losses were for the year 1947? A. I would have to refer to the books.

Q. Well, this paper was filed on September 23, 1947; do you know what the losses of the consolidated corporations were up to that time, September 23, upon which you based your estimate? A. I could estimate what the losses were—up to that time?

Q. Are there any books which if I handed you, could give you a quick answer? A. No, sir. It was a pure estimate in my mind from the trial balances or other records. I cannot give you a quick answer.

Q. Do you know where those trial balances are? A. They should be amongst all the other corporate records.

Mr. Wessel: Ladies and gentlemen, Exhibit 90, which was offered in evidence yesterday afternoon, is the Form 1138 which is a request for an extension of time to pay taxes, on the theory that there will be a carry-back loss the next year so that the tax won't have to be paid anyway. The only important figure is the $350,000 I have referred to, which is the estimated loss for the corporations for 1947.

Q. Is that figure of $350,000 a consolidated figure or a non-consolidated figure? A. A consolidated figure.

(1204)

Q. Now, Exhibit 89, Mr. Roth, that was received in evidence yesterday afternoon, you said it was prepared either by Mr. Holzer or Mr. Ronayne; do you recall which of those two gentlemen prepared it?

Mr. Wessel: If your Honor please, the foreman, I think, wishes to ask a question.

The Foreman: Some of the jurors in the back row didn't see that last exhibit that was handed out yesterday just before we adjourned for the day.

The Court: All right.

The Foreman: And they request to see it.

Mr. Wessel: I am sorry. I had forgotten.

The Court: It was an oversight by me.

The Foreman: That is that balance.

(Exhibit handed to the jury.)

A. I do not recall exactly who prepared this carry-back, this form.

Q. Do you see Mr. Holzer here in court? A. Not from here.

Q. Would you stand up and see if you can see him, please? A. (After standing) Yes, the gentleman on the extreme left, against the wall.

Q. Now this paper, do you note the date that it was

(1205)

filed, October 30, 1950? A. October 26, 1950.

Q. October 26. Do you know on what date informations were filed against you and others in connection with certain income tax violations? A. Not the exact date. I know it was some time in 1950 but I don't know the exact date.

Q. But do you know whether or not this paper was prepared before or after the filing of those informations? A. I do not know.

Q. Did you ever have any discussion with Mr. Giglio, Mr. Lawn or Mr. Livorsi, in connection with the payment to be made to Mr. Holzer? A. The only payment that I recall to Mr. Holzer is in connection with employing him as an accountant for our defense.

Q. Well, now, when, first of all, was the discussion you are referring to? A. I can only answer when by placing it about two weeks before the examination of the books on the fourth floor.

(Government's Exhibit 91 marked for identification.)

Q. I show you, Mr. Roth, Government's Exhibit 91 for identification, and ask you if that assists you in any way to refresh your memory as to the date of the conversation? A. My conversation with Mr. Holzer——

(1206)

Q. Now I want to make myself clear, Mr. Roth. Referring to a conversation at which either Mr. Giglio, Mr. Lawn or Mr. Livorsi were present, and I am only asking you about a date now and not the contents of the conversation. A. I recall one conversation with Mr. Lawn and Mr. Holzer.

(1206a)

Q. Well, now, would you give me the date before you tell me what was said, if you can give the date, or your best recollection? A. I can only identify it by an event.

Q. Does that letter refresh your recollection as to the date at all? A. Approximately January—the first week in January, 1953.

Q. All right.

Now, Mr. Lawn and Mr. Holzer were present? A. Yes, sir.

Q. Would you state that conversation, please? A. I was examining the records of the companies, in one of the end rooms on the fourth floor, and Mr. Holzer was present at that time; and we had an appointment with Mr. Lawn in order to discuss final arrangements to engage Mr. Holzer.

Mr. Holzer told me that I am doing the defense no good by being present and acting as my own accountant because he cannot get friendly with Mr. Present, as one accountant to another would in order possibly to get some pieces of information that would assist him in preparing the defense, and that reason is because I am a defendant.

However, if I wouldn't be there, the possibility exists

(1207)

that he would be able to get assistance by discussions of accounting data.

Q. Do you see Mr. Present here in court? A. Second chair at the first table.

Q. Did you ever have any discussion in which Mr. Giglio, Mr. Lawn or Mr. Livorsi were present in connection with the fee to be paid Mr. Holzer? A. I am not finished with the discussion——

Q. Excuse me, I beg your pardon. A. I am not finished with that discussion.

We adjourned to a building, I think it was the New York County Law Building, the reference room on the ground floor, to discuss fee.

Mr. Holzer wanted $25,000 in order to represent us on the defense. And he said, Mr. Lawn said, that the reason he only wants $25,000 is because Mr. Holzer earned a substantial amount of money as the accountant on the Shotwell Candy Company case in Chicago, so he was giving us a break by reducing his fee.

I told him I thought it was too high and I can't afford to be a participant as one-fourth in that fee.

He finally came down to $22,500, and he drew a memorandum, which he wanted to be signed, so that I could pay

(1208)

it out on the installment basis.

That was the conversation I had, one of the conversations I had with Mr. Holzer and Mr. Lawn.

Q. Is Exhibit 91 for identification the memorandum which you received, and which you just referred to in your testimony? A. Yes, this memorandum was submitted to me to show to my attorney.

Mr. Wessel: Ladies and gentlemen, Exhibit 89 in evidence is a claim for refund by American Brands Corporation for the $300 in estimated taxes which had been paid in 1947. It was filed October 30, 1950.

(Handed to jury.)

Mr. Wessel: And you will note the name, care of Herman Holzer & Co. on the outside.

By Mr. Wessel:

Q. Now, Mr. Roth, yesterday we referred to the Loraine Corporation, and you testified in connection with the change of some accounts receivable over to loans receivable. I ask you if you can state—— A. I don't know whether——

Q. Excuse me. A. Mr. Wessel, I don't think I said just accounts receivable.

(1209)

Q. Would you state what you said? A. I would rather refer to a number of ledger sheets. They may have been either accounts receivable or accounts payable.

Q. Excuse me. Certain accounts were changed, there was a name put on a certain account? A. Yes.

Q. I want to ask you if you can describe the original account before the change came about. Do I make myself clear? A. Yes, sir.

Q. Would you explain that, please? A. It was the ordinary account that was giving a heading in the ordinary course of business when a new ledger sheet is started.

Q. Well, if I may—that isn't what I had in mind. Did Loraine, American Brands Corporation and American Brands Wholesale Corporation have some relationship to the partnerships of Tavern and Eatsum? And if I haven't made myself clear, I will—— A. The only relationship that I know of is that Loraine was manufacturing jelly, the same as Tavern was manufacturing jelly.

Mr. Wessel: If I may be permitted to lead for just a few minutes, your Honor, this is a technical

(1210)

matter, and I don't think it is of very great importance.

By Mr. Wessel:

Q. Is it the fact, Mr. Roth, that Tavern Fruit Juice Co. manufactured jelly which it sold through Eatsum Food Products Co.? A. Yes, sir.

Q. And did American Brands Corporation manufacture jelly which it sold through American Brands Wholesale Corporation? A. Yes, sir.

Q. Did American Brands Corporation take over, at least in general, the business of Tavern Fruit Juice partnership? A. It did.

Q. And did American Brands Wholesale Corporation take over, at least in general, the business of Eatsum partnership? A. Yes, sir.

Q. And did Loraine Food Company also wholesale its jelly or its products through American Brands Wholesale Corporation? A. It did.

Q. Did that mean that on the various books of American Brands Wholesale and American Brands there were accounts payable to Loraine? A. Yes, for the merchandise that they purchased.

Q. And did it mean that on Loraine there were various accounts receivable for American Brands or American

(1211)

Brands Wholesale? A. There were various accounts.

Q. Those were intercompany sales and intercompany purchases, am I correct? A. Yes, sir.

Q. Now, sir, you referred yesterday to the stockholding of Loraine Corporation. Do you recall what the exact stockholding was of that company in 1947? A. I always knew it to be a 50 per cent interest to William Giglio and a 50 per cent interest to Louis Damaro.

Q. I show you Government's Exhibit 86B for identification and ask you if you can tell me what that book

is? And at the same time I will show you Government's Exhibits 86A and C and ask the same question about them. A. These books are the minute book of Loraine Food Corporation, the stock and transfer ledger of the Loraine Food Corporation, and the stock certificate book of the Loraine Corporation.

Q. Do you recognize those as books kept in the regular and ordinary course of business of Loraine Food Corporation? A. I very seldom saw these books because they are not accounting records.

Q. Can you tell me how those books came into the pos-

(1212)

session of the Government? A. About 10 to 15 days ago you requested me to bring down and produce all corporation records that I have, books, working papers, and so forth. And in looking through my old records, I found the Loraine stock certificate book, minute book and transfer book and I brought it in to you.

Q. How did you get them in your possession? A. I do not know.

Q. Do you know whether you got them in your possession before or after August of 1950? A. I do not know. I could only estimate when I got them in my possession.

Q. Would you give us your best recollection, please? A. I think—my best recollection is that when the corporation was organized the books were turned over to me to be turned over to Mr. Lawn, and I did not turn them over to Mr. Lawn, and put them in one of the old files, and never knew where they were until I made a complete search for everything that belonged to the American Corporations and the Loraine Corporations.

Q. What was the name of the attorney who organized the corporations? A. You are referring to Loraine Food?

(1213)

Q. Yes, sir. Well, if you can only tell by looking at the minutes—do you have any independent recollection of that fact? A. To the best of my recollection, Mr. Adam Rossback organized the corporation.

Q. Who is Adam Rossback? A. He is the father of Mr. Rossback who was the former United States Attorney in the State of New Jersey.

Q. Do you know where either Mr. Adam Rossback or Mr. Edgar Rossback are today? A. No.

Mr. Wessel: I offer these exhibits——

By Mr. Wessel:

Q. Before I do that, I notice a page in the front of Exhibit 86A, which is in typewriting, with some handwriting on it and ask you if you can identify that page for me? A. I don't know what that page is, except that it was in the book.

Q. Now, there is certain handwriting on the first page of Exhibit 86A and I ask you if that refreshes your recollection as to the date it was turned over to the U. S.—to me? A. Yes, sir, that is my handwriting.

(1214)

Q. And is your recollection now refreshed as to the date on which that book was turned over to the United States Attorney's office? A. I identify it by my writing, "Turned over to United States Attorney's office, December 30, 1954."

Mr. Wessel: I offer Exhibits 86A through C in evidence.

(Discussion off the record between witness and the Court.)

(1215)

Mr. Stryker: My objection is, if it please the Court——

Mr. Wessel: Before counsel objects, I will ask some more questions, if I may.

Mr. Stryker: Yes, surely.

Q. Would you be good enough, Mr. Roth—and I would like you to listen to my question carefully—to look through first of all Exhibit 86-A, and identify any handwriting which you can identify as being the handwriting of Mr. Lawn or Mr. Giglio, Mr. Livorsi or yourself? Do you follow me? A. Yes, sir.

Q. Please, would you look through it? A. On the first page——

Q. That is the note you referred to before? A. The note that I referred to is my handwriting.

Q. The page number appears in the bottom righthand corner of the various pages in typewriting. A. On page 33-NJ, I recognize the handwriting of Louis J. Damaro. On page 34-NJ, I recognize the handwriting of Louis J. Damaro.

Q. Actually, Mr. Roth, my question was limited to the handwriting of Mr. Lawn, Mr. Giglio, Mr. Livorsi or yourself. A. Excuse me. On page 35-NJ, I recognize as the handwriting of Howard M. Lawn.

(1216)

Q. You recognize his signature? A. Yes, sir.

On page 41-NJ, I recognize the signature of Howard M. Lawn. On page 42-NJ, I recognize the signature of Howard M. Lawn. On page 57-NJ, I recognize the signature of Howard M. Lawn.

The Witness: This don't belong in here.

Mr. Wessel: The witness said "this don't belong in here" with regard to some papers at the end of the book.

Q. Mr. Roth, when you handed me the book——

Mr. Stryker: Pardon me, Mr. Wessel. You spoke very lowly. Would you mind repeating?

Q. Mr. Roth, when you handed the book to me, were the papers which you just pointed out and said, "These don't belong in here," were those in the book? A. Yes, sir.

Q. Do you know where they were in the book when you first received it? A. Yes, sir; the books were not touched since the time I received it until I found them.

Q. Now I ask you the same question as to the signatures with regard to 86-B?

Mr. Wessel: And I again offer 86-A in evidence.

(1217)

Mr. Stryker: I object to it upon the ground it is not part of the charges here; irrelevant; there is no charge in the indictment with respect to this particular corporation, and there is no charge in the bill of particulars; nor is there any charge in the Lawn conspiracy count that mentions this particular corporation.

The Court: I will overrule the objection.

Mr. Stryker: I except.

Mr. Wessel: Well, then, I also offer the other two books, Exhibits 86-B and C, in evidence.

Mr. Stryker: If your Honor please, before they finally go in, I would like to ask the witness a question or two.

The Court: All right.

Mr. Wessel: Whatever is in that book is included in my offer.

Mr. Wolfram: Including the material in the back?

Mr. Wessel: Everything.

I withdraw the last question.

Preliminary Questions by Mr. Stryker:

Q. Are these the papers which you said didn't belong in the book? I am taking three different items that I find, (1218) there; are they the ones you said didn't belong there? A. No, sir.

Q. I don't understand "No, sir." You mean they don't belong there? A. I refer to three different papers.

Q. These do belong, you say? A. I do not know whether they do or not, but the name Loraine Food Corporation is on there, and they were in a Loraine minute book.

Q. Were these the papers you referred to that don't belong there? A. Yes, sir.

Q. Three stock certificates of another corporation? A. Yes, sir.

Q. They had no place there at all? A. I don't think they had any place there but they were there.

Q. That is, when you found them in your files? A. Yes, sir.

Q. When was that that you found those, Mr. Roth? A. About three or four days before December 30, 1954.

Q. That was after you had pleaded guilty? A. Yes, sir.

Mr. Stryker: So that my questioning may be clear for the record, I would like to have these papers that I held and showed the witness, identified separately.

(1219)

Mr. Wessel: I suggest that they mark them D, E, F, and so forth.

Mr. Stryker: All right, any way you want.

Mr. Wessel: With the same exhibit number, so that they are kept together.

Mr. Stryker: Will you mark that last one first.

(Marked Government's Exhibits 86-D through 86-J for identification.)

By Mr. Stryker:

Q. Here is Exhibit 86-D for identification, Government's numbers, in typewriting. Did you prepare that? A. No, sir.

Q. Do you know who did? A. No, sir.

Q. Do you know anything about it? A. No, sir.

Q. Was it in the book when you turned it over to the Government? A. Yes, sir.

Q. When did you receive these papers? A. To the best of my recollection, I received the minute books and the contents possibly a week after its organization by Mr. Rossback.

Q. Who turned them over to you? A. I do not recall.

Q. Have you no recollection of the incident when they were turned over, what was said, who was present? A. (1220)

No, sir.

Q. In other words, as to these papers, you don't recall any conversation that went with them? A. I don't recall any conversation as far as those three books and all those papers.

Mr. Stryker: All right.

Well, I will ask your Honor first to be kind enough to rule on all of these papers I have just marked for identification. I will try to make that—well, these three papers. Strike out what I said before, please. 86-H, I and J for identification. I am going to ask you to rule on those before you rule on the rest. Would you care to see them?

Mr. Wessel: May I state, if your Honor please, that those three papers are, in the Government's

view at least, the most important part of the book, and reference will be made to them later. They are not just in there, that is, they are not just offered as part of a book.

Mr. Stryker: Whatever the Government's view about it, wouldn't change whether they should be or should not be in evidence under the issues of this case.

Mr. Wessel: That is certainly true, but it is not a question of relevance. In other words,——

Mr. Stryker: And there is no foundation for them whatever, that I observed.

(1221)

The Court: Well, I am going to sustain the objection at this time.

Mr. Wessel: May I, if I may, if your Honor please, inquire as to the grounds? Is it on relevance?

The Court: As far as I am concerned, they are just three pieces of paper, but nobody knows where they came from.

Mr. Wessel: Well, I think the witness testified they were in the book when he received them.

The Court: They came out of that book, but how they got in the book, we don't know.

Direct Examination Continued by Mr. Wessel:

Q. Mr. Roth, can you state what the Cornelison Holding Corporation is or was?

Mr. Stryker: One moment. I object to it as immaterial and irrelevant.

Mr. Wessel: Very material.

Mr. Stryker: Whether he knows or not. The witness has said that after he was indicted he searched his files and he found these papers that

Mr. Wessel offers. He doesn't know when he got them, how he got them, whom he got them from. Now this line of inquiry wouldn't assist us on that at all.

(1222)

Mr. Wessel: This question is not directed to the papers.

The Court: It may have relevance completely apart from these exhibits.

Mr. Wessel: Yes, it does.

Mr. Stryker: Anyhow, I object to it. I don't see the relevance to it.

The Court: As of this moment, your objection is sustained as to these papers, not as to the question but as to the three documents.

Mr. Stryker: What about the question? How does your Honor rule on that?

The Court: I overrule your objection on the question.

Mr. Stryker: All right, exception.

By Mr. Wessel:

Q. I will reframe the question, Mr. Roth. What was the Cornelison Holding Corporation in 1946? A. The Cornelison Holding Corporation was a corporation organized by the brother, sister and wife of William Giglio, to hold—to own the property, or as purchasers of the property at 101 Fairmont Avenue, Jersey City, New Jersey.

Q. What corporations operated at that address, 101

(1223)

Fairmont Avenue, in Jersey City? A. American Agar Corporation and Loraine Food Corporation.

Q. Did there come a time when Loraine Food Corporation moved to another address? A. To the best of my recollection, yes.

Q. When was that and where was it? To assist you in refreshing your recollection—— A. I——

Q. Excuse me. A. I could only explain to you, Mr. Wessel. I recall Loraine Food manufacturing jelly on the premises of 101 Fairmont Avenue, and then the complete research equipment and physical facilities were moved in, and I think Loraine Food Corporation operated from Troutman Street, Brooklyn, after that.

Q. Had any other Giglio properties operated at Troutman Street, Brooklyn? A. Tavern Fruit Juice Company operated at Troutman Street.

Q. With regard to the 101 Fairmont Avenue building in Jersey City, was there any lease arrangement between American Agar and Cornelison Holding Corporation? A. I do not know of any lease, written lease arrangement, but I know that Mr. Giglio told me that an oral arrangement exists between——

Q. What was that? A. —between American Agar (1224)

Corporation and Cornelison Holding Corporation.

Q. And what was that oral arrangement that he told you about? A. That the rent for the building will be approximately $25,000 a year from American Agar to Cornelison Holding Corporation.

Q. Do you know whether that rent was ever paid? A. I do not recall any rent payments to Cornelison. I recall tax payments, real estate tax payments on the property from American Agar Corporation.

Q. Do you know when 101 Fairmont Avenue was purchased by Cornelison? A. I could give you the exact date by referring to my records, but I could give you an estimated date now.

Q. Which records are you referring to, Mr. Roth? A. I turned over a complete blue, red folder, with cancelled checks, working papers and everything else.

Q. Let me ask it this way: did you ever have a conversation with Mr. George Braggolini? A. I have had a num-
(1247)
ber of conversations with Mr. George Braggolini.

Q. Did you ever have a conversation with Mr. George Braggolini in connection with paying, with American Brands Corporation paying the amount of money it owed to Loraine Food Corporation, by check? A. Yes, sir.

Q. All right now, had you prior to that time had a discussion with Mr. Giglio in connection with that subject? A. Yes, sir.

Q. What was the discussion with Mr. Giglio? A. In order—my discussion with Mr. Giglio was as follows: In order to avoid making entries on the books of Loraine Corporation, that this indebtedness was due to William Giglio, I tried to arrange with Mr. Braggolini, who was an assistant vice president of the Manufacturers Trust Company, to draw a check from the Loraine Food Corporation in the amount of one of the indebtedness, I recall, $78,000, depositing that check to American—depositing that check to American Brands, drawing the check out from American Brands to William Giglio, and using Mr. William Giglio's personal check to come back into American Brands, in my attempt to avoid book entries, but having bank clearances of all checks, and Mr. Braggolini refused to go along with it.

Q. If I may lead for just a moment on this subject:
(1248)
Does the fact that before you sought to do that, Mr. Giglio owed certain money to the various American Brands Corporations? A. Yes, sir.

Q. And those various corporations owed certain moneys to Loraine Food Corporation? A. I would rather say that Loraine Food Corporation owed certain moneys to American Brands, and there was some indebtedness on the part of American Brands and Eatsum to Loraine.

Q. Well, now, without regard to the date, Mr. Roth——
A. May I say this, sir: I would say it was some time about September or October, 1945.

Q. Do you know any of the circumstances pursuant to which Cornelison purchased that building at 101 Fairmount Avenue?

Mr. Stryker: Your Honor, I don't want to interrupt, but I fail to see that it has the slightest (1225)
bearing on the offer of those three documents.

The Court: At this moment your objection to those three documents has been sustained. This is a line of inquiry which, as far as I am concerned, is the same as many other lines of inquiry we pursue in the case. We have to see where it leads.

(1225a)

Mr. Stryker: Well, then, your Honor, so that I won't interrupt you, may I have a continuing objection to it? I submit that the question lays no foundation, is irrelevant, immaterial to the issue now before you as to what one of these various documents you will or will not admit——

Mr. Wessel: That is not the issue.

The Court: That issue is not before me. I have decided in your favor.

Mr. Stryker: What's that?

The Court: I say that issue is not before me. I have decided in your favor. I have sustained the objection to those documents.

Mr. Stryker: Also, again, and I hope I conclude with this, am I correct in assuming that I have a continuing objection to all this proof upon the ground that it is irrelevant to the issues here as

tendered, both by the indictment and by the bill of particulars.

Mr. Wessel: May I state, if your Honor please, the relevance and the materiality of this line is with regard to the concealment count of the indictment.

Mr. Stryker: Am I correct in my understand-

(1226)

ing, if you should rule against me——

The Court: Yes, you are correct in your understanding.

Mr. Stryker: So I don't have to keep up, keep interrupting. I don't want to do that.

By Mr. Wessel:

Q. Can you state the circumstances, Mr. Roth, pursuant to which Cornelison purchased 101 Fairmont Avenue, the building, in 1945? A. At the time of purchase, Mr. Giglio requested me to give him a check for $7,500, to the Union Towel Supply Company; he would return it to me within a day or two.

I drew a check for $7,500 to Union Towel Supply Company, and Mr. Giglio did return it to me, within a day or two after that.

The property was purchased from Union Towel Supply Company at 101 Fairmount Avenue for Loraine Food Corporation, originally operated in manufacturing jelly, and simultaneously, physical equipment was being installed for research.

Q. Do you know the value of the——

Mr. Wessel: Strike that.

Q. Do you know the cost of the physical equipment

(1227)

which was installed in 101 Fairmont Avenue for research

purposes? A. I would have to refer to the American Agar books and records.

Q. Could you do that quickly or would it take you some time, Mr. Roth? A. I couldn't do that quickly.

Q. Well, could you say whether or not it was in excess of $50,000? A. It was in excess of $50,000.

Q. Do you know whether on September 15, 1947, Cornelison still owned 101 Fairmont Avenue? A. I do not know.

Mr. Wessel: I again offer in evidence Exhibits 86H and J on the following ground—I think the relevancy and materiality has been established—as to the competence of these documents, the witness, his best recollection is that he received them at or about the time of the formation of the corporation.

The Court: He has no recollection of those documents at all. He received the books, and he found those in the books. He doesn't know how they got in the books.

Mr. Wessel: I thought I had asked that question. (1228)

By Mr. Wessel:

Q. Mr. Roth, were these papers, all the papers you have seen here, which have been marked 86D through J for identification, were those loose papers in the book when you received the book? A. Mr. Wessel, to the best of my recollection, when I received those books, I put them in one place, and did not see them for years until I made a thorough search, and of necessity those had to be in the books when I got them, when I received the books.

I do not recall ever seeing those corporate papers since the very first time I received them.

Mr. Wessel: That was my recollection of the witness' testimony before, if your Honor please, and I think they came into his possession at a time when he was a conspirator, and therefore are admissible against all.

Well, if there is a question I will withdraw the offer.

The Court: No, I don't see that.

By Mr. Wessel:

Can you tell me, Mr. Roth, who Florence LeGrange was (1229)

or is? A. No, no, sir.

Q. Do you know the name of Mr. Giglio's sister? A. Well, that rings a bell, that LeGrange was—I think that is the marriage name of one of his sisters.

Q. And do you know his brother's and his wife's first names? A. His brother is Raymond and his wife is Margherita.

Mr. Wessel: If your Honor please, with regard to the other exhibits which were loose in the book, and that is, I believe, D through G, I take it the same objection would be sustained, so I will withdraw the offer as to those.

The Court: I haven't seen them. I don't know what they are.

Mr. Wessel: Those are loose papers which were also in the book at the time, turned over to the Government, and they are not of any great consequence, except that they are part of the minute book or they were produced as part of the minute book.

Mr. Stryker: I think that isn't quite correct. I don't think that was so, that he stated that he produced them as part of the minute book.

Mr. Wessel: They were produced to me as part——

(1230)

Mr. Stryker: He produced them as papers that he found in his files. What part of what they were I don't think there is any evidence about.

Mr. Wessel: I think counsel is correct.

The Court: I haven't seen them.

Mr. Wessel: I am not very concerned about those papers.

The Court: What about the minute book?

Mr. Wessel: I do, however, offer the minute book again, which is Exhibit 86A.

The Court: This I will receive.

Mr. Stryker: I except.

(Government's Exhibit 86A for identification received in evidence.)

Mr. Wessel: I also offer Exhibits 86B and C. I don't know whether there is an objection or not.

Mr. Stryker: I have objected, a general objection.

The Court: I don't think I will take either of these, unless I have a clearer understanding of the purpose than I have now.

Mr. Wessel: Is the denial of the offer as to materiality, if your Honor please?

The Court: Take a look at 86C and tell me what

(1231)

that has to do with the case.

Mr. Wessel: It proves there were no transfers of stock. I shouldn't say that in front of the jury.

The Court: Well, it doesn't prove anything, because all we know is it is a blank book with that

thing pasted on the front. We don't know if that was ever used or not, do we?

Mr. Wessel: The fact is, the absence of any entry in the book is the fact which I am offering in evidence.

The Court: No, on that basis I won't take it.

Mr. Wessel: All right.

Well, the minute book, standing alone, if your Honor please, I think would be confusing, and I will withdraw my offer and withdraw 86A, also. I think by itself it doesn't——

The Court: All right, I will exclude the whole business, then.

(Government's Exhibit 86A in evidence withdrawn and remarked for identification as Government's Exhibit 86A.)

(Marked Government's Exhibit 92 for identi- (1232)
fication.)

By Mr. Wessel:

Q. I show you, Mr. Roth, Government's Exhibit 92 for identification and ask you if that refreshes your recollection in any way as to the date on which the $7,500 transaction you referred to took place? A. This $7,500 deposit was what I received from Mr. Giglio—to answer you very exacting, I would have to look at my records.

Mr. Stryker: Can I see that, Mr. Wessel?

Mr. Wessel: I don't believe at the moment, counsel.

Q. Are these the records to which you referred, Mr. Roth?

Mr. Stryker: Am I mistaken? I may be.

Did not the witness purport to refresh his recollection from the paper shown him?

Mr. Wessel: No, he did not. He said he could not, as I understood him.

Mr. Stryker: Oh, I see.

Mr. Wessel: I have handed the witness a red manila folder with a group of papers in it.

By Mr. Wessel:

Q. Is that the group of papers and the folder you re- (1233)
ferred to in your prior testimony, Mr. Roth? A. Yes.

Q. Why don't we wait for the recess for this, Mr. Roth? A. All right.

Q. Can you tell me whether the $7,500 that you received, Mr. Roth, from Mr. Giglio was in check or cash?

Mr. Stryker: Pardon me, I submit that if this man is going to purport to refresh his recollection from the document, it should not be at the recess but right now.

Mr. Wessel: Well, all right, go ahead and look through them, Mr. Roth.

The Court: No, I am not going to do that Mr. Stryker.

I don't think we have to hold up——

Mr. Stryker: What I want to know is what he refreshes his recollection from?

The Court: You are entitled to know that. I think you can bring that out on cross examination, or, if any exhibit is offered, on the voir dire, but I don't think we have to sit here while he goes through it.

Mr. Stryker: Your Honor, we have had many
(1234)
instances—I am not criticizing at all—of documents being marked for identification, and not offered.

I don't know whether these things will be offered or not.

Mr. Wessel: I am seeking to establish a date, if your Honor please, and nothing more.

I am not seeking to offer any document.

Mr. Stryker: Can't he find it there?

Mr. Wessel: He can find it, I am sure, in that group—al least he said he could. It will probably take some time.

If counsel wishes to do it now, we will do it now.

Mr. Stryker: Let me ask this question and then I will stop: Will you show me, if you do not offer it, any paper that he says refreshes his recollection?

Mr. Wessel: Without any question.

Mr. Stryker: All right.

The Court: All right.

By Mr. Wessel:

Q. Mr. Roth, do you recall—you can put that folder down for the moment—do you recall, Mr. Roth, whether or not the moneys you received from Mr. Giglio in connec-
(1235)
tion with the purchase by Cornelison were in cash or by check? A. I do not recall. I could only tell you that I received the money approximately a day or two after I issued the certified check to Union Towel Supply Company, and whatever date that is, that is the time I received it, then I will have to look at the deposit ticket, or my cancelled checkbook, and my own handwriting, to see if I can determine in what form I received it.

Q. Would the deposit ticket be in that red manila folder you have? A. No, sir.

Q. I show you, Mr. Roth, Exhibit 92 for identification, and ask you whether that refreshes your recollection as to whether or not you received the money from Mr. Giglio in cash or by check? A. If the date of June 11, 194——

Q. Please don't mention the date, Mr. Roth, until we—you said that did not refresh your memory, am I correct? A. This deposit indicates——

Q. No, please, Mr. Roth. I asked you a question whether it refreshed your memory or not, not what that paper indicates.

Does it refresh your memory, yes or no?

Well, it appears to me—no, I won't press it. A. It does (1236) not refresh my memory.

Mr. Wessel: I will still hand it to counsel.

I am handing counsel Exhibit 92 for identification.

(Marked Government's Exhibit 93 for identification.)

By Mr. Wessel:

Q. Now, Mr. Roth, can you tell me what Van Dyk Industrial Corporation was?

Mr. Stryker: Here you are, Mr. Wessel, thank you.

A. Van Dyk Industrial Corporation was organized by Dr. Van Dyk, who was originally employed as a chemist in this research process.

It was opened up as a research plant in the State of New Jersey by Dr. Van Dyk, and Mr. Giglio bought an interest into that corporation.

Q. Do you know when he purchased the interest? A. To the best of my recollection, it was either the latter part of 1945 or the early part of 1946.

Q. Do you know, first, if Mr. Giglio ever sold that interest? A. I do.

(1237)

Q. When? A. I will give you an area of dates between August 1st and September 10, 1947—August 1, 1947, to September 10, 1947.

Q. I show you, Mr. Roth, Exhibit 93 for identification, and ask you, first, if you can tell me what that is? A. A check.

Q. Well, do you recognize any of the handwriting on the front of the reverse side of the check? A. I recognize the handwriting on the reverse side of the check, and it is, "For deposit, Louis J. Roth, Special."

Q. Do you recognize the handwriting above that in any way? A. I do not recognize that handwriting.

Q. Did you deposit that check in an account, Mr. Roth? A. Yes, sir.

Q. Was it your account? A. It was in my—a special account of mine.

Q. Where did you have it? A. Pennsylvania Exchange Bank, New York City.

Q. And do you recall when you deposited that check? A. Whatever the date indicates on the rubber stamp of the bank, and I can't read that date, sir.

(1238)

Q. Now, Mr. Roth, did you, after the date of this check, after you received this check and deposited it, make any withdrawals from that bank account? A. I withdrew $15,000 to the order of American Brands, or to the order of Mr. Giglio, and recall the money going into the American Brands Corporation checking account.

Q. Would those checks be in your manila folder which you have by your side? A. No, sir, I cannot—this is one account, to the best of my recollection I only had this one transaction, and I can't find the cancelled checks or the bank statement of this transaction. It is not a regular account. It was opened up, I think, just for a special purpose of clearance.

Mr. Wessel: Well, I offer in evidence Exhibit 93.

Mr. Stryker: Your Honor, not only my general objection, but I say, as we have it here at the moment, utterly meaningless, no foundation, I see no possible foundation for the offer of this. It don't mean anything.

Mr. Wessel: Suppose I go a little further with the foundation.

(1239)

By Mr. Wessel:

Q. Mr. Roth, was any part of the money that you received and paid into American Brands Corporation used to pay the tax liability of American Brands Corporation? A. No, sir.

Mr. Wessel: I again offer the document.

Mr. Stryker: My objection is that there is still no foundation for the offer of this document, and my general objection which I will not have to repeat.

The Court: May I see the document.

Mr. Stryker: Will your Honor see it.

Mr. Wessel: I think I should ask one more question.

Q. Do you know where the original of that document is, Mr. Roth? A. Of that check?

Q. Yes, sir. A. No, sir.

The Court: I will receive it.

Mr. Stryker: Exception.

(Government's Exhibit 93 for identification received in evidence.)

Mr. Wessel: Ladies and gentlemen, Exhibit 93 is a check payable to the order of William Giglio, dated September 19, 1947, in the amount of $15,000.

(1240)

It says, "In payment of the following," and inside, "Mortgage funds, Van Dyk Industrial Co., Philadelphia."

On the back there is a signature which the witness could not identify, but it reads "William Giglio," but the witness could not identify it.

Underneath is "For deposit, Louis J. Roth, Special."

(Handed to jury.)

By Mr. Wessel:

Q. Now, Mr. Roth, I show you page 123 of Exhibit 71E for identification and ask you if that refreshes your memory in any way as to your withdrawals from your Pennsylvania Exchange special account and deposits into the American Brands Corporation account?

Now I am referring to page 123 of that exhibit. A. On page 123——

Q. Mr. Roth, I asked you whether it refreshed your recollection. I don't want you to read from the document. A. Yes, sir.

Q. It does refresh your recollection? A. Yes, sir.

Q. What is your refreshed recollection? A. The transfer of $15,000 from the Louis J. Roth special account to

(1241)

the check account of American Brands Corporation in four amounts:

On the 22nd there is an amount of $2,000, and $8,000; on the 25th, $2,000; and on the 26th, $3,000.

Q. And those dates are all September, 1947? A. The year is 1947.

Q. What month is it? A. September 22nd—September is the month.

Mr. Stryker: May I see what you referred to, Mr. Wessel?

The Court: We will take our midmorning recess now. Don't discuss the case.

(Short recess.)

(1242)

(Jury in box.)

(Government's Exhibit 94 marked for identification.)

By Mr. Wessel:

Q. Mr. Roth, did you pick out from your manila folder Government's Exhibit 94 for identification? A. Yes, sir.

Q. Have you been able to find the certified check you referred to? A. A certified check was issued on June 11, 1945. A deposit was made on June 11, 1945.

Q. Have you been able to find the check in your folder? A. I didn't have sufficient time to look through all the checks, because the clerk of the court came in.

Q. What is the exhibit in front of you? A. The bank statement from the Chase National Bank.

Q. And that is a statement that you received? A. That is a statement I received at the end of the month with all other cancelled checks.

Q. Mr. Roth, were you the accountant for Loraine Corporation? A. Yes, sir.

Q. Yesterday, Mr. Roth, I misspoke myself. I asked you about the stock ownership of Loraine Corporation in a conversation with Mr. Giglio, at page 1169, and said I (1243)

would come back to the subject in a moment. I am sorry it has been as long as it has. Do you recall having had any discussion with Mr. Giglio in 1947 in connection with his purchasing the stock of Louis Damaro? A. The only discussion that I—Mr. Giglio had with me, was to the effect that he purchased the stock of Louis Damaro and "I am a hundred per cent owner of Loraine Food."

Q. Did he tell you when he had made that purchase? A. No, sir.

Q. Did you, subsequent to that time, have a meeting in the office of Walter T. Kohn? A. Yes, sir.

Q. Would you state who was present, when that meeting took place and what was said, and the date of the meeting? A. I would say it was, to the best of my recollection, that would be about May or June, 1948. At that time the receivership proceedings of the American Corporation was in progress. Mr. Louis Goldberg, the attorney, didn't appear to make any progress and Walter T. Kohn was employed through Mr. Lawn to represent the corporations. By appointment I came to Walter Kohn's office, Mr. Kohn's office, and between—and Mr. Lawn, Mr. Giglio and myself discussed with him whatever happened at the hearings. Mr. Kohn was familiar with the situation based on pre- (1244)

vious conversations with Mr. Lawn. I submitted at that time to Mr. Kohn my cancelled checks, aggregating $18,000, to indicate that the entire amount of loans that I received were chargeable to William Giglio. I also explained to

him the ledger sheets of Loraine Food Corporation, indicating that that was, the money that the American Brands Corporation received from Loraine was to be applied as moneys received for the account of William Giglio. Mr. Kohn accepted all that information, told me it was unnecessary for me to appear again at the receivership hearings. I gave him the cancelled checks, which incidentally up to this time I have not received, was returned to me, and the receivership proceedings were closed thereafter.

Q. I may not have caught it, but did you say who else was present at that meeting? A. Mr. Giglio, Mr. Lawn, myself, Mr. Walter Kohn. We also had another meeting with Mr. Walter Kohn's partner included, Mr. Wexler.

Q. Was anything discussed——

Mr. Wessel: Strike that.

Q. Did Mr. Giglio say anything with regard to the theory of the defense in the receivership? A. Yes, sir.

Q. At that time? A. Well, I don't know whether was that time, but the entire theory of defense——

(1245)

Mr. Stryker: One moment. I object unless it is a conversation.

Mr. Wessel: I will find the conversation. I am sure it is admissible even though it is not conversation, if your Honor please.

Mr. Stryker: I don't think this man's statement of what he says the theory is, is admissible anywhere. If it is conversation with the defendant, of course it is admissible.

Q. Did you have a conversation with Mr. Giglio, Mr. Lawn or Mr. Livorsi in connection with the theory of defense in the receivership? A. There may have been, but

there is only one outstanding conversation about defense that exists in my mind, and that happened in my—in Mr. Kohn's office.

Mr. Stryker: Will you strike out, your Honor, what may have been?

The Court: I don't know where "may have been" comes into this thing.

Mr. Stryker: No, he is making that observation, that something may have been.

The Court: I will let it stand. He has said there is only one conversation that stands out in his (1246)

mind. We will go on from there.

Mr. Stryker: All right.

Q. Is that the conversation you have already referred to, Mr. Roth? A. Yes. And the defense was discussed at that time, also.

Q. What was discussed in connection with the defense at that time? A. The loans receivable that was due from the officers are offset by the moneys that came into the corporation by either cash or merchandise from Loraine Food Corporation and Eatsum Food Products Company; and being that Mr. Giglio is a hundred per cent stockholder of Loraine Food Corporation and the individual proprietor of Eatsum Food Products Company at that time, he took out money and he put in money; therefore there was no loans receivable.

Q. Did anybody express any dissent from that defense or disagreement with it? A. It was unanimous.

Q. Now, had you before that time discussed any other way of accomplishing the same result? A. In the receivership proceedings?

Q. Or prior to the receivership proceedings? A. Accomplishing what result?

Q. Let me ask you this: Did Loraine Food Corporation sell its products through American Brands Wholesale Corporation for a time? A. Yes, sir.

Q. And also for a time through American Brands Corporation? A. Yes, sir.

Q. And would American Brands Corporation and American Brands Wholesale Corporation owe money to Loraine to pay for that? A. They would.

Q. And if I understand this check you are talking about, American—— A. A series. There couldn't be one check, Mr. Wessel. I attempted to do it, but a series three or four checks to cover all the half a dozen accounts, that I indicated to you on the Loraine books this morning.

Q. Now, would the effect of that transaction have been to transfer the loans receivable, the amount of money that Mr. Giglio owed to American Brands Corporation, into an

(1249)

amount of money that he owed to Loraine Corporation? A. Excuse me. I——

Mr. Wessel: I had better save it.

The Witness: I didn't see that. May I have the question?

(Question read.)

A. Yes, sir.

Q. And Loraine—— A. (Continuing) And it would work both ways.

Q. And Loraine Food—— A. Mr. Wessel——

Q. I am sorry. Go ahead. A. Nobody—all the corporations would not be affected, except that instead of the American Brands Corporation and American Brands Wholesale showing an indebtedness to or from Lorraine and Eatsum, it would not show an indebtedness to and from

Loraine, Eatsum, and by the same token it would not show as loans receivable from William Giglio, Frank Livorsi, etc.

Q. And that loan receivable would then be on the books of Loraine rather than on the books of American? A. Yes, sir.

Q. And Loraine was not in receivership? A. No, sir.

Q. And the receiver, therefore, couldn't sue on behalf of American Brands Corporation; is that correct? A. (1250)
Well, there was nothing left to be sued if that would work.

Q. Yesterday, Mr. Roth, at page 1133 of the transcript you said that you overstated Mr. Betancourt's income by about $50,000; how did you accomplish that?

Mr. Wessel: Strike the question.

Q. Did Mr. Betancourt agree with that? A. He did not know about it.

Q. How did you do that? A. I instructed Mr. Starr to disregard the checks that were drawn to the order of cash——

Q. Let me stop you. You have already explained that, Mr. Roth. I just want to know how you accomplished filing Mr. Betancourt's return and overstating his income without his knowing about it? A. He signed the return in blank and I filled in the figures.

Q. Yesterday at page 1173 of the transcript—I am not sure whether there is a typographical error there or not—you said, and you were referring to the Dun & Bradstreet report—"This particular dynasty was a million dollars worth of stock and $500 worth of surplus." A. $500,000 worth of surplus.

Q. Now, Mr. Roth, at page 994 of the transcript you referred to two transfer cartons full of papers that you (1251)

gave to Mr. Giglio when you gave up your 62 William Street office; at page 1142 of the transcript you referred to two cartons that Mr. Giglio and Mr. Gangi took from you on one occasion. I ask you if those two were the same occasion or not? A. No, sir.

Q. At page 1174 of the transcript, Mr. Roth, in reference to the various American corporations, you said that Mr. Giglio had said that he would get the managers for the various companies to share in the profits of those companies; was there any discussion about giving those managers a stock interest? A. No, sir.

Q. Just sharing—— A. A profit-sharing agreement.

Q. Yesterday at page 1163 you referred to individual tax returns for the corporations that you prepared but did not file. Did you ever show those individual returns to Mr. Giglio? A. No, sir.

Q. Do you know whether or not he ever knew of their existence? A. I do not know whether he knew of their existence.

Q. Now, you referred on several occasions to Mr. Rabkin and Mr. Portner in conversations that you and Mr. Giglio and Mr. Lawn had with those men. I ask you whether or not you ever discussed with Mr. Rabkin the possibility of setting up corporate losses against corporate

(1252)

gains to reduce tax liability?

Mr. Stryker: I object to it as not binding on the defendants, incompetent, irrelevant and immaterial

Mr. Wessel: I think it calls for a yes or no answer and then I will see whether anyone else was present.

The Court: All right.

Q. Can you answer that, Mr. Roth?

The Witness: May I have the question?
The Court: Read the question.

(Question read.)

A. I do not recall any conversations with Mr. Rabkin regarding that item in the presence of Mr. Giglio or Mr. Lawn.

Q. Did you ever have any discussion, in the presence of Mr. Giglio, Mr. Lawn or Mr. Livorsi, in regard to some form of bad debt theory of setting off the various losses against the gains? A. I do not recall that type of conversation with Mr. Giglio, Livorsi or Mr. Lawn, with Mr. Rabkin.

(1253)

Q. Did you have a discussion with them when Mr. Rabkin was not present about that? A. Yes, sir.

Q. When was that, who was present, where and what was said? A. The discussion took place prior to September 15, 1947, a number of times. Due to the fact that the balance sheet of American Brands indicates a couple hundred dollar advances to American Agar for research, and the research was not accomplished, we discussed the possibility of setting up a reserve for doubtful accounts, and in that manner it would reduce the income of American Brands and not being necessary to apply the losses of American Agar to the profit of American Brands in consolidated form.

Q. Do you recall when that was, or was that several discussions that you are referring to? A. To the best of my recollection those discussions commenced about August 1, 1947, and continued a long while thereafter, because it also served as a means of my defense.

Q. Now, Mr. Roth, were Mr. Giglio and Mr. Livorsi officers of these various corporations as well as yours? A. Yes, sir.

Q. And as officers, did Mr. Giglio and Mr. Livorsi (1254)

receive salaries? A. Yes, sir.

Q. Do you know whether or not any——A. I have to refer to the corporation records, because they did not receive salaries in every one of the corporations.

Q. Well, did they receive salaries in some of the corporations? A. Yes, sir.

Q. Do you know whether or not in any of the corporations from which they received salaries there was ever any tax withheld or social security payment made? A. I do not recall whether any social security payment was made, but I recall there was no income tax withheld.

Q. Did you ever have a discussion with Mr. Giglio, Mr. Roth, in connection with his knowledge of the operation of the various businesses of which he was a partner or owner? A. Many discussions.

Q. Did you ever have a specific discussion in connection with Jack Miller or other persons? A. Well, do you want to start with Jack Miller, because you mentioned him?

Q. Well, I am trying to pinpoint one discussion rather than a whole group of them, Mr. Roth, if I can. (1255)

Do you recall a specific discussion in connection with Jack Miller or Dominick Gangi? A. Well, Jack Miller and Dominick Gangi only at the time of the purchase of the stock of Tavern Fruit Juice Co., Inc.

Q. Would you state what that conversation was? This is with Mr. Giglio, am I correct? A. Yes, sir.

Q. Would you state what that conversation was? A. Mr. Giglio told me that Mr. Miller and Mr. Gangi bought

out the interests of the former stockholders of Tavern Fruit Juice Co., Inc.

Q. I don't want to interrupt you, Mr. Roth. This is not the conversation I had in mind. I don't intend to offer it at this time.

I am referring to any conversation you had with Mr. Giglio in connection with alleged spies in the business. A. Yes, sir.

Q. Now, when was that, where, who was present, and what was said? A. Well, my conversations were with Mr. Giglio.

Q. Were not? A. Were with Mr. Giglio.

In following the expendi res of the business, except those expenses that Mr. Giglio knew about, I watched very

(1256)

carefully, to the best of my ability, the amount of money that was reimbursed in the various supporting schedules both Mr. Miller and David Cohen gave me, and at one time Mr. Miller went into Mr. Giglio's office and communicated about the manner in which I am holding him down——

Q. Is this a conversation with Mr. Giglio you are referring to or are you telling some background to it? A. I am telling background.

Mr. Wessel: I move to strike the background.

Q. I would just like to have the conversation with Mr. Giglio, if you could give it.

Mr. Stryker: Could I have the date or approximate date so I don't have to interrupt?

By Mr. Wessel:

Q. Could you give the date as best you can recall it, Mr. Roth? A. It happened throughout our occupancy of the 19 Rector Street office on different occasions.

Q. Do you have a specific incident in mind or are you talking about several incidents? A. I have two specific incidents in mind.

Q. Well, try and fix the time as best you can and tell

(1257)

us what was said on those two different occasions. A. About June, 1946, or about the middle of 1946, I went into Mr. Giglio's room and I told him that "I understand that Dave Cohen was in here complaining to you about me as to the expenditures."

He asked me, "How do you know?"

I says, "It's just common gossip," because Dave Cohen said, "I'm going to fix you."

I said, "I wish when these men come in to talk to you that you let me confront them with whatever they have to say."

Mr. Giglio says, "I will listen to them, and I will decide whether I want you to confront them, but so far just go about doing your business the way you are doing and never mind about his complaints to me. I want those complaints."

The same thing—the substance of the same type of conversation existed with Jack Miller, approximately two or three months thereafter. I requested Mr. Giglio to let me confront them, and he says, "I want them to complain to me, but you keep on doing your work. I am to decide whether you are to confront them or not."

Q. Can you state from your own knowledge, Mr. Roth,

(1258)

the extent to which Mr. Giglio knew the detailed operation of the various businesses of which he was either owner or stockholder?

Mr. Stryker: I submit that calls for a very definite mental operation, conclusion, is not evidence, whether he knew that Mr. Giglio knew.

Mr. Wessel: I will rephrase the question.
The Court: All right.

By Mr. Wessel:

Q. Did you observe, Mr. Roth, Mr. Giglio's knowledge of the operations of his various businesses? A. Yes, sir.

Q. What was your observation? A. My observation, that he knew everything and anything within 99 per cent of what was going on in the businesses.

Mr. Wessel: I ask this be marked with the next exhibit number.

Q. What was the Burlan Corporation, Mr. Roth? A. I didn't get the name, Mr. Wessel.

Q. What was the Burlan Corporation? A. Oh. The Burlan Corporation——

Mr. Stryker: The same objection. It is not in the indictment or the bill of particulars, and I have (1259)
made the objection before.
I just call your Honor's attention to it.
The Court: All right.
Overruled.

By Mr. Wessel:

Q. Well, just generally, without a detailed explanation, Mr. Roth. A. It was supposed to serve the purpose of earning income which was to be divided between—in the same manner as the interests of Eatsum Food Products Co., 50 per cent for Mr. Giglio, et al., and 50 per cent for David Lubben, et al.

Q. And did there come a time when Mr. Lubben's interest was taken over by Mr. Giglio? A. At the time that

Mr. Lubben left the Eatsum partnership, Burlan Corporation became a 100 per cent—Mr. Giglio became a 100 per cent owner of Burlan Corporation.

Q. Would that be Mr. Giglio or Mr. Giglio and Mr. Livorsi? A. I would say Mr. Giglio, et al.

Q. Who is the "et al.," Mr. Roth? A. Well, I would say "et al." means Mr. Livorsi, because he was, I understood—not I understood; throughout my entire business association with Mr. Giglio, Mr. Livorsi was 50 per cent

(1260)

interest with him in every venture that existed.

Q. Was Raymond Giglio ever employed by Burlan Corporation? A. Not that I know of.

Burlan Corporation, to my recollection, had no employees whatsoever.

Q. Did Raymond Giglio ever sell anything for Burlan Corporation? A. To my knowledge, no.

(Marked Government's Exhibit 95 for identification.)

By Mr. Wessel:

Q. I show you, Mr. Roth, Government's Exhibit 95 for identification and ask you, first, if you can tell me what that is? A. It is a check from the Burlan Corporation——

Mr. Stryker: Just a minute. The same objection. There is no identification of the document. The man mentioned is not a defendant. There is no suggestion of an allegation in the indictment or the bill of particulars about it.

The Court: I will overrule the objection. Go ahead.

Q. Don't describe the document in your answer.

Do you recognize that document? A. Yes, sir.

(1261)

Q. Did you have a conversation with Mr. Giglio about that document before it came into existence? A. Yes, sir.

Q. When was the conversation, where, who was present, and what was said? A. Conversation between Mr. Giglio and myself.

Q. Go ahead. Would you state what was said and where it was and when it took place? A. At the time of drawing this check, or before drawing this check, Mr. Giglio asked me, "What is the balance on Burlan Corporation?"

To give you a background for one moment, Burlan Corporation did a very small amount of business, I think in some watches, after Mr. Lubben left, or during the time of Mr. Lubben, very negligible. And I told him what the balance was.

To my recollection the balance was in excess of $10,000. He told me to draw a check to Raymond Giglio for $10,000 out of the Burlan Corporation, try to use it as a deduction for expenses.

The handwriting on the check looks to me as if it is Mr. Giglio's or Miss Feldmann's.

Q. Isn't the signature yours? A. But the signature of

(1262)

the check, I had power of attorney to sign checks on all accounts. The check was drawn for $10,000 to Raymond Giglio, and I recall I charged it to commission on the Burlan Corporation books, commission pay.

Q. I show you Exhibit 78 for identification, page 108.

I ask you if that is the charge on the books to which you just made reference in your answer? A. Yes, sir.

Q. Do you know where the original of Exhibit 95 for identification is? A. No, sir.

Mr. Wessel: I offer in evidence Exhibit 95.

Mr. Stryker: If your Honor please, there is absolutely nothing from this document that is offered, photostat of the front of a check——

Mr. Wessel: It is not a photostat.

Mr. Stryker: What is it?

Mr. Wessel: Microenlargement.

Mr. Stryker: —microenlargement from the front of a check—there is nothing on the back of the check to show whose endorsement it bears. Therefore, there is no foundation laid for this document.

The reason that I took some time to look at it is

(1263)

because it is new to me, not in the bill of particulars, not in the indictment. I have not been apprised of it, and I would like to have your Honor look at it to see the point of my objection, if you would be good enough to.

Mr. Wessel: I would like to explain to your Honor that that document appears to be a microenlargement from bank records of a check. The reverse side I don't believe is in the—I know is not in the possession of the Government.

The Court: I will receive it.

Mr. Stryker: I except.

(Government's Exhibit 95 for identification received in evidence.)

By Mr. Wessel:

Q. Did you cash this check, Mr. Roth? A. If I didn't cash it, I was instrumental in getting it cashed. May I see it for officers' signatures.

Mr. Stryker: Can I have that answer stricken out? He was asked a plain, simple question and he gave a hypothetical answer.

Mr. Wessel: I join in the motion.

The Court: I disagree with both of you; I would (1264)

let it stand, but if you both want it stricken out, I will strike it.

The Witness: Now I would like to ask for the question, please.

(Question read.)

By Mr. Wessel:

Q. If you can, answer yes or no, please, Mr. Roth, and if you can't answer it that way I will ask another question. A. I cannot answer that yes or no.

Q. Did you go to the bank with Mr. Giglio when that check was cashed? A. Are you referring to Raymond Giglio?

Q. I will rephrase my question again.

Do you know what happened to that check after you wrote it? A. To the best of my recollection, Raymond Giglio endorsed that check, and the check is drawn on the uptown 59th Street Branch of the Manufacturers Trust Company where the account existed prior to the organization of the Eatsum partnership.

I recall going to the Manufacturers Trust Company branch at Broadway and Canal Street, where Mr. Bragalini was an officer. He approved the cashing of the check after inquiring from the branch official at Columbus Circle (1265)

whether there is enough money in the bank, in the account, and he set aside that sum of money, and I received $10,000

—whoever the messenger was at that time, either Raymond Giglio or Jack Miller, or perhaps William Giglio, I turned the money over to him.

Mr. Stryker: I object to that, ask to have it stricken out, a guess, "or perhaps William Giglio." It certainly is not evidence.

Mr. Wessel: I will agree to strike that portion, "or perhaps"——

The Court: All right, down to "whoever the messenger was at that time." After that we will strike it out.

By Mr. Wessel:

Q. You received cash, am I correct, Mr. Roth? A. To the best of my recollection, yes.

Q. Well, would you describe the bills as best you can? Was it a $10,000 bill, ten ones, or how was it? A. I would say, to the best of my recollection, it ranged amongst 50s, $20 bills, $50 bills and $100 bills, not any larger.

Q. Was anybody with you when you got the money, except for the bank officials, I mean? A. I can only recall

(1266)

either one of three people being with me——

Q. Was one of those three persons with you? A. Yes, sir.

Q. What is your best recollection as to which one? A. Raymond Giglio.

Mr. Wessel: I offer in evidence Exhibit 95.

Excuse me, it is in evidence.

Ladies and gentlemen, Exhibit 95 is the check to which I have made reference in the questioning, and to which the witness has made reference.

(Handed to jury.)

By Mr. Wessel:

Q. Mr. Roth, would you describe, generally, and as briefly as you can, what the offices at 19 Rector Street were like? A. They were spacious, nice offices.

Q. Do you know what the cost was of the furnishings and fixtures in that office, your best estimate? A. If you will include the word "alterations," I may be able to answer it, in knocking down walls and building walls, I may be able to answer the question.

Q. You can't answer it otherwise, however? A. I have no amount as to breakdown, because an extensive altera-

(1267)

tion job was done in addition to furnishings.

Q. Did there come a time when the furnishings and fixtures of that office were sold by American Brands Corporation, or one of the companies? A. Yes, sir.

Q. When was that? A. In the area between September 1st and September 25th or September 30, 1947.

Q. And to whom were these furnishings and fixtures sold? A. An import and exporting firm.

Q. Do you have the name?

Would Commerce International be correct? A. Yes, Commerce International Company is the name.

Q. Who is the principal owner in Commerce International, do you know? A. I do not.

Q. Would the name Satiris G. Fassoulis mean anything to you? A. The name Fassoulis is a name that was mentioned prior to 1947, but it doesn't mean to me that he is the owner of Commerce International.

Q. Now, do you know what price was received for the sale of these assets, the furnishings and fixtures? A. Mr. Giglio told me that he negotiated for the sale of the

(1268)

fixtures, the lease, the assets, to Commerce International, for $10,000.

Q. Do you know whether the companies received that amount of money? A. Yes, sir.

Q. Do you know whether any part of that sum was used to pay taxes? A. I do not know of any.

Mr. Wessel: May I attempt to do it this way: I offer in evidence the books of the American Brands Corporation which have been marked Exhibit 71, and various subdivision letters.

Now, if there is an objection, I will proceed to lay a foundation. There is none.

Mr. Stryker: Tell me, will you, Mr. Wessel—I am sorry I was busy.

Mr. Wessel: These are American Brands' books.

Mr. Stryker: Do you have them enumerated, what you are offering?

Just give me a list of what it is. Maybe I won't object to it. If you will just tell me, I am not going to stop.

Mr. Wessel: Well, 71A——

Mr. Stryker: Just tell me what it is, each one, and I won't bother to look at it if you will just

(1269)

tell me.

Mr. Wessel: 71B is the general ledger of American Brands Corporation.

Mr. Stryker: And the year?

Mr. Wessel: For the year 1946.

Mr. Stryker: All right.

Mr. Wessel: 71D is the accounts payable and accounts receivable ledger of the same corporation, for the year 1946.

71A is the general journal of American Brands Corporation for two years, 1946 and 1947.

The other books were 1947 also.

71C is the general ledger of American Brands Corporation for 1947.

71E is the sales and purchase ledger for 1946 and 1947, cash receipts and cash disbursements.

(1270)

If there is a more expeditious way of doing this I would be very happy to do it.

Mr. Stryker: You are really doing it expeditiously. Just tell me. Maybe I can give you a quick answer.

Mr. Wessel: I am now referring to Exhibit 71.

Exhibit 82-A is American Brands Corporation, Michigan, general ledger; and Exhibit 72-B is American Brands Corporation cash disbursements, apparently cash receipts ledger for American Brands-Michigan.

Mr. Stryker: Go ahead and list them.

Mr. Wessel: Exhibits 80-A, B and C, are the minute books, stock and transfer ledger, stock certificate books——

Mr. Stryker: Of American Brands?

Mr. Wessel: I think it includes American Brands Corporation.

Mr. Stryker: I have no objection to the introduction of all those books.

The Court: All right, received.

(Government's Exhibits 71-A through 71-E for identification, 72-A and B for identification, 80-A, B and C for identification, all received in evidence.)

(1271)

Colloquy

Mr. Wessel: I won't burden your Honor by handing them up unless your Honor wishes me to.

The Court: No, I will wait to hear further testimony about them.

Mr. Wessel: Now 75 is a general ledger and other books of American Trucking & Forwarding Corporation.

Mr. Stryker: Go along and identify them. Maybe we can hurry it.

Mr. Wessel: It is one book, Mr. Stryker.

Mr. Stryker: All right.

Mr. Wessel: 84-A, B and C are the minute books, stock certificate, stock transfer ledger of American Trucking, which I believe completes American Trucking & Forwarding Corporation.

Mr. Stryker: I think we will take one category at a time. I have no objection to those.

The Court: Received.

(Government's Exhibits 75, 84-A, B and C. all for identification, received in evidence.)

Mr. Wessel: Now Exhibit 73-A is the American Agar accounts payable ledger; B, American Agar general ledger; C, American Agar cash receipts and disbursements; D, American Agar purchase, apparently petty cash sales and general journal.

(1272)

Mr. Stryker: I didn't catch the last one.

Mr. Wessel: Journal.

Mr. Stryker: Finish with Agar.

Mr. Wessel: I don't understand either, Mr. Stryker.

Mr. Stryker: You are better than I am. Finish with that item and then I will tell you what I will do.

Colloquy

Mr. Wessel: Exhibit 82, American Agar minute stock and stock certificate reports.

Mr. Stryker: Are you through with Agar now?

Mr. Wessel: Yes.

Mr. Stryker: No objection.

The Court: Received.

(Government's Exhibits 73-A, B and C and D, 82-A, B and C, all for identification, received in evidence.)

Mr. Wessel: Exhibit 74 is one book including all the ledgers and journals of American Brands Wholesale Corporation, accounts receivable, general ledger, and so forth.

Mr. Stryker: No objection.

Mr. Wessel: And Exhibits 81-A, B, and C, are the minute, stock certificate and stock transfer ledger of the same company, American Brands Wholesale. (1273)

Mr. Stryker: Put it in.

(Government's Exhibits 74, 81-A, B and C, all for identification, received in evidence.)

Mr. Wessel: Exhibit 76-A is the accounts receivable and payable ledger of American Sweets Corporation; B, cash receipts and disbursements, purchase and sales journals of American Sweets Corporation; 76-C is the general ledger of American Sweets Corporation, and 83-B is the American Sweets stock certificate book; 83-A is American Sweets minute book.

Mr. Stryker: Put them right in.

The Court: Received.

(Government's Exhibits 76-A, B and C, 83-A and B, all for identification, received in evidence.)

Mr. Wessel: I now offer 60, which is Tavern Fruit Juice Company accounts receivable and accounts payable ledger for the fiscal year 1946.

Mr. Stryker: Can I just see that a minute? I am not too sure about that.

(After looking) This one, 60 for identification, I object to.

Mr. Wessel: Well, I haven't laid a foundation. I will do so.

Mr. Stryker: Well, until you do, then reserve (1274)

that.

Mr. Wessel: Yes. Then I offer Exhibit GG, which is the Eatsum general ledger for the fiscal year ending May 31, 1946, Eatsum partnership.

Mr. Stryker: We will hold those two. Will you do that, Mr. Wessel?

Mr. Wessel: I also offer Exhibits 70-A, B and C, which are various other books of Eatsum.

Do you want me to hold those, also?

Mr. Stryker: I think you better, because I will have the same objection.

Mr. Wessel: I now offer Exhibits 77-A and B, 77-B being the cash receipts and disbursements and other books, journals, of Lawn International, Inc.; 77-B being the general ledger of Lawn International, Inc.

Mr. Stryker: Well, those I object to. They are outside the scope of this indictment or the bill of particulars or any charge that is made against these defendants.

Mr. Wessel: If the objection is to foundation——

The Court: I will overrule it on that ground.

Mr. Wessel: If the objection is to foundation, it is well taken. I would not attempt to put them in.

Mr. Stryker: Well, I don't know whether I have (1275)

any objection on that score or not. I will look at them. Suppose you put them aside for the time being. We can settle the ones that are not objectionable.

Mr. Wessel: Exhibit 78 is Burland Corporation general ledger; Exhibit 85-A, B and C are the minute books, stock certificates and stock transfer ledgers of Burlan Corporation.

Mr. Stryker: Well, I will have an objection on that. So lay those aside.

Mr. Wessel: And Exhibits 79-A, B and C, are with regard to Loraine Corporation. Same objection?

Mr. Stryker: Same objection, yes.

By Mr. Wessel:

Q. Now, Mr. Roth, were you the accountant for the Loraine Food Corporation? A. Yes, sir.

Q. During what period of time? A. From its inception to the time it stopped doing business.

Q. And what period was that, sir? A. Is this the general ledger?

Mr. Wessel: The witness asked me if it was the general ledger. I don't know, Mr. Roth.

Q. Let me ask you this, sir. Were you the accountant during 1945-46—1946 and 1947? A. Yes, sir.

Q. I show you, Mr. Roth, Government's Exhibit 79-A, (1276) B and C for identification, and ask you if you can tell me what those are?

Mr. Wessel: I should note for the record that part of the Loraine general ledger is in evidence, was put in evidence yesterday.

A. These books are the general ledgers of Loraine Food Corporation for the year 1946-47. It is accounts receivable ledger sheets of Loraine Food Corporation for the years 1946-47; the original books of entry of Loraine Corporation, consisting of sheets, journal, purchase invoice sheets, cash receipts, cash disbursements, petty cash and sales sheets.

Q. Were those books kept under your general supervision as accountant for the company? A. Yes, sir.

Q. Were they kept in the regular and ordinary course of Loraine Food Company's business? A. Yes, sir.

Q. And was it a part of the ordinary and regular course of business of Loraine Food Corporation to keep such books? A. It was.

Mr. Wessel: I offer them in evidence.

Mr. Stryker: Just a question or two.

Other than my continuing objection, I have no independent objection.

(1277)

The Court: All right, Mr. Stryker; received.

(Government's Exhibits 79-A, B and C for identification received in evidence.)

Mr. Wessel: Shall I continue?

The Court: Yes.

Q. When were you accountant for Burlan Corporation, Mr. Roth? A. To the best of my recollection I recorded the transactions—I was accountant for Burlan Corporation after Mr. Lubben left the partnership.

Q. And while Mr. Lubben was in the partnership, who was accountant for Burlan Corporation? A. Bernard Bercu.

Q. Do you recall when it was you first became accountant? I am referring now to date. Do you recall when it was you first became accountant for the company and commenced taking care of the books? A. I can answer that better by referring to the books.

Q. I show you Exhibit 78 for identification and ask you if you can tell me when you first commenced making entries or having custody or having supervision of the Burlan books? A. I can only answer that question by saying after Mr. Lubben left the Eatsum partnership.

(1278)

Q. Can you identify Exhibit 78? A. 78 contains Burlan Corporation general ledger sheets, sheets recording cash receipts, cash disbursements, purchase invoices, purchases, sales, accounts receivable sheets; two types of accounts receivable sheets, assigned to factors and unassigned to factors; accounts payable sheets.

Q. Was that book kept by you as accountant or under your supervision as accountant for Burlan Corporation after Mr. Lubben left the partnership? A. Yes.

Q. Do you recognize it as a book kept in the regular and ordinary course of business by Burlan Corporation? A. I do.

Q. And was it a part of the business of Burlan Corporation to keep that book in the regular and ordinary course of its business? A. Yes, it was.

Mr. Wessel: I offer it in evdience.

Preliminary Questions by Mr. Stryker:

Q. Are some of the transactions in this 78 for identification those that occurred before Mr. Lubben left? A. To the best of my recollection, yes.

Q. Do you know about those transactions, yourself? A. Except as they appear on the books of account.

Q. I say, that is all you know about it? A. Yes, sir.

(1279)

Q. You know nothing about the transactions? A. Except that they appear upon the books of account.

Q. Yes, you told me that. I mean, that is all you know? A. That is all.

Q. About how far down in the book can you—take your time, but tell me where Lubben left?

Mr. Wessel: Of course, if your Honor please, there is no question that that book was kept——

The Court: Can't we fix a date?

Mr. Wessel: We can. In addition, there is no question but that book was kept in part before Mr. Roth ever saw it. I offer it under Section 1731 of Title 28, which says that the knowledge of the entry, or the knowledge of the person who made the entry is not in any way an objection to admissibility.

The Court: I recognize that, but can he say this was kept in the regular course of business?

Mr. Wessel: He has already said that.

The Court: Did he say that?

Mr. Stryker: Taking your Honor's suggestion——

By Mr. Stryker:

Q. Do you know whether it was kept in the regular

(1280)

and ordinary course of business during the time that Mr.

Lubben was there? Do you know, yourself? A. When you say "Mr. Lubben was there," just what do you mean, Mr. Stryker?

Q. Well, until he left the partnership in March 1946? A. During the time of the partnership these books were kept.

Q. That doesn't answer my question.

Mr. Wessel: If I may say, if your Honor please, I hate to interrupt Mr. Stryker, but how else could anyone get into evidence books dating back to 1810, for example, if the person who actually had them or had custody of them cannot be witness——

Mr. Stryker: We are not going back to 1810. We are only going back ten years.

Q. But could I have an answer to my last question? A. May I hear the question again?

Mr. Wessel: To save time, I will offer them only for the period April 1, 1946, on.

Mr. Stryker: Well, then, with that, reserving my general objection which your Honor has well in mind, I have no other objection.

The Court: All right, I will receive it from April 1st on.

(1281)

Mr. Stryker: Exception.

(Government's Exhibit 78 for identification received in evidence.)

The Court: All right, we will recess now for lunch. Don't discuss the case. We will resume at two o'clock.

(Recess until 2:00 p. m.)

(1281a)

AFTERNOON SESSION

(2:00 p. m.)

LOUIS J. ROTH, resumed.

(Jury present.)

The Court: All right, Mr. Wessel.

(Discussion off the record between witness and the Court.)

Direct Examination by Mr. Wessel Continued:

Q. Mr. Roth, I neglected to ask you, with regard to Exhibit 86B, whether you can recognize any of the handwriting in that book? A. Yes, certificate No. 3 has the signature of Howard Lawn as secretary of Loraine Food Corporation.

Mr. Wessel: I now renew my offer, if your Honor please, with regard to Exhibit 86B, and offer again 86A, which was accepted and then withdrawn.

The Court: 86A was the minute book?

Mr. Wessel: Yes, which was admitted in evidence. Then I withdrew it.

Mr. Stryker: Are you offering this one, Mr. Wessel?

Mr. Wessel: I am offering that book now, which is 86B, and Exhibit 86A again.

Mr. Stryker: This is the one your Honor re- (1282)

jected, isn't it?

The Court: I think so. I rejected two of them, and some loose certificates.

Mr. Wessel: Yes, your Honor did. Your Honor rejected everything except 86A, in the group 86.

Mr. Stryker: Then do you want to take a minute if I could hear the question Mr. Wessel asked the witness?

The Court: Yes, read the question and answer.

(Question and answer read.)

Mr. Strkyer: I don't see that that makes the slightest difference.

The Court: I would like to look at it again. I may have missed something there.

No, I think I will still exclude it.

Mr. Stryker: What did your Honor say?

The Court: I am going to continue to exclude it.

Mr. Stryker: All right, sir.

By Mr. Wessel:

Q. I show you, Mr. Roth, Exhibits 77A and 77B for identification and ask you if you tell me what those books are? A. General ledger sheets of Lawn Interna-

(1283)

tional, Inc. for the years 1946 and 1947, accounts receivable, section of sheets, accounts payable, section of sheets. That is 77B.

77A, a binder of sheets, containing a section of purchase entries, cash receipts, cash payments, petty cash, journal, sales.

Q. Were you the accountant for Lawn International, Inc. in 1946 and 1947? A. Yes, sir.

Q. Do you recognize those as books kept by you or under your supervision as accountant for that company? A. Yes, sir.

Q. Were they kept in the regular and ordinary course of the business of Lawn International, Inc? A. Yes, sir.

Q. And was it a part of the business of Lawn International to keep such books in the regular course of business? A. Yes, sir.

Mr. Wessel: I offer them in evidence.

Preliminary Examination by Mr. Stryker:

Q. Did I understand you to say you identified all of these papers, quite voluminous, in these two exhibits? A. Yes, sir.

Mr. Stryker: I have the same objection as I had before, not part of the indictment, not part of the (1284)
bill of particulars.

The Court: I will receive them.

Mr. Wessel: I think I should state, if your Honor please, that the outside cover on each one of the books, which is in evidence, was something put on by agents of the Government.

The Court: All right.

(Government's Exhibits 77A and 77B for identification, received in evidence.)

(1285)

Q. I show you, Mr. Roth, Exhibit 60 for identification and ask you if you can tell me what that is? A. It is the accounts receivable ledger sheets and accounts payable ledger sheets of Tavern Fruit Juice Company partnership.

Q. Were you the accountant for Tavern Fruit Juice Company partnership? A. Yes, sir.

Q. Do you recognize this book as one kept by you or under your supervision as accountant for the company? A. Yes, sir.

Q. Is it a book that was kept in the regular and ordinary course of the business of Tavern partnership? A. Yes, sir.

Q. And was it part of Tavern partnership's regular course of business to keep such books? A. Yes, sir.

Q. Incidentally, what other books did Tavern Fruit Juice Company have, Mr. Roth? A. General ledger, purchase book, sales book, payroll book, journal—that is substantially all the records that were kept, to the best of my recollection.

Q. When did you last see these other books other than Exhibit 60? A. Prior to December 2, 1947.

Mr. Wessel: I offer Exhibit 60 in evidence.

Q. Was there also cash receipts, of receipts and dis- (1286)
bursements in Tavern partnership? A. Yes, sir; check books—I should have added checkbooks and cancelled checks.

Mr. Stryker: Pardon me. I am looking at this and not following it. It may be my fault. Do you mind waiting a minute?

Preliminary Questions by Mr. Stryker:

Q. Can you tell me, Mr. Roth, whether this is a complete book that was shown you? A. To the best of my recollection, these are all the accounts receivable and accounts payable ledger sheets that I recall being in the book.

Q. The pages, as far as I read them, are not numbered, or are they? A. They are not numbered but they are identified by tabs, which is accounts receivable and which is accounts payable.

Q. I understand that, but the pages themselves are not numbered? A. We didn't number any pages at that time.

Q. My question still is, are the pages numbered or not in that book? A. Pages are not numbered in this book.

Q. Is it a looseleaf book? A. It—yes.

Mr. Stryker: No objection.

(1287)

The Court: All right. Received.

(Government's Exhibit 60 for identification received in evidence.)

By Mr. Wessel:

Q. I show you, Mr. Roth, Exhibit 70-A, and ask you if you can tell me what that is, please? A. This is the general ledger for Eatsum for the year ending May 31, 1947.

Q. First may I ask you, did Eatsum also have a regular set of books like you described for Tavern? A. Yes, sir.

Q. Do you recognize this as a book which was kept by you or under your supervision as an accountant for Eatsum? A. Yes, sir.

Q. Was it a book kept in the regular course of business by Eatsum? A. Yes, sir.

Q. And was it a part of Eatsum's regular course of business to keep this book? A. Yes, sir.

Mr. Wessel: I offer it in evidence.

Mr. Stryker: Well, other than my continuing objection, I won't make any other at this point.

The Court: All right, Mr. Stryker. I will receive it.

Mr. Wessel: I don't know what this continuing

(1288)

objection is.

Mr. Stryker: I thought his Honor understood it.

Mr. Wessel: I mean on Eatsum?

Mr. Stryker: Well, there are items there—maybe I had better explain it to you, why I think that applies then.

The Court: All right.

(Discussion off the record at the bench.)

The Court: It will be received.

(Government's Exhibit 70-A for identification received in evidence.)

Q. I show you, Mr. Roth, Defendants' Exhibit GG——
A. Defendants'?

Q. —and ask you if you can identify that book, with the exception of one black photostat page, which is headed "Account No. 15". Can you identify the book except for that one page? A. This is Eatsum's general ledger, starting with the inception of the partnership until the closing, first year of May 31, 1946.

(1289)

Q. And have you already described your duties at Eatsum in the testimony you have given in this court? A. Yes, sir.

Q. Do you recognize that as a book kept in the regular and ordinary course of business? A. Yes, sir.

Q. And was it a part of Eatsum's regular course of business to keep that book? A. Yes, sir.

Q. With regard to the photostated page, account No. 15, do you recognize that as a photostat of a page which was in that ledger at the time you maintained it or Eatsum maintained it? A. Yes, sir.

(Marked Government's Exhibit 96 for identification.)

Mr. Wessel: I suggest that this book be numbered 96A, if that would be satisfactory, Defendants' Exhibit GG, for identification.

By Mr. Wessel:

Q. I show you, Mr. Roth, Exhibit 96 for identification and ask if you can recognize that as a photostat of a page out of the Eatsum general ledger?

(Defendants' Exhibit GG for identification marked Government's Exhibit 96A for identification.)

(1290)

A. This looks like a duplicate copy of the sheet that I just looked at, the photostatic sheet in the center of the general ledger.

Q. Is Exhibit 96 for identification a copy of a page which was kept in the regular course of business by Eatsum? A. Yes, sir.

Q. And was it part of Eatsum's regular course of business to keep that page? A. Yes, sir.

Mr. Wessel: I offer in evidence Exhibit 96A, except for the one page which is a photostat and, as a substitute for that page, I offer Exhibit 96.

Mr. Stryker: I don't think I have any objection.

The Court: All right. Received.

(Government's Exhibit 96 and 96A for identification received in evidence.)

By Mr. Wessel:

Q. I show you, Mr. Roth, Exhibit 70C and ask if you can identify that book for me, or that group of pages for me? A. No, sir.

Q. I show you, Mr. Roth, Exhibit 70B and ask you if you can identify that book for me? A. Yes, sir.

(1291)

Q. What is it, sir? A. To the best of my recollection, this book was used in the examination of the individual proprietorship of Eatsum Food Products Company before it became a partnership.

Q. That is, in early 1945 sometime? A. Prior to May, 1945.

Q. And when you say "in the examination," who conducted the examination? A. Mr. Hausman, one of my assistants.

Q. Was that under your supervision? A. Yes, sir.

Q. Were opening entries in Exhibit 96 taken in part from Exhibit 70B?

Mr. Wessel: Let me rephrase my question, Mr. Roth.

Q. Exhibit 96 is the general ledger of Eatsum for the period once the partnership commenced, am I correct? A. Yes, sir.

Q. And Exhibit 70B is the general ledger for the preceding period of the Eatsum proprietorship; is that correct? A. Yes, sir.

Q. How did you go about making the opening entries in Exhibit 96A? A. The opening entries were not made (1292)

by me.

Q. Who made them? A. They were made by Mr. Bercu.

Q. And did you conduct the regular audit you described in your earlier testimony with regard to the work by Mr. Bercu in Eatsum's general business? A. Yes, sir.

Q. And in connection with that audit, did you, or your accountants under your supervision, examine the opening entries of the Eatsum 1946 fiscal year general ledger? A. Yes, sir.

Q. Now, upon what book or books, if any, were those opening entries made? A. On the closing entries of the general ledger of the previous fiscal period.

Q. And Exhibit 70B, is that book? A. Right. Either the closing entries—Mr. Wessel, either the closing entries or the balances, the last balance of the previous general ledger.

Q. I don't want to be too specific, but am I correct that Exhibit 70B was used in the setting up of the book, Exhibit 96, which is the Eatsum 1946 general ledger? A. Yes, sir.

Mr. Wessel: I offer Exhibit 70B in evidence (1293)

for the limited purpose which the witness has described in his testimony.

Mr. Stryker: Can I see the other one, Mr. Wessel?

Mr. Wessel: Yes.

Mr. Stryker: While the accountants are looking at this, Mr. Wessel, will you give us photostats of all these papers?

Mr. Wessel: I am afraid I am not in a position where I can furnish photostats to the defendants. The defendants are welcome to photostat anything they wish, of course, and they have made arrangements, I understand, for that.

Mr. Stryker: Just a minute.

Preliminary Examination by Mr. Stryker:

Q. Does this 70B for identification show a closing statement—this is the proprietorship. Just tell me. I am looking at page marked—what's that, "inventories"? A. It does not show a closing statement.

Q. I show you—the pages aren't numbered, I think —page, oh, it isn't page—page labeled "Merchandise Inventory" in 76A, which is the Eatsum general ledger. Do you find an inventory set up there in that book? A. Yes, sir.

Q. What sum? A. $77,905.65.

(1294)

Q. Well, that obviously is not based on the proprietorship book, is it? A. That is not the exact amount that is on the inventory sheet of the previous book you showed me.

Q. I thought I understood you to say there wasn't an inventory item there at all, or am I wrong? A. I think you are wrong, sir.

Mr. Stryker: I might be.

Q. What I am trying to get at is that in the proprietorship there is no closing statement for the inventory; it is not closed out there on the page marked "Inventories"; is that not correct? A. There are no closing entries of the inventory account on the book marked 70-B.

Q. Then this book marked 76-A is not based on the proprietorship book marked 70-B; is that right? A. That item of inventory on 70-B is not the same as on 96.

Q. All right. A. But, Mr. Stryker, they are two different dates.

Q. Are they? This one, on 96-A, looks to me like June 1st; do I read that right? A. Just a moment, please. That is January 1st, 1945.

Q. Which one are you pointing to? That is the

(1295)

proprietorship, isn't it? A. Yes, that is January 1st, 1945.

Q. Well, the one I asked you about was here. A. June 1st, 1945.

Q. That is right, the one I pointed to on 96-A, the entry there, the first entry under the merchandise inventory is June 1, 1945. A. Correct.

Q. Did I read that correctly? A. Yes, sir.

Q. The item under "Inventories" in the proprietorship book is marked June 1, 1945; is that right? A. That is January 1st, 1945.

Q. I beg your pardon. Is it January? A. Yes, sir.

Mr. Stryker: I think you are right. All right. The basis of Mr. Wessel's offer, as I understood it, was to show that the two books were tied up, tied in, I think that word was used. I think, from the witness's testimony, it now is apparent that that is not correct.

Mr. Wessel: Let me ask a few more questions.

Mr. Stryker: Sure.

By Mr. Wessel:

Q. Do you know whether or not, Mr. Roth, there are any adjusting or closing entries in the Eatsum 1945 general ledger? A. Are you talking about the proprietorship or partnership?

(1296)

Q. Proprietorship, the '45 general ledger? A. In the proprietorship general ledger there were no closing entries put in the books, and I wasn't interested in closing entries, because that was Mr. Bercu's sole responsibility. It belonged only to David Lubben.

Q. Do you know whether or not opening entries in the 1946 general ledger, that is, the partnership general ledger, were based on the '45 general ledger plus the adjusting and closing entries made at some time? A. Made by—— Yes, sir.

Mr. Wessel: I offer them in evidence.

By Mr. Stryker:

Q. What entries are you talking about, not the ones I have seen, are they? Mr. Wessel asked you based on some entries. All the ones I know about are the ones I asked you. Are there some other entries you are speaking of? A. There are closing entries.

Q. Where, in these books? A. Not in those books, sir.

Q. Some other books? A. Not in some other books.

Q. Where, then? A. On Mr. Bercu's working papers, when the proprietorship ceased operations, he made adjustment entries applicable to the proprietorship, which were not recorded in the proprietorship books by him.

(1297)

Q. He was Lubben's man; Bercu was Lubben's man? A. Yes, sir.

Q. Well, now, have you the papers that you speak of, on which you based these entries? I don't want to spend much time with it. A. Mr. Hausman, my assistant, has the opening entries of the partnership and the closing entries of the proprietorship to tie up the figures.

Q. Are they here in court? A. I don't hear you, sir.

Q. Are they here in court, those papers you speak of? A. I haven't got them.

Mr. Stryker: All right. I think the two books are not related, so far as any evidence yet is concerned, and I object to them.

Mr. Wessel: Let me ask you——

Mr. Stryker: And even if they were, one of them is clearly outside the scope of this indictment, by dates.

By Mr. Wessel:

Q. Let me ask you, Mr. Roth, whether those work papers of your assistant Hausman were included in the

papers that you turned over to Mr. Giglio? A. To the best of my recollection, yes.

Q. Do you know where they are today? A. They should have been in those two transfer files that I turned over

(1298)

to Mr. Giglio.

Mr. Wessel: I offer it in evidence again, if your Honor please.

The Court: Could I see the bound book?

By the Court:

Q. This book, 70-B, is that a study Mr. Hausman made under your direction at the time Mr. Giglio was considering buying into the proprietorship? A. Yes, sir.

The Court: I will take it.

Mr. Stryker: I except.

(Government's Exhibit 70-B for identification received in evidence.)

By Mr. Wessel:

Q. Mr. Roth, you have not yet been sentenced; am I correct? A. No, sir.

Q. Has any promise been made to you with regard to what your sentence will be or any recommendation of any kind? A. No, sir.

Q. Do you ever—— A. Except a conversation that you had with me and my attorneys.

Q. Would you please state that conversation to the Court and jury? A. You offered to permit me to withdraw my plea if I so chose.

(1299)

Q. That is, your plea of guilty you are referring to? A. My plea of guilty.

Q. When was this conversation? A. About the 3rd or 4th of January, 1955.

Q. Go ahead. A. After consultation with my attorneys, I decided not to withdraw my plea, but to continue the cooperation of the Government, dating back to the middle of 1952; and you said to me that the only thing that you could do is resting solely a hundred per cent in your judgment at the time of sentence you would call the Court's attention to the extent of my cooperation and you can't do anything further for me, or could I hope for anything further except the true recommendation—except the recommendation of your true feelings, to the extent of my cooperation.

Q. Did I tell you whether or not there was any policy on the part of the United States Attorney with regard to recommended sentences? A. You told me that there exists a policy in the United States Attorney's office not to recommend to a justice as to the amount or type of sentence.

Q. Now, Mr. Roth, do you recall having a conversation with Mr. Giglio, Mr. Livorsi and Mr. Lawn at Pennsylvania Station? A. Mr. Wessel, I had so many conferences at

(1300)

that station that the one particular conference—just asking me the question that way don't stay—don't recall anything specific to my mind.

Q. All right. Do you recall a conversation with those gentlemen at Pennsylvania Station in which reference was made to a candidate for the Indiana Senate? A. United States Senate.

Q. Excuse me, United States Senate from Indiana; do you recall that conversation? A. I recall one conversation. A good friend of Mr. Lawn's——

Q. Just a moment. Do you recall the conversation? A. Yes, sir.

Q. When was it, Mr. Roth? A. After the informations were filed.

Q. And can you fix it any better than that? That would be after 1950? A. That would be after 1950.

Q. Would it be in the year '50, '51 or '52? When would it be? A. Mr. Wessel, we must have had 150 or 250 conversations.

Q. Do you have a specific conversation in mind at the moment? A. I have a specific conversation in mind, I mean.

Q. Can you fix the year? A. I would say in the middle of 1953.

Q. Who was present and what was said? A. I remem-

(1301)

ber one conversation where Mr. Livorsi and Mr. Giglio and I were present, at which time a discussion was had regarding retaining counsel to defend the four of us.

Q. Let me ask you this before you go any further: Is this the conversation in which the candidate for the Senate from Indiana was referred to? A. No, sir.

Q. Well, I am asking you about that conversation; do you remember when that was, or was there such a conversation? A. I don't recall any conversation at the Pennsylvania Station—excuse me, I am sorry. After the informations were filed, I do recall such a conversation.

Q. Can you fix the time, Mr. Roth, and who was present? A. Mr. Lawn and Mr. Giglio.

Q. Now please tell us what was said? A. A former Department of Justice attorney from Indiana was defeated for United States Senator. Mr. Lawn told me he knows him very well and that gentlemen knows Mr. Saypol very well, who was the United States Attorney here, and they were going to bring him on to New York in order to discuss the merits of the information that was filed, to

retain him at that particular time to present our case to Mr. Saypol, for the purpose of cancelling the information.

Q. Now you referred to another conversation at which (1302) Mr. Livorsi was present. When was that conversation? Is that the one in 1953 you referred to? A. Yes, but that was absolutely nothing to do with the United States, the candidate for the United States Senate.

Q. I understand. Would you state what happened, what was said during the conversation at which Mr. Livorsi was present, in the middle of 1953? A. At that time a conversation was had regarding a retaining counsel to represent us on a defense. Former Judge Pecora represented me on one matter. He represented me on arraignment of these indictments; and it was a question of choosing counsel to represent all the four of us; and it was a question of raising money or contributing money toward a defense fund; and I told them that I haven't got any money and I am going to retain my own counsel.

Mr. Livorsi said to me, "Well, you earned a lot of money with us." I said, "It is very true, but I don't owe you any money. I want to separate and have my own counsel."

Mr. Giglio blamed me in the manner in which I kept the books, that a great deal of this fault and this trouble is due to me; and I pointed out to him in front of Mr. Livorsi that it isn't my fault, that it is the fault of our (1303) depending on the contacts and influence of Jim Ronayne in the Treasury Department to forestall any future tax examination, any fraud, any indictment, and we lulled ourselves to sleep with Howard Lawn's contact with the Department of Justice in Washington, in New York and in New Jersey, in order to prevent any indictments; and

gradually we are going on the road to ruin, because all that protection and contacts have fallen down.

Mr. Livorsi just didn't say anything, and at that time I told Bill Giglio that "if you will stop being a lawyer and a judge and let's turn over all these things to experts, we would be better off instead of being our own lawyers."

Q. Do you recall ever having had a discussion with Howard Lawn, in which the phrase "criminal intent" was referred to? A. Yes, sir.

Q. When, where, who was present, and what was said? A. There were a number of conversations with Howard Lawn regarding criminal intent, and the word "intent;" that the main part of a criminal case is if the Government cannot prove intent or criminal intent, and that is what we have got to work around in order not to show intent, then the Government's claims on all these matters will fall.

(1304)

Q. During what period of time were those conversations? A. Those conversations were continual conversations from the time of the informations of 1950 up to about the middle of 1953 or the latter—or the middle of 1954. It was part of an overall defense.

Mr. Wessel: I am starting on a new line, if your Honor please. I will do that either now or after recess.

The Court: Why don't we take our recess now. Don't discuss the case.

(Short recess.)

(Jury in.)

By Mr. Wessel:

Q. Did there come a time, Mr. Roth, when you purchased the estate of William Giglio in New Jersey? A. Yes, sir.

Q. When was that? A. About September 1, 1947.

Q. I show you Government's Exhibits 53 and 55 in evidence and ask you if those refresh your memory as to the date of the transfer? A. Yes, sir.

Q. What was that date? A. September 11, 1947.

(1305)

Q. Now, was that transfer made after a conversation with Mr. Giglio? A. Yes, sir.

Q. Will you state what the conversation was, who was present, when it took place, and what was said? A. About five or six—the conversation took place about five or six days prior to September 11, 1947. Mr. Lawn was present, Mr. Giglio and myself. The conversation took place in Mr. Lawn's private office.

Mr. Giglio told me, "I owe you some money that you advanced to me, and a great deal of that money I used to make amortization payments to the mortgage company on my house in New Jersey. Now I am going to sell you the house, and I want you to give me additional money in order to keep up the payments, and in that way I will have a roof over my head in case the Government assesses me and will not be able to take the house, and at the same time it will give you protection for the money that I owe you."

I said, "That is all right with me."

Mr. Lawn agreed that it would save Mr. Giglio's home, and protect me, and he said, "I will have a New Jersey lawyer draw up the papers, and I know an attorney in New Jersey who is an attorney for a mortgage company; he will

(1306)

draw up the papers."

He did draw up the papers.

Q. Well, now, before you come to the next step, have you finished the conversation, Mr. Roth, at that time? A. At that time we discussed that Mr. Giglio owes me—

there were two sets of moneys. There were monies involved that I loaned to him, which he returned to me through loans receivable in my name on the corporations, but the net amount of money that he owed me for my personal check account was $20,000, and we were going to consider at that time that $20,000 would be a down payment—that $30,000 would be a down payment, of which he would acknowledge receipt of $20,000, and I would owe him $10,000 additional.

I was to keep on making payments to the mortgage company, and taxes, and when the house is sold I would take back the money that I advanced, plus any taxes that would result on account of me buying the property from him, and then reselling it, and in that way he would save his home and I would get my money back.

That is substantially the conversation that took place.

Q. Did you know at that time what steps the Govern-

(1307)

ment normally takes to collect taxes when there is an assessment or a deficiency? A. Yes.

Q. Would you describe those steps, please? A. Well, they look to the taxpayer to attach whatever property the Government may have a knowledge of or they could lay their hands on to satisfy themself for the deficiency or the amount of taxes that exists.

Q. And did you know that that was—at that that time that that was the Government's regular procedure, when taxes were not paid? A. Yes, sir.

Q. Now, did there come a time, then, when—well, there did come a time when you actually received title to this estate, am I correct? A. About five days later the attorney brought a completed bill of sale which I signed. The attorney wrote out checks for the additional money, and the deal was closed.

(Marked Government's Exhibit 97 for identification through Government's Exhibit 102 for identification.)

By Mr. Wessel:

Q. Now, you say "the attorney." Was there only one attorney present at this closing? A. Well, the attorney (1308) came to New York, Mr. Lawn called me in, he introduced me to the attorney, the papers had already all been typed, I just signed them, the closing took about five minutes.

Q. That was Mr. Tepper, am I correct? A. Yes, sir.

Q. And whom did he represent, if you know? A. He didn't represent me. I had my own attorney.

Q. Who was that? A. Milton Fox and Max A. Goldhill. While he did not represent me, Mr. Wessel, at the suggestion of Mr. Lawn I gave Mr. Tepper a check for $200 to cover his legal services for the transfer of the property in order to show it, to make it look good.

Q. Are you clear whether or not Milton Fox was your attorney at the time of the transfer from Mr. Giglio? A. Excuse me, I didn't hear your question.

Mr. Wessel: I will rephrase it.

I ask that this paper be marked for identification.

(Marked Government's Exhibit 103 for identification.)

(1309)

By Mr. Wessel:

Q. I show you, Mr. Roth, Exhibit 103——

Mr. Wessel: Well, strike that.

Q. This property was subsequently sold, am I correct? A. Yes, sir.

Q. Was that to Townsend Martin? A. Yes, sir.

Q. And did you have an attorney present at that time? A. No, sir.

Q. I show you Exhibit 103 for identification and ask you if that refreshes your recollection as to when it was that Milton Fox represented you as attorney? He represented me as attorney at the time the property was sold to Townsend Martin.

Q. Has your recollection been refreshed in any way as to who represented you at the time you purchased the property from Mr. Giglio? A. Nobody represented me.

Q. Am I correct, then, that Mr. Tepper was the only attorney present? A. Well, Mr. Lawn was an attorney, but he didn't act in the capacity of attorney.

Mr. Wessel: Let the record show I have handed Exhibit 103 to counsel.

(1310)

By Mr. Wessel:

Q. Now, Mr. Roth, did you pay Mr. Giglio some moneys at the time of this transfer or about that time? A. Yes, sir.

Q. How much did you pay him and when, how? A. Well, up to the time of transfer, Mr. Giglio owed me $20,000. Mr. Tepper drew—the, let's say, the closing statement that Mr. Tepper brought with him indicated that I was obligated to pay $30,000 in cash, plus a second mortgage to William Giglio, subject to a first mortgage to the mortgage company who held the first mortgage.

Mr. Tepper wrote out a check for $5,000, and he also wrote out his check for $200 for the fee, and about five days later or six days later I gave Mr. Giglio another check of $5,000.

Q. First, Mr. Roth, I show you Government's Exhibit 100 for identification and ask if you can tell me what that is? A. This is the closing statement that Mr. Tepper brought with him at the time that I just mentioned, in Mr. Lawn's office.

Q. Well, is that a closing statement, Mr. Roth, or is it a contract? A. It says, "New Jersey Contract for the Sale of Property." I don't understand New Jersey law,

(1311)

because I remember asking Mr. Tepper, "Why isn't it notarized, or some seals?"

He says, "You don't need any notaries in the State of New Jersey."

Q. Do you recognize the signatures at the bottom of the third page? A. Yes, sir.

Mr. Wessel: I offer this exhibit in evidence.

Mr. Stryker: Objection.

The Court: Received.

(Government's Exhibit 100 for identification received in evidence.)

Mr. Wessel: Ladies and gentlemen, Exhibit 100 is a contract of the sale of the property, and recites certain figures in payment, $30,000 at the date of execution of the agreement. It is signed by Emanuel Giglio, Margherita Giglio and Louis J. Roth; it is in the presence of Solomon Tepper. The date of the document is September 11, 1947.

(Handed to jury.)

By Mr. Wessel:

Q. I show you, Mr. Roth, Exhibit 99, and ask you if you can tell me what that is? A. It is a check dated September—can I continue?

(1312)

Q. Just, is it a check? A. It is a check.

Q. And is it signed by you? A. Yes, sir.

Q. And whose handwriting is the rest of the document in except for your signature? A. Mr. Tepper.

Q. Is that the check you referred to in your testimony? A. That is the $200 check that I referred to.

Mr. Wessel: I offer that check in evidence.

Mr. Stryker: I have no objection.

(Government's Exhibit 99 for identification received in evidence.)

(1313)

Mr. Wessel: (Handing to jury) I think Exhibit 99 has already been identified.

Q. I show you, Mr. Roth, Exhibit 97, and ask you if you can tell me what that is? A. That is a check signed by me.

Q. And whose handwriting is the balance of the check in? A. Mr. Tepper.

Q. Is that the check that was written by Mr. Tepper at the time of the closing? A. Yes.

Mr. Wessel: I will offer it in evidence.

Mr. Stryker: No objection.

(Government's Exhibit 97 for identification received in evidence.)

Q. Mr. Roth, what did you do with this check, Exhibit 97? A. After Mr. Giglio endorsed it and he wrote his wife's name underneath, I went down with him to the bank and I got cash, "O. K. for Cash, Louis J. Roth," and turned over the cash to Mr. Giglio.

Q. Whose initials appear in the upper righthand corner of the front side of the check, next to the number 10? A.

I recognize them to be Mr. Bragalini of the Manufacturers Trust Company.

Q. And would you describe the bills that you received at that time? In what denominations were they, as best (1314)
you recall? A. As best I recall, they could be in twenty-dollar bills, fifty-dollar bills, and hundred-dollar bills.

Q. Any thousand-dollar bill? A. I do not recall.

Mr. Wessel: Ladies and gentlemen, Exhibit 97 is the check just referred to (handing to jury).

Q. Mr. Roth, I show you Exhibit 98 and ask you if you can tell me what that is? A. That is a check on the Manufacturers Trust Company, signed by me.

Q. And is that the other check you referred to in your testimony? A. That is the other $5,000 check.

Mr. Wessel: I offer that in evidence.

Mr. Stryker: No objection. What is the date again?

Mr. Wessel: September 24, 1947.

Mr. Stryker: All right, put it in.

(Government's Exhibit 98 for identification received in evidence.)

Q. What did you do with Exhibit 98, Mr. Roth? A. I went down to the bank; Mr. Giglio endorsed the check; wrote his wife's name underneath, "O. K. for Cash, Louis J. Roth." It has Mr. Bragalini's approval on the face of the check. Cashed it and gave Mr. Giglio the cash. (1315)

Q. Were the bills in the same denomination as in regard to the other check that you mentioned, substantially? A. To the best of my recollection, yes.

Mr. Wessel: (Handing to jury) Exhibit 98 is the other check just referred to.

Q. Did any part of the proceeds of Exhibit 97—was any part of those proceeds used for the payment of Mr. Giglio's tax, Mr. Roth? A. I do not know of any.

Q. Do you recall when the property was sold, Mr. Roth, by you as the title owner? If you need refreshment of your recollection, I show you Exhibit 103. A. I would say approximately May 1948.

Q. I show you Exhibit 103 and ask you if you can fix the date more precisely, and also exhibit——

Mr. Stryker: Tell him the date and save time.

Q. —54. Was it June 25, 1948? A. The closing statement was dated June 25, 1948.

Q. Now between the time that you purchased the property and the time you sold it, Mr. Roth, did you ever live there? A. No, sir.

Q. Did you ever receive any rent? A. No, sir.

Q. Did your wife ever receive it? A. No, sir.

Q. When did you first see it? A. June 25, 1948, when I went over to New Jersey. That is the first time I saw the

(1316)

property, before we went over to the attorney's office for the closing.

Q. Was your wife present at that closing? A. I think she had to be present on account of certain signatures that a wife has got to sign when you sell real estate.

Q. Look at 103 and tell me if it isn't a fact that your wife was present? A. Yes, sir.

Q. And she saw the estate that day? A. We went in the house and had a few minutes and looked around.

Q. Do you know who lived there during the time, after you purchased it and before you sold it? A. Mr. Giglio and his family.

Q. Mr. Roth, did you have a conversation with Mr. Giglio before you went over to sell the property to Mr. Martin? Let me ask a different question. How did you learn that Mr. Martin was going to buy the property? A. Mr. Giglio told me.

Q. Did he tell you what the purchase price was going to be? A. Yes.

Q. Do you recall what that purchase price was? A. Whatever the closing statement indicates, approximately $85,000.

Q. Do you recall, Mr. Roth, what portion of the $85,-

(1317)

000 you received as the net proceeds of the sale, after all mortgages and other closing payments were made? A. The first moneys I received was about $7,500 at the—about one month prior to the closing, which represented a deposit on the sale of the property. At the closing time I received approximately $50,000.

Mr. Wessel: I ask that this paper be marked.

(Marked Government's Exhibit 104 for identification.)

Q. I show you, Mr. Roth, Exhibit 104 for identification and ask you whether at the closing there were not two checks made out to you, one in the amount of $41,500, and the other in the amount of $35,000? A. Those two checks were made out to me.

Q. Let me ask you this, Mr. Roth: Does Exhibit 103—— A. Mr. Wessel, excuse me. If you will give me my red folder I can give you all the arithmetic, because I worked out all the schedule of the property and the net proceeds and the cash and the money.

Q. When did you do that, Mr. Roth? A. About ten days ago. (After looking) The net amount that I received and deposited to my account on the sale of that property was, at the time of closing and deposit, amounted to $57,954.59. Do you want me to go ahead?

(1318)

Q. Yes, please do, Mr. Roth. A. Deducting $41,000 that Mr. Giglio owed me, cash or notes, left a balance of $16,954.59. Mr. Giglio at that time told me that he wants to enter some business venture and he needed money, and as long as I got my money back, whether I won't lend him $5,000 in addition to the $16,000, because he needs it.

Q. Are you reading from something written out, Mr. Roth? A. Yes, sir; it is my own paper.

Q. I though you were. Go ahead. A. So I drew a check for $21,954.59, in the Pennsylvania Exchange Bank, at the same time that I deposited close to $50,000, and the president of the bank, Mr. Miller, in view of the fact that I had——

Mr. Stryker: Just pardon me a minute.

A. (Continuing)—a cashier's——

Mr. Stryker: Just a minute, if you don't mind, Mr. Roth. Conversation with some bank official this man says he has, I object to.

Mr. Wessel: I think that is correct. Don't say what happened with the bank official.

Mr. Stryker: Mr. Roth was trying to do it.

Q. I think that is enough. I think we have enough at the moment. A. I cashed the check and gave it to Mr.

(1319)

Giglio.

Mr. Stryker: Will you mark that paper the witness read from.

Mr. Wessel: I intend to do just that now, counsel. Will you please mark this for identification.

(Marked Government's Exhibit 105 for identification.)

Mr. Stryker: I would like to look at that paper.

Mr. Wessel: I intend that you should. In fact, I intend to offer it.

Q. Mr. Roth, I ask you if Exhibit 105 is the computation which you were referring to in your testimony, and which is based upon your analysis of your own records, that you referred to just a few moments ago? A. Yes, sir.

Mr. Wessel: I offer it in evidence.

Q. That is the piece of paper you were testifying from? A. Yes, I was refreshing my memory on the arithmetical amounts.

Mr. Stryker: Go ahead, put it in.

(Government's Exhibit 105 for identification received in evidence.)

Q. If I understood you correctly. Mr. Roth, at the (1320) conclusion of the transaction and after all payments had been made, you had received back the money Mr. Giglio owed you, you still owed him a total of $16,954.59? A. Yes, sir; with this explanation: that $16,954.59 represented the actual money that I advanced on the property and loaned Mr. Giglio, deducted from the actual cash that I received, regardless of any other figures in connection with the property, just from a cash point of view.

Q. Would it be fair to state that that represented Mr. Giglio's remaining equity in the property or is that——

Mr. Wessel: Strike the question.

A. I——

Mr. Stryker: Go ahead, ask it. I don't care.

Q. I show you Exhibit 101, Mr. Roth, and ask you if you can tell me what that is? A. That is the check on the Pennsylvania Exchange Bank, signed by me.

Q. Is that the check for $21,954.59, you referred to in your testimony? A. Yes.

Q. I notice the date is June 28, 1947. I ask you if you can tell me whether that is the correct date for that check? A. No, sir.

Q. What is the correct date for that check? A. June 28, 1948.

Q. I show you Exhibit 102 for identification and ask (1321)

you if you can tell me what that is? A. That is the monthly bank statement I received at the end of the month from the Pennsylvania Exchange Bank, showing my deposits and withdrawals.

Mr. Wessel: I offer in evidence Exhibits 101 and 102.

Mr. Stryker: Put them in.

(Government's Exhibits 101 and 102 for identification received in evidence.)

Mr. Wessel: Ladies and gentlemen, Exhibit 101 is the check in the amount of $21,954.59 to cash, signed by Louis J. Roth. In the back there is a signature, "Louis J. Roth."

Q. Mr. Roth, can you tell me whose initials in pencil appear on this check? A. Mr. Miller, the president of the Pennsylvania Exchange Bank.

Q. James Miller? A. James R. Miller.

Q. Do you recall cashing this check at the bank? A. Yes, sir.

Q. Do you know what kind of bills you got? A. To the best of my recollection, it was fifties and hundreds.

Q. Nothing higher than hundreds? A. I do not recall any.

(1322)

Q. What did you do with the money? A. I never touched the money. Mr. Giglio was there, Mr. Miller was there and myself, at Mr. Miller's desk. He buzzed for the paying teller, gave him the check. The paying teller brought over the money in a package. Mr. Giglio counted it and I watched him, and he took the money.

Q. Do you know whether or not any part of it went to pay Mr. Giglio's 1946 taxes? A. I do not know of any.

Mr. Wessel: This exhibit, ladies and gentlemen, is dated June 28, 1947, but the punch holes indicate that it is 1948, and Exhibit 102, which is the bank statement, has a check on it, $21,954.59 on June 28, 1948.

Q. Mr. Roth, at page 1179 of the transcript you made reference to an amount of $18,000—$18,500, being loans receivable from you by the various corporations in receivership. I ask you whether those moneys are the same moneys you referred to at page 1102 and 3 of the transcript, which were advances by you to Mr. Giglio? A. They are the same.

(1323)

Q. Were all of those advances? A. It was a running account up and back. I advanced money to him. Then in order to get it back, a few days later I drew a check with his authority from the corporation, for the same amount of money, and charged it to loans receivable, to my account, and I told him that that isn't a very good idea, because I wasn't—it would show that I am indebted to the corporation.

He said, "Do not be concerned about that, because if I were to draw the money out of the corporation in my name, I would have to straighten out with Frank at the end of the month, based on the amount of money that I drew"——

Q. You already told us this, am I correct? A. I don't hear you.

Q. Haven't you already testified to what you are now saying? A. I don't know.

Q. Go ahead. A. And I would have to balance off with him. "In this manner, leave it rest on the books in your name, and I will redeposit money to the American Brands and credit your loan account and you will not be responsible for the loans."

Q. After the transfer of this estate to Mr. Martin, Mr. Roth, did you have a conversation with Mr. Ronayne

(1324)

about it?

Answer yes or no, please, if you can. A. Yes.

Q. Was anybody else present at that conversation? A. No, sir. I mean, except Mr. Ronayne and myself.

Q. Do you recall where and when the conversation took place? I don't want any more now. Just where and when. A. In Mr. Ronayne's office, about October 1, 1947.

Q. Now, will you state what was said, and by whom?

Mr. Stryker: I object to it. Obviously hearsay, not binding on the defendants, conversation of this

man with Mr. Ronayne alone without the defendants present, not binding on them.

Mr. Wessel: I think, if your Honor please, it is very material. At this time the defendant was a conspirator.

The Court: I will take it.

Mr. Stryker: Exception.

A. I told Mr. Ronayne of the various items that were withdrawn out of the business prior and subsequent to filing the tax returns on September 15, 1947, and I also told him (1325)
about Mr. Giglio's property and what I had done.

He told me I made a very grave error, because that is positively a concealment, and if I ever get into trouble, I will be a conspirator to a concealment, but he says, "Well, let's hope nothing is going to happen. It's done now and you can't undo it."

Q. Do you recall having had a conversation of any kind with Mr. Giglio about the hiring of Mr. Ronayne as an attorney?

I don't want the conversation; I just want to know whether you recall having had such a conversation. A. Yes, sir.

Q. When was it? A. I would say about May, 1945, June, somewhere in the area between May and July, 1945.

Q. Now, I want you to listen carefully to my question, Mr. Roth, and only answer what I am asking about.

Will you state what, if anything, was said about Special Agent Coyle? Do you follow me? Limit yourself to that subject. A. With whom?

Q. With Mr. Giglio. A. Mr. Coyle at that time was (1326)
investigating the Alpine Sales.

I told him that Mr. Ronayne, when he was in the Treasury Department, was Mr. Coyle's squad leader and he would be the ideal man to employ in order to represent Alpine Sales and Sidney Cohen, in an investigation that Mr. Coyle was making at that time.

Q. Now, Mr. Roth, do you recall ever having had a conversation of any kind with Mr. Giglio in regard to the organization of corporations, and if you want me to be more specific I will?

Does that bring anything to your mind? A. Well, Mr. Wessel, we have had so many conversations.

Q. Let me ask you this question, Mr. Roth: Do you recall having had a conversation of any kind with Mr. Giglio in which the phrase "legitimatizing money" was used? A. That had nothing to do with the corporations.

Q. Do you recall having had a conversation of any kind with Mr. Giglio in which reference was made to purchasing various companies, corporations? A. Yes, sir.

Q. When was the conversation, where was it, who was present, and what was said? A. There were a number of

(1327)

conversations between Mr. Giglio and myself about diversified investments.

The conversations extended over the period from approximately October, 1944, to January 1, 1946.

I would like to correct that. October 1, 1944 until the inception of the Eatsum partnership, which was around May, 1945.

The conversations had reference to magazine investments in diversified interests because he told me he has a great deal of money, wants to legitimatize it and invest it and what is the best plan to proceed.

I suggested to him two plans: One, by purchasing stock in a small corporation, on the assumption that that stock

is 50 per cent interest in the corporation, and the balance sheet would be worth $25,000, that no individual who has a successful business will want to sell a half interest for the exact amount of book value; that in order to purchase the stock for just the book value he should pay his goodwill in currency to the individual who pays—who sells the stock.

That is one method I suggested to him, because at some future date, were he to sell his interest he would sell it for a substantially larger amount than the $25,000 purchase

(1328)

price, and in that manner get the benefit of the currency that he would pay out for goodwill.

Another method was, if you make an investment in a corporation, and goodwill amount is not a factor, and black marketing was prevalent at that particular time, to purchase a great deal of inventory for currency, use it in manufacturing and then at the end of the year not declare the value of the inventory on your tax return that was purchased for currency, but at some future date dispose of it through the books, when tax rates are not so high.

Q. These were all ideas of yours, am I correct, Mr. Roth? A. Yes, sir.

Q. What was your gain out of these various companies, partnerships and corporations which were in existence from 1945 through 1947? A. The amount of money that I received, and with the hopes of being a very big executive of a large dynasty at some future date, in leaving the accounting profession and getting into industry.

Q. Well, about how much money did you receive, and how did that compare with the money you made before you commenced working with Mr. Giglio? A. Prior to

(1329)

working with Mr. Giglio, my net income was approximately from $10,000 to $15,000 a year.

After commencing to work with Mr. Giglio my net income went to $50,000-odd a year. After filing tax returns on $50,000 and paying the tax, I was practically in the same posit[illegible] as I was at the beginning.

Q. Now you didn't report all this money on your tax returns, did you? A. The only money I did not report on the tax return was—I indicated that to you the other day—was the—during the year— from October, 1944, to May 1945, during that six month period, I received $100 a week in cash for the first three months, and $200 a week for the second three months, and then sometime in 1946 I received from Michael Cohen over a period of five to six weeks $500 a week in currency, with the knowledge of Mr. Giglio, and I kept that.

Those two items were not reported on my income tax return.

Q. As I correct, then, in 1944, 1945 and 1946 you filed false returns? A. Yes, sir.

Q. Did you ever tell Mr. Lubben that the Doughnut (1330)
Corporation of America was to have an interest in Eatsum Food Products Company? A. No, sir.

Q. Did you ever tell Mr. Lubben that it was not to have an interest in that company? A. No, sir.

Q. Did you ever have a discussion with Howard Lawn in which the name of T. Lamarr Caudle was used? A. Yes, sir.

Q. Who was T. Lamarr Caudle? A. Head of the Criminal Division in the Department of Justice in Washington.

Q. When was this conversation, where was it, who was present and what was said? A. When the informations were filed in the year 1950, Mr. Lawn explained to me that informations are filed at the discretion of the local

United States Attorney. The only one that could overrule him is the Department of Justice in Washington.

Incidentally, there was a discussion about expenses in order to squash this information.

He flew to Washington by appointment with an Assistant Attorney General by the name of Rothwacks, who arranged an appointment with Mr. T. Lamarr Caudle, to

(1331)

whom Mr. Lawn explained the facts——

> Mr. Stryker: I suppose this is all going to be in some conversation he says he had with Mr. Lawn. It would be idle to object. If he doesn't know that, if that isn't the intention, of course, it is giving pure hearsay.
>
> Mr. Wessel: I thought my question was directed to a conversation with Mr. Lawn. May I make it clear if I didn't in my question.

By Mr. Wessel:

Q. I am only asking about this conversation had with Mr. Lawn. Now, is this something Mr. Lawn told you? A. Yes, sir, that is what I am referring to.

Q. All right, please go ahead. A. An appointment was had with Mr. T. Lamarr Caudle—this is substantially—what I am doing now, Mr. Wessel, I am substantially quoting Mr. Lawn.

Q. You don't know the exact words of Mr. Lawn? A. No, substantially the story.

Mr. Caudle was—he told me Mr. Caudle was very much annoyed that a former Department of Justice man, an information should be filed against him; it just isn't done.

He told me Mr. Caudle telephoned Mr. Saypol, the (1332)
United States Attorney in this district, and asked him to cancel the information, or withdraw the information.

He also told me that the conversation between the two officials was quite heated, and Mr. Saypol said, "I will not cancel it just by telephone conversation, but if you will send me official orders or direction I will cancel it."

Mr. Caudle never sent Mr. Saypol official written orders canceling—authorizing him to cancel the information.

Mr. Stryker: Is this all in the conversation you say you had with Mr. Lawn?

Is it, Mr. Wessel? If it is not——

Mr. Wessel: I think the witness can say.

By Mr. Wessel:

Q. Can you tell me, Mr. Roth, is all this information that you are giving based upon what Mr. Lawn told you? A. Yes, sir.

Q. Did you get any information about this subject from any place else other than Mr. Lawn? A. No, sir.

Mr. Stryker: All right.

Q. Continue please. A. That is what happened with (1333)
the conversation, and Mr. Caudle, nothing was done. I mean, our information was never cancelled.

Q. Are those informations still outstanding so far as you know? A. Yes, sir.

Q. Have you pleaded guilty to them? A. No, sir.

Q. Why not? A. The matter never came up—the matter of informations have never been discussed with my attorneys since the past four or five years, and at the time of pleading, I pleaded not guilty to the information.

Q. I show you, Mr. Roth, Exhibit 60 in evidence, which is the Tavern accounts receivable ledger and ask you if you can tell me what the last date of sale by Tavern Fruit Juice Company partnership was? A. November 23, 1945.

Q. And can you tell me, Mr. Roth, what purchases were made after that date? Have you examined this book recently, I should ask? A. Yes, sir.

Q. Well, can you state from your own recollection, without reference to the book, what companies sold merchandise to Tavern after November 23, 1945? A. Bayonne

(1334)

Barrel & Drum Company, Mulomoline Company, National Sugar Refining Company, Holloway Company, Charles Pfizer & Company, Sunhill Products; that is all I can think of at the present time, without books.

Q. Is that the inventory that you referred to as having been stored in a warehouse? A. The inventory comprised from those purchases, that were made after November 23, 1945.

Q. Who is Leo Edelstein? A. Leo Edelstein is in charge of the insurance department of Doughnut Corporation of America.

Q. Did you know him in 1945? A. Yes, sir.

Q. Do you recall whether or not you placed any insurance with him with regard to this inventory? A. I placed warehouse insurance with him on this inventory.

Q. Do you recall the amount of that insurance? A. Do you mean the premium?

Q. No, I am referring to the total value of the merchandise which was to be insured? A. Only an estimate.

Q. Well, if you will look at the book, Mr. Roth, perhaps

(1335)

you can give us your best recollection of the value of that inventory. Would you do that, please? A. The value of the inventory from this book, sir?

Q. Have you computed that value from that book? A. Yes, but I have that on paper.

Q. Where is the paper?

Well, before you testify, may I have the paper please?

Mr. Wessel: I ask that this be marked with the next exhibit number.

(Marked Government's Exhibit 106 for identification.)

By Mr. Wessel:

Q. When did you prepare Exhibit 106, Mr. Roth? A. A week to ten days ago.

Q. Have you been working with myself and Mr. Present and Mr. Fichtenholz and Mr. Krane over the last few weeks? A. Yes, sir.

Q. Can you just tell me approximately how many hours a day you have been working? A. Some days I worked eight, nine and ten hours, and some days I started about 4:30 and worked till about 8:30, about four hours.

(1336)

Q. And is Exhibit 106 a calculation you made based upon your examination of the Tavern accounts receivable and payable ledger? A. Yes, sir.

Q. Well, now, would you tell me what the value—the cost basis was of the inventory?

Mr. Stryker: One moment, incompetent, irrelevant, immaterial for him to say what the value of the inventory was.

Mr. Wessel: Well, I shouldn't have asked value.

By Mr. Wessel:

Q. Can you tell me what the cost, as shown by the books, of the inventory, purchased after November 23, 1945, was?

Mr. Stryker: One moment. I object to it as not the best evidence. Some item in the book that is relevant to this issue, that is the best evidence.

Q. Just to explain it, Mr. Roth, would there be any one item in this book, Exhibit 60, which would explain that matter? A. You mean the inventory?

Q. Yes, sir. A. Just the purchase of raw materials would explain——

Q. I don't want you to answer the question yet. Before you answer anything else, about how many of the pages (1337)

in that book are required in order to calculate the total cost basis of the inventory purchased by Tavern after November 23, 1946—1945? A. About five pages.

Q. And you would have to compute figures from those various pages? A. Yes, sir.

Q. And is Exhibit 106 for identification your computation based upon your analysis of the book? A. Yes, sir.

Q. And are you a qualified accountant with 30 years of experience? A. Yes, sir.

Q. I will ask you if you will tell me what the cost basis of that inventory was?

Mr. Stryker: Just a minute, just a minute.

I object to it on the ground that it is not the best evidence.

The Court: I will take it.

Mr. Stryker: One more.

The Court: All right.

Mr. Stryker: I object to it, also, that if there is to be a summary by an accountant, it should not be by an accountant who has pleaded guilty and is awaiting sentence.

The Court: I will overrule your objection.

(1338)

By Mr. Wessel:

Q. Would you state, Mr. Roth, what your summary is? A. $80,542.94.

Q. And that is based upon——

Mr. Wessel: I will be finished in a moment, if your Honor please.

The Court: All right.

Q. —upon the purchases by Tavern from what companies? A. From the Bayonne Barrel & Drum Company, Hexter & Son, Holloway Corporation, National Sugar Refining Company, Mulomoline Company, Charles Pfizer & Company, Stein Hall & Company and Sunhill Products Company.

Mr. Wessel: Would this be a good point to stop, if your Honor please?

The Court: All right. We will adjourn now until 10:15 Monday. Don't discuss the case.

(Adjourned at 4:00 p. m: to Monday, January 31, 1955, at 10:15 a.m.)

(1339)

New York, January 31, 1955,
10:15 o'clock a.m.

Trial resumed.

(Jury present.)

LOUIS J. ROTH, resumed.

Mr. Wessel: If your Honor please, on several occasions during the trial, I have offered, during the testimony of this witness, testimony of this wit-

ness with regard to conversations with third persons, and I have stated that those were admissible on the grounds that he was a conspirator.

Of course, I should say it was alleged that he was a conspirator and all that testimony should be taken subject to connection.

I am specifically referring to pages 1229 of the transcript and 1325, and I suggest, perhaps, an instruction to the jury as to the effect of testimony of that kind, depending upon a finding of conspiracy.

Mr. Stryker: I don't hear what you said.

(1340)

The Court: Mr. Wessel is afraid he may have overstated the effect or the admissibility of testimony by a conspirator. He would like to have me clear it up.

Mr. Stryker: All right.

The Court: Well, Mr. Foreman, ladies and gentlemen, if you find that Mr. Roth and the three defendants on trial were—first of all, if you find that there has been a conspiracy, as charged in the indictment, and then if you find that the three defendants on trial or any one of them, and Mr. Roth, were parties to that conspiracy, then during the period of the conspiracy, whatever Mr. Roth said or did in furtherance of that conspiracy is admissible against the defendant or defendants whom you find to be a party to the conspiracy.

In other words, it is the story of a partner being bound by the acts of his partner. If you find there was a partnership, what one partner does is considered the act of all of his partners.

Now, I think that is very elementary instruction. I will give you a much more detailed discussion of that subject at a later date.

All right, Mr. Wessel.

(1341)

Mr. Wessel: Thank you, your Honor.

Direct Examination Continued by Mr. Wessel:

Q. Mr. Roth, with regard to the receivership which you say commenced in December of 1947, did you have conversations with Mr. Giglio and Mr. Lawn or Mr. Livorsi in connection with the receivership before that date? A. My conversations were only with Mr. Lawn and Mr. Giglio, and not with Mr. Livorsi.

Q. When were those conversations and where did they take place, and what was said? A. During the months of October and November, 1947, there was discussions about receivership, bankruptcy, dissolution of the businesses, and at that time it was Mr. Lawn's suggestion that a receivership in the State of New Jersey, being that the corporations were New Jersey corporations, would be more advantageous than bankruptcy in the federal courts in the State of New Jersey.

(1342)

Q. At page 1319 of the transcript you were referring to your purchase of the estate of Mr. Giglio, and you made reference to a loan by you of $5,000, in addition to the $16,000-odd that you owed him on the sale of the estate. I ask you, Mr. Roth, whether that $5,000 was ever repaid by Mr. Giglio? A. No, sir. That was—while it was the word "loan," it wasn't an additional advance to him. It was rather a balance of moneys due him as a result of receiving the loans from American Brands Corporation. If I were to add up the money that I advanced to Mr. Giglio and deducted that amount of money from what I received from the property and from the American Brands Corporation in the loan account, there was still money due him, and

while I identified that item as a loan, it wasn't brand new loans that I gave him.

Q. Well, it was repayment of the loans; is that correct? A. Repayment of moneys due.

Q. With regard to this estate, Mr. Roth, how did you handle it on your own personal tax return, that is, the sale of the estate by you to Mr. Martin? A. I put it in the capital gains section of my tax return, indicating the sales price. I used the closing—excuse me—I used the closing statement at the time the property was sold to Mr. Martin

(1343)

as a guide in enumerating the facts on my capital gains section of the tax return. I put down the selling price. I knew what the purchase price was, based on the agreement from Mr. Tepper; and I also enumerated the adjustments on the closing statement for taxes, interest and other items and considered that as an expense.

Q. Didn't you take something over a thousand-dollar loss on your 1948 tax return on the sale of this property? A. Arithmetically, based on the closing statement, it showed a thousand-dollar loss if it was on those figures.

Q. Did you sustain any loss at all in connection with the sale of that property? A. No, sir.

Q. Was that a false statement? A. That thousand dollar was false.

Q. So that in addition to your 1944, '45 and '46 tax returns, you also filed a false tax return in 1948; am I correct? A. Yes, sir.

Q. Page 1199 of the transcript, you referred to having lied in the receivership proceedings; have you ever lied in any other proceedings in connection with this case? A. Yes, sir.

(1344)

Q. Did you have any conversation with Mr. Giglio at the time you paid him the $21,000 in connection with the use of that money to pay taxes? A. The money—yes, yes, sir.

Q. What was the conversation, where did it take place, and when was it? A. It took place at the Pennsylvania Exchange Bank at the time that the bank official turned the money over to him. It was his money, and I told him, I suggest that he make some payments on his tax returns. He said, "I will take care of it."

Q. Mr. Roth, I want to show you some tax returns and ask you if you can identify certain signatures. Can you identify the signature of William Giglio on Exhibit 2? A. Yes, sir.

Q. Can you identify the signature of Frank Livorsi on Exhibit 4? A. Yes, sir.

Q. On Exhibit 4, Mr. Roth, I noticed income listed there in the amount of $2,825, from Eleanor Post Dresses, Inc. for Mr. Livorsi. Were you the accountant for that company? A. Over a period of time I was.

Q. What was the name of the principal in that company? A. There were two principals. I recall the name of only one.

(1345)

Q. Who was that? A. Max Eder.

Q. Do you know whether or not Mr. Ronayne was attorney, tax-wise, for that company? A. He became tax attorney at a certain time.

Q. Do you recall when that was? A. After Eleanor Post went out of business, Eleanor Post Company went out of business, an assessment was received by Eleanor Post from the Government.

Mr. Stryker: One moment. I object to that. I don't see that it has anything to do with the issues.

Mr. Wessel: I suggest it be stricken.

The Court: All right.

Do you know when that was, Mr. Roth? A. At the time they received an assessment from the Government for taxes.

Q. Do you know when that was? Was it in 1946, '47, 48? A. I would say, to the best of my recollection, during the year '49.

Q. Do you know what work Mr. Livorsi did for Eleanor Post Dresses, Inc., in 1946? A. I do not know.

Q. I show you Exhibit 6 and ask you if you can identify the signature of William Giglio on that, which is the Eatsum tax return? A. Yes, sir.

(1346)

Q. Do you identify the signature of William Giglio on Exhibit 7, the Tavern return? A. Yes, sir.

Q. And the signature of Mr. Giglio on Exhibit 8, American Brands consolidated return? A. Yes, sir.

Q. And the signature of Howard Lawn on Exhibit 10, the Lawn International return? A. Yes, sir.

Q. And the signature of William Giglio on Exhibits 11, 13, 15 and 17? A. I am not looking at the numbers; I am only looking at the signatures.

Q. Yes, sir. A. Yes, sir; on the top and on the bottom sheet.

Q. That is Exhibit 17. A. 17-A and D.

Q. Now, sir, with regard to Exhibits 2, 4, 6 and 7, can you tell me when those returns were prepared, not filed, but prepared? A. The information on these returns were prepared about June or July of 1947.

Q. And that is the two partnership returns and the two individual returns; am I correct? A. Well,—the two partnership returns. The two individual returns, I would say, were prepared about—I had the information on work paper—they were prepared about a month after July 1947.

Q. The American Brands consolidated return, Ex-
(1347)
hibit 8, do you know when that was prepared? A. The actual typing of the return was prepared about September 1st, 1947.

Q. With regard to the Eatsum information return, you see the name, Frank Loperfido, under E in Schedule I; did you ever know Frank Loperfido by any other name? A. Yes, sir.

Q. What was that name? A. Lopez.

Q. At page 1254 of the transcript you referred to a conversation in which reference was made to certain methods of setting off losses against gains, and you said there was a couple of hundred dollars advances by American Brands Corporation to American Agar; did you mean a couple of hundred dollars or did you mean more than that? A. Oh, thousands, and—not hundreds. I meant —I didn't even mean a couple. I would say about a hundred and fifty to two hundred thousand dollars.

Q. That would be a couple of hundred thousand dollars; is that correct? A. Yes.

Q. At page 1204 of the transcript I asked you some questions about Exhibit 90, which is the form 1138, extension of time to pay the 1946 corporate taxes. I ask you how you computed that $350,000 carry-back estimated loss? A.
(1348)
The $350,000 was an estimated figure. I recall from January 1, 1947 to approximately June or July 1947, the various corporations sustained a loss of about $150,000. I added on $200,000 to that figure in order to reach a $350,000 estimated loss, so that in the computation of the carry-back there will be a sufficient amount of carry-back taxes to offset the indebtedness that was due on the consolidated return.

Had I used a lesser figure there would still remain a balance due on the consolidated tax return.

Q. Do you know— A. (Continuing) I used a greater figure to cancel the indebtedness.

Q. Do you know what the actual consolidated losses were for 1947? A. I would have to go to the books.

Q. Well, would the figure $205,000-odd be correct? A. I would have to go to the books. It sounds—I knew that there was a loss and I know I added a hundred or two hundred thousand dollars to the existing loss in order to arrive at the $350,000 figure.

Mr. Wessel: I have no further questions of this witness.

The Court: All right.

(1349)

Cross Examination by Mr. Stryker:

Q. Mr. Roth, did you plead guilty to the felony of wilfully and knowingly making a false statement for the purpose of influencing the action of the Reconstruction Finance Corporation? A. I pleaded guilty, but I don't know whether it was a felony.

Mr. Stryker: Have you those original papers, Mr. Dilberian?

The Clerk: I don't have them now. I sent out for them.

Mr. Stryker: Will you mark this for identification.

(Marked Defendants' Exhibit LL for identification.)

Q. I show you Defendants' Exhibit LL for identification; is that a copy of the indictment to which you pleaded guilty? A. I did not plead guilty to this full indictment.

Q. What do you mean by that? A. There are two counts to this indictment. To my recollection, I pleaded guilty only to one count, Mr. Stryker, or so Judge Pecora informed me.

(1350)

Q. Which count was it that you pleaded guilty to? There is the copy of the indictment. A. May I look at that, please.

Count 1.

Q. Count 1. And when did you enter that plea? Can you give me your recollection? A. Do you want the date or the circumstances, sir?

Q. I think the word "when" means date, doesn't it? When did you do it? A. I would say about June or July, 1952.

Q. At that time Judge Pecora was representing you? A. Yes, sir.

Q. When did you engage him? A. After the indictments were handed down.

Q. You are referring to the indictments concerning false statements to the RFC? A. I am referring to that indictment you have in your hand, sir.

Q. When was it handed down, do you know? A. I would have to refer to dates. Around the middle of 1952.

Q. You said around the middle of 1952? A. Yes, sir.

(1351)

Q. And do you now admit that it was in March, 1952? A. If the official record indicates that, I would ad——

Q. That is what the clerk of the court just tells me. A. Well, it was March, 1952.

Q. Now, would you call that around the middle of 1952? A. I would call that March, 1952.

Q. Would you call it around the middle? That is what you said a moment ago. A. Yes, sir.

Q. Now, then, you pleaded guilty to the charge that on or about the 28th day of March, 1949, in the Southern District of New York, Joseph P. Giabbi or Giassi and Louis J. Roth, the defendants, did unlawfully, wilfully and knowingly make a false statement for the purpose of influencing the action of the Reconstruction Finance Corporation upon the application of Celufibre Can Corporation for a loan. Said statement was to the effect that a balance sheet and operating statement of Celufibre Can Corporation as of the last day of December, 1948, which had heretofore—theretofore been submitted and delivered to the Reconstruction Finance Corporation were true statements, whereas, they were then and there—they were—whereas, as they then

(1352)

and there well knew, said statement was false in that the balance sheet and operating statements were not true.

Is that what you pleaded guilty to? A. If that is what the official document reads that——

Q. Well, now, I have read it. Is there any question about it?

The Court: I think you interrupted his answer. Go ahead, complete your answer.

A. If that is what the official document says, that is what I pleaded guilty to.

Q. There is a photostatic copy. Read it and tell me if it does not contain that which I just read to you, and if that is not the charge, the crime to which you pleaded guilty? A. Mr. Stryker, I do not recall every word that you just said. In order for me to make sure that what you said is correct, I would have to compare it with the answer and follow over here.

Mr. Stryker: All right. Now, then, I will ask the recorder to read what I said.

Mr. Wessel: I object.

(1353)

The Court: Mr. Stryker, we are not going to take time to do that. Mr. Wessel, is there any question that is the charge?

Mr. Wessel: I am sure there isn't any question.

The Court: All right. We will let it stand.

Mr. Stryker: All right.

Mr. Wessel: Although I might say I don't know whether this is the one to which he has pleaded guilty.

The Court: At least there is no doubt that Mr. Stryker read it accurately.

Mr. Wessel: I assume it is correct as he read it.

By Mr. Stryker:

Q. Now, have you ever been sentenced on that plea to the indictment, the count of which I read to you? A. No, sir.

Q. Not yet? A. No, sir.

Q. You are awaiting sentence for the crime to which you pleaded guilty in that indictment; is that right? A. Yes, sir.

(Marked Defendants' Exhibits MM, NN, OO, PP and QQ for identification.)

(1354)

By Mr. Stryker:

Q. I show you Defendants' Exhibits MM—

Mr. Stryker: What is that, A first? I can't read your writing.

The Clerk: That is MM for identification.

Q. (Continuing) MM, NN, OO, PP and QQ—that is one, two, three, four, five—as I count them—indictments,

and ask you whether or not those indictments are still pending against you? A. Yes, sir.

Q. And are you guilty of those charges in those indictments as well as the one to which you pleaded guilty? A. I pleaded not guilty to those indictments.

Q. I didn't ask that. I am asking whether you were guilty? A. No, sir.

Q. In other words, the grand jury, when it charged that you made a false statement for the purpose of influencing the action of the Reconstruction Finance Corporation upon the application of Bertro Tool & Die Company for a loan, and that said statement was to the effect—maybe you had better read it with me—that a balance sheet and operating statement of Bertro Tool & Die Company as of the last day

(1355)

of October, 1950, which had theretofore been submitted and delivered to the Reconstruction Finance Corporation were true statements, whereas, as he then and there well knew, said statement was false in that the balance sheet and operating statements were not true.

Are you telling me that the charge in that indictment is wrong?

Mr. Wessel: I object to the form of the question.

The Court: Sustained:

By Mr. Stryker:

Q. Well, are you telling me that you are not guilty as charged by the grand jury in that indictment? A. Yes, sir.

Q. Did you represent the Bertro Tool & Die Company? A. Yes, sir.

Q. Did you file a statement with the RFC for a loan on behalf of that company? A. Yes, sir.

Q. And that time your statement was correct; is that it? A. In my opinion, it was correct.

Q. I am not asking your opinion. I am asking the fact. A. To the best of my knowledge, that statement was correct.

(1356)

Q. Is what you have just said— A. And the loan was repaid to the RFC.

Q. Well, the charge, then, in the indictment is not true; is that right? A. I just said to you, sir, that the loan—this was a $15,000 loan from the RFC and it was repaid.

Q. I am asking you whether the charge that you made a false statement on behalf of that company is not true? A. I did not make a false statement to the RFC for that company.

Q. In other words, what the grand jury there charged you with is not so; is that it? A. I did not make a false statement to the RFC on the Bertro Tool & Die Company.

Q. You will notice that the grand jury says that you made a false statement. A. I did not file a false statement.

Q. Did you file a statement? A. I did, sir.

Q. Did you sign that statement? A. Yes, sir.

Q. Did you also sign the statement mentioned in count 1 of the indictment to which you pleaded guilty? A. Yes, sir.

(1357)

Q. You signed all the statements mentioned in these indictments? A. Yes, sir.

Q. Signed them? A. Yes, sir. And in count 1, sir, the loan was paid back before I was indicted.

Q. Did you sign the statement is what I am interested in? A. I did, sir.

Q. And that statement that you filed you knew was false? A. On count 1?

Q. That is what I am talking about. A. Yes, sir.

Q. That is right, isn't it? A. I answered yes, sir.

Q. Well, now, on these other indictments, 1, 2, 3, 4, 5, you are awaiting trial on those indictments, are you not? A. I presume so.

Q. Well, they haven't been dismissed, have they? A. No, sir.

Q. Well, then, you are awaiting trial? A. Yes, sir.

Q. So in addition to the indictment, one count of which you pleaded to, you are now awaiting trial on five other indictments charging the making by you of false statements to

(1358)

the RFC; is that right? A. I am awaiting disposition of those matters, and I would like to explain it to you, if you will permit me.

Q. You are awaiting disposition? A. Yes, sir.

Q. Have you been told what the disposition would be? A. No, sir.

Q. Has Mr. Wessel or anyone in the Government promised you that those indictments concerning which you say you are not guilty would be dismissed? A. There was never any discussion with Mr. Wessel about any RFC indictments.

Q. Then all you know about it is that there are these indictments, to which you have entered a plea of not guilty, they have not yet been dismissed, and, as far as you know, then, you are awaiting trial on those indictments; that is right, isn't it? A. Those matters have not been disposed of.

Q. Then you are awaiting trial on it? A. May I explain? I do not know whether I am awaiting trial or not awaiting trial, but permit me to explain.

Q. Well, you can explain. If you haven't been promised

(1359)

that those indictments would be dismissed, naturally you are awaiting trial on them, aren't you?

Mr. Wessel: I object to that.
The Court: Sustained.

By Mr. Stryker:

Q. Now, a moment ago in Mr. Wessel's examination of you you said that you filed a false return, a personal false return, income tax return of your own in 1948; is that right? A. On one item, yes.

Q. Well, when Mr. Wessel asked that, did you limit it by saying "one item"? I understood you to tell him—correct me if my memory is wrong—that the 1948 return, your own return, was false? If I am wrong in my memory, I want to be corrected. A. To the best of my recollection, I told him regarding the item of the profit is false.

Q. You signed that return? A. Yes, sir.

Q. And you think you said—correct me if I am wrong—that you also filed a personal false return for 1947; is that right? A. I do not recall 1947.

Q. 1946? A. Yes, sir.

Q. You signed that return? A. Yes, sir.

(1360)

Q. And it was false? A. Yes, sir.

Q. And in 1945 you filed a false return, and that was false? A. Yes, sir.

Q. You signed all the returns that I have just referred to? A. Yes, sir.

Q. What was the last date, 1946 or 1945? 1945, did I ask that? 1945 did you file a false return? A. Yes, sir.

Q. Signed it? A. Yes, sir.

Q. And that was false? A. Yes, sir.

Q. Your own personal return? A. Yes, sir.

Q. 1944, did you file a false income tax return? A. Yes, sir.

Q. You signed that? A. Yes, sir.

Q. When did you sign it? A. At the time I filed it.

Q. When was that? A. March—either on March 15th or thereafter, 1945.

Q. Now, did you say in this trial: "Whenever I am doubtful about the contents of a tax return I never put my signature on it or—"? Did you swear to that? A. May I read that, please?

Q. Certainly. Page 1052, in the center of the page. I have underlined it. A. I said that in connection with other

(1361)

returns.

Q. I don't care what it was in connection with. I am asking if you said what I have read. Have I read it correctly, on page 1052 of the transcript of this case? A. May I read back two of three questions to see if it is not taken out of context?

Q. Sure. A. I said that in connection with Mr. Giglio's and Mr. Livorsi's return.

Q. Regardless of in what connection you said it, you did swear to what I have read you, did you not? A. My answer referred to Mr. Giglio's and Mr. Livorsi's return.

Q. Well, now, you said, "Whenever I am doubtful about the contents of a tax return I never put my signature on it".

Did you swear to that?

A. My questioning at that moment was in reference to Mr. Giglio's and Mr. Livorsi's return, and I answered it that way.

Q. Well, regardless of how you answered it, did you answer it as I have read it? A. Those two lines standing alone is quoted, but in connection with Mr. Giglio's and Mr. Livorsi's return.

(1362)

Q. In other words, it was only with regard to their returns that you did not put your signature, but when you made false returns for yourself, you did put your signature; is that right? A. I don't follow your question, sir.

Mr. Stryker: Read it again.

(Question read.)

A. The signatures that——

Q. No, Mr. Roth, if the question isn't clear——

The Court: He doesn't have to answer it yes or no, Mr. Stryker.

Mr. Stryker: Yes, I know that.

The Court: Let the question stand. He is trying to answer it. Let's go ahead.

By Mr. Stryker:

Q. Will you answer the question. A. I am trying to answer, if you will permit me, sir.

Q. Go ahead. A. There are two types of signatures on tax returns. When I signed my own, I signed it as an individual taxpayer.

Q. I am aware of that, go ahead. A. The answer that you are referring to, sir, is in the capacity of an ac-

(1363)

countant preparing the tax return, where I am supposed to sign it.

I am referring to that second signature that I usually did not sign a tax return where I knew that the contents were fraudulent.

Q. Now, you knew the contents of your own personal returns were fraudulent, did you not? Did you not? A. Yes, sir.

Q. And you signed them? A. Yes, sir.

Mr. Stryker: May I have Exhibit 8?

By Mr. Stryker:

Q. I show you Government's Exhibit 8, call your attention to the first—to the last signature, where I am pointing, over the words "Signature of person preparing the return."

Is that your writing? A. Yes, sir. Excuse me.

Q. Take your time, surely, look at it all you want. A. That is my signature.

Q. And on page 2 of this return there is the affiliation statement, is there not? Is that not what that is? A. Yes, sir.

Q. Whose signature is at the bottom of that affiliation statement? A. That is my signature.

(1364)

Q. The only signature to the affiliation statement is yours, is it not? A. Yes, sir.

Q. There is not other signature to the affiliation statement but yours; is that right? A. Mine is the only signature on that statement.

Q. Were you doubtful about the contents of that affiliation statement? A. I should never have signed that return.

Q. I did not ask that. Were you doubtful about it? A. I should never have signed that return sir.

Q. I did not ask you that. I asked you, were you doubtful about it? A. I should never have signed——

The Court: No, he wants to know, were you doubtful about that return, not whether you should have signed it or not.

The Witness: I am sorry, your Honor, I——

The Court: Read the question.

(Question read.)

A. I knew it was false.

Q. Well, then, I suppose that would mean even more than doubt. A. I should have—I knew it was false and

(1365)

I should have never signed that return.

Q. Now, then, going back to your testimony at page 1052, wherein you said, "Whenever I am doubtful about the contents of a tax return, I never put my signature on it", that testimony was given, you have stated, with reference to the returns in this case; is that right? A. Yes, sir.

Q. And Exhibit 8 was definitely one of the returns in this case, wasn't it? A. Is that the consolidated return, Exhibit 8?

Q. Yes, sir. A. Yes, sir.

Q. Well, then, when you swore here before this jury, "Whenever I am doubtful about the contents of a tax return, I never put my signature on it", what you swore to was not true, is that not so? A. I should have never signed that tax return.

Mr. Stryker: Would you read the question, Mr. Recorder. The answer is not at all responsive.

(Question read.)

A. When I made that statement——

No, will you——

The Court: Let him answer.

Mr. Stryker: Can't I have a plain answer?

(1366)

The Court: I won't require a yes or no answer.

A. When I made that statement in this courtroom, I was incorrect.

(1366a)

Q. Well, now, we have it this way: the statement I have read to you from page 1052 was incorrect? A. Yes, sir.

Q. And you knew it was incorrect when you gave it, did you not? A. No, sir. Mr. Stryker, after two or three days' questioning I may have made an error in answering.

Mr. Stryker: I am looking for a page, your Honor. You will realize I have many pages.

The Court: I am sure you have.

Q. You prepared Exhibit 8, did you not, the American Brands report? A. Yes, sir.

Q. Did you not also prepare all the other tax returns that have been offered in evidence here by the Government? A. Yes, sir.

Q. When you engaged Judge Pecora, whom we all know to be an honorable and upright and able lawyer, you talked to him at length, did you not? A. I did, sir.

Q. He cross-examined you, didn't he? A. Extensively.

Q. And took your statements? A. It was oral discussions.

Q. Well, he took statements from you, I think? A. No written statements.

(1367)

Q. When did that cross examination of Judge Pecora begin? A. After I—all the RFC indictments came down.

Q. Which, I think we have that now as being March 1952; is that right? A. Yes, sir.

Q. And you engaged him shortly afterwards and he began cross-examining you; is that right? A. Yes, sir.

Q. And he examined you about all phases of your activities, including those connected with these defendants; is

that not so? A. He examined many phases but I don't recall whether he covered all the phases at that time.

Q. Well, would you say he neglected to cover all the phases? I certainly wouldn't, knowing Judge Pecora. Would you say that? A. My original conversations with him, with Judge Pecora, were mainly on the phases of the RFC loans; and then he went into my further activities on any matters that were pending in an investigation state with the United States Government.

Q. And those conversations with Judge Pecora continued on from the time you engaged him down to at least the 19th of July, 1954; did they not? A. I think you have——

(1368)

Q. I mean—I misspoke—July 15th, 1954, last year; is that right? A. No, sir.

Q. Did you tell Judge Pecora the story that you have unfolded here for three days in this court? A. Substantially, yes, sir, but not July—not up to July 1954.

Q. Well, up to when? A. Up to the time I offered to cooperate with the Government, which was in the middle of 1952, before any of these income tax indictments were handed down.

Q. To whom did you make that offer? A. To cooperate?

Q. Yes. A. After discussions with Judge Pecora, he went down to see the United States Attorney.

Q. Mr. Leone? A. Yes, sir.

Q. And you are referring, I take it, to a statement that you made to Mr. Leone, is that right? A. The statement that I made to Leone is only part.

Q. Of your cooperation? A. No, sir; is part of the story.

Q. Well, when you mentioned a minute ago that you were cooperating in 1952, my question was—it might not have been clear—whether you referred to the time when (1369)
Judge Pecora brought you down and Mr. Leone examined you; is that what you referred to? If not, tell me what it was. A. That was—at that time that you are referring to this statement?

Q. Yes. A. That was only an incident to the cooperation discussion.

Q. I see. Now, were you in court on July 19, 1954, before Judge Skelley Wright? A. Yes, sir.

Q. And Judge Pecora was there that day, acting as your counsel, was he not? A. Together with Mr. Jacob Rosenblum.

Q. Well, he was there, speaking in your behalf as counsel? A. Also Mr. Rosenblum was speaking in my behalf.

Q. Yes, I know that. Was Judge Pecora speaking in your behalf? A. In behalf of what?

Q. You. A. For what purpose?

Q. I don't know. I am just asking you that. A. Well, he made statements to the court. I don't know whether it was in my behalf.

Q. You mean he was making statements not in your behalf, statements against you? A. He did not make any statements against me.

Q. Well, who was he representing that day when he (1370)
came to court there, when you were before Judge Skelley Wright? A. He was representing me.

Q. All right, and you were there and heard what he said, did you not? A. I——

Q. You heard what he said? A. To be frank with you, Mr. Stryker, at that day or any day in the courtroom

I don't hear what anybody says, when you are up there in front of a judge.

Q. Well, as far as your hearing was concerned, you were where you could hear him? A. I could hear sounds.

Q. I see. You did not repudiate anything that Judge Pecora said there that day as your lawyer, did you? A. Are you talking about open court?

Q. That's right. A. I neither affirmed nor repudiated what he said.

Q. Well, then, the answer to my question would be that you never, that you did not in that hearing repudiate anything he said; that is true, isn't it? I mean, you didn't get up and say "Here, Judge Pecora has not told the truth," or "It isn't so"? A. No, I just stood there and let him do the talking.

Q. All right. You heard him say——

(1371)

Mr. Wessel: I object, if your Honor please.

Mr. Stryker: Here is a man's lawyer speaking in court and——

The Court: Oh, no, you are not going to question him about things his lawyer said, Mr. Stryker, and I don't regard him as having any duty in standing up and contradicting his lawyer in court, not even knowing what his lawyer said. We have got enough issues here without going into that.

Q. Do you know whether Judge Pecora told Mr. Leone that if you had been telling him the truth there would not be—you would not be of much avail to him, Mr. Leone? A. I do not know of anything, of any conversations that Mr. Pecora had, which Judge Pecora had with Mr. Leone.

Q. Didn't he ever tell you? Did he never tell you? A. He told me that he was going to go down to see Mr. Leone,

to discuss with him cooperating with the Government before any indictments were handed down.

Q. Did he tell you what he had said to Mr. Leone? A. It has just been a mystery all my life what my lawyer told Mr. Leone or what Mr. Leone told to Mr. Judge Pecora.

Q. Let me see if I understand that. Judge Pecora was

(1372)

representing you, was he not, at that time? A. Yes, sir.

Q. All right, and as your representative, your counsel, you knew that he went down and talked with Mr. Leone, did you not? A. I did, sir.

Q. After he had had that talk, did you not ask your lawyer what the talk was, what he had said? A. I could tell you what Judge Pecora told me, but I don't question Judge Pecora as to—I had that faith, I didn't ask him, "Well, what did he say and what did you say?"

Q. Well, what did Judge Pecora tell you? A. He said Mr. Leone wants to accept my cooperation.

Q. Yes. A. That there is an investigation in progress.

Q. Yes? A. But he will not accept my cooperation unless the RFC cases were disposed of.

Q. Yes? A. At that—Judge Pecora said that he would discuss with me in detail all the facts of the RFC cases and he will let him know just what he is going to do about the RFC cases. Do you want me to continue, sir?

Q. Yes, go ahead. A. Judge Pecora and I and one or two other attorneys in his office reviewed all the facts of

(1373)

the RFC cases and financial statements. He pointed out to me at that time, on that one count that I pleaded guilty, all the items, good and bad, and my rationalization as to why I did it; and despite the fact that this is only a $40,000 loan, which was paid back to the Government before I was

indicted, and despite the fact that the falsity of the statement was adding on the hundred per cent stockholders' business property as an asset of the corporation, and despite the fact that the individual stockholder endorsed the loan and the property was automatically subject to RFC, he said "You are guilty the way it is written, with the letter of the law, of that one count." He also said as long as there is an investigation in progress, and based on what I told him I did, he evaluated again as to what the best thing for me to do, and I made my decision at that time to cooperate with the Government, and in order to cooperate with the Government, at Mr. Leone's request, he accepted the plea of guilty on that one count, that Judge Pecora told me that legally I was guilty, and I pleaded guilty to that one count. I was ready to go down the next day to talk to Mr. Leone. Mr. Leone advised Judge Pecora, when we left the courtroom after pleading, that he will get in touch.

(1374)

with Mr. Pecora, Judge Pecora, when he wants to see me. A month passed. I communicated with Judge Pecora and I said, "Have you heard from Mr. Leone?"

He says, "No." "Don't you think it is advisable to call him up?" He says, "Well, Mr. Leone is aware that we are ready to cooperate and he will call us when he is ready for us."

Six weeks passed, and I made another call to Judge Pecora and I got the same answer.

About eight or nine weeks after I pleaded, Judge Pecora called me and said, "We are going down to see Mr. Leone."

Q. All right, go ahead. A. Shall I keep on going?

Q. Well, you wanted to make a full statement and I am not stopping you. A. No, I asked you—Mr. Stryker, if you please, sir, I asked you if you want me to explain. I am not making a statement.

Q. I am not stopping you, Mr. Roth. Go ahead. A. You said, "Go ahead and explain," and I am explaining. If you want me to stop, I will stop.

Q. Go on. I won't stop you. Go on till you finish.

(1375)

The Court: Apparently the witness hasn't the least idea what you want him to do, Mr. Stryker. I don't.

Mr. Stryker: Well, I asked him a question a long time ago.

What is the question?

The Court: What was the question? That is what he wants to know.

Mr. Stryker: I will have to turn back.

What was the question?

(Question read.)

Mr. Stryker: I think at this point, your Honor——

A. (Continuing) Judge Pecora never told me verbatim the conversations that he had with Mr. Leone or Mr. Leone had with him.

Q. Well, whether it was verbatim or not, didn't he tell you that he told Mr. Leone that if you had been telling him the truth, that your testimony would not be of much avail to Mr. Leone? A. I do not know whether that discussion took place.

Mr. Stryker: Can we take a short recess here?

The Court: All right, we will take our mid-morning recess.

(Short recess.)

(1376)

(Jury present.)

By Mr. Stryker:

Q. Mr. Roth, did you, through your lawyer, Judge Pecora, in 1952, ask permission to go before the grand jury to explain your own personal income tax return? A. Yes, sir.

Q. And did you go before the grand jury and testify? A. Yes, sir.

Q. That was about your own personal return? A. Yes, sir.

Q. That was a return that I think you have told us was a false return? A. What year was that, sir.

Q. That was the 19— your return for the tax—your tax return for the year 1945, that was the one. A. That was false to the extent of an omission.

Q. Well, now, when you were before the grand jury, having obtained permission to go there, did you tell the grand jury that your return was false? A. I have to explain that answer, sir.

Q. Can you tell me that plainly, whether you did or not? A. I cannot answer that yes or no.

Q. Did you testify concerning that matter before the grand jury? A. I testified to the best of my recollection

(1377)

on a specific matter.

Q. You were testifying about your 1945 tax return, weren't you? A. In connection with a specific matter, sir.

Q. Well, I say you were testifying about your return in some respect? A. Yes, sir.

Q. And were you asked whether or not the return that you had filed was false? A. Yes, with an explanation.

Q. Well, in general, that question was asked you somewhere in the inquiry before the grand jury; is that right? A. And I answered to the best of my recollection, yes, and I explained wherein it was false.

Q. You said that before the grand jury? A. To the best of my recollection.

Q. Did you tell the truth before that grand jury? A. On those expianations, yes.

Q. On anything else did you not tell the truth? A. I did not tell the truth when I failed to include the currency that I received from Mr. Giglio.

Q. Well, then, we have it this way, haven't we, that in some respect at least—I don't care about the respect—you testified falsely before that grand jury? A. On the items

(1378)

that I explained to you, about the currency, the answer is yes.

Mr. Stryker: I now call on the Government to produce those grand jury minutes for your Honor's view, to be turned over to me if in your judgment there is anything in the minutes in conflict with anything he said here, according to the well settled rule.

The Court: I will look at them.

Mr. Stryker: Pardon me, your Honor?

The Court: I will look at those minutes.

Mr. Stryker: All right.

The Court: We won't hold up the trial now.

Mr. Stryker: No, I am not going to ask you to.

Mr. Wessel: If I am correct, the reference is only to certain testimony on September 11, 1952, which I hand up to the Court.

The Court: All right.

By Mr. Stryker:

Q. Now, after you testified before the grand jury, in the matter I have just discussed, were you indicted for your own personal return? A. Yes, sir.

Q. Just an indictment against you on your own personal return? A. Yes, sir.

(1379)

Q. Have you pleaded not guilty to that indictment? A. I can't answer that yes or no, without explaining the circumstances as to why the plea——

Q. Will you tell me whether you pleaded guilty or not guilty and then saying anything you want. A. I pleaded not guilty.

Q. When was that? A. When the matter came up in court.

Q. About when? Can't you give us—this was your own personal matter; wouldn't you remember that date? I don't mean the exact date, but about when it was. A. Mr. Stryker, if you will give me the date that the indictments were handed down, I could tell you within two weeks after that.

Q. I am sorry, I haven't it. I will have to rely on your knowledge and your recollection. You would know more about it than I would. A. May I have your first question? I will try to answer it.

Mr. Stryker: Surely, of course.

(Question read.)

A. I would say about July or August, 1952, somewhere within that time.

Q. All right, all right, within that area. A. Within

(1380)

that area.

Q. Now, have you ever changed your plea of record on that indictment on your own return to which you pleaded not guilty? Have you ever withdrawn that plea? A. That indictment was dismissed.

Q. When was that? A. By Judge Goddard, the indictment was dismissed.

Q. Was that dismissed along with the other indictments? I thought this was an individual indictment. A. That was dismissed along with the other indictments.

Q. On the motion that I made? A. On the motion that both you and Mr. Rosenblum made.

Q. I don't mean I made it in your behalf; I mean the motion I made for my clients and Mr. Rosenblum conferred with me and filed a motion for you. A. I don't know what he did, but my attorney represented me.

Mr. Wessel: I object to who got the idea first, if your Honor please.

By Mr. Stryker:

Q. Well, in all events it was that motion in which Mr. Rosenblum represented you; is that right? A. Yes, sir. (1381)

Q. As I recall, those motions before Judge Goddard—you can correct me if I am wrong—I think they were made in January of 1953; is that right? A. If you say so, sir. My dates on legal documents, motions, and pleas, I can only give you within approximately a year or so. They don't stay in my—they don't stick in my memory. Whatever the record indicates, that I will agree.

Q. That kind of thing doesn't stay in your mind? A. Those particular dates that my attorney was to take care of, I do not remember, but whatever the official record indicates, I agreed to it.

Q. Well, Mr. Roth, this was a matter that concerned you personally. Haven't you some recollection of the matters that related to you personally? A. Yes, sir.

Q. Well, can't you give me, without my taking a record, about when that motion was made? I think you were in

court, weren't you? A. I listened to the arguments of Mr. Rosenblum.

Q. Well, then, you were in court? A. Yes, sir. Will you give me one or two seconds, and I will try to——

(1382)

Q. Surely, by all means, by all means. A. I would say the early part of 1953, to the best of my recollection.

Q. All right, that is good enough.

And can you give us your recollection of when Judge Goddard dismissed all of the six indictments on the ground that the Government had violated the rights of the defendants, about when it was—I am not expecting—— A. I can't give you the ground. All I can say is I was very happy that he dismissed them.

Q. That would be about March, 1953, would that be about right? A. Well, if the record indicates that.

Q. During the time that this motion was pending to dismiss the indictments were you cooperating with the Government? A. No, sir.

Q. Well, I thought—correct me if I am wrong—that you said you began cooperating with the Government in 1952, didn't you? A. I told——

Q. Am I right or wrong? A. Well, the way you put it, you are wrong, sir.

Q. All right. A. Prior to the indictments, Judge Pecora

(1383)

arranged for me to cooperate for the——

Q. Well, go on, go on. A. I will stop, sir.

Q. No, no, finish, finish. A. No—may I have your question?

Q. Certainly. A. Because you accused me before of making statements; I want to try to answer your questions only.

Mr. Stryker: All right, read the question.

(Question read.)

A. I began to cooperate with the Government at 1952, prior to the indictments, the very first indictments were handed down.

Q. And did that cooperation continue? A. I was ready to cooperate with the Government at all times awaiting their call.

Q. My question, I think, was, did your cooperation which you say began in 1952 continue? A. My arrangement for cooperation was in the hands of my attorneys. I was ready to cooperate at all times.

Q. Well, I imagine that you knew what you did, and my question is, did that cooperation that you speak of as having occurred in 1952 continue from that time on? A. I was not requested by the Government to come down to

(1384)

continue cooperation.

Q. I see. In other words, after the indictments were all dismissed you were not asked to continue to cooperate; it that it? A. I was not requested by the Government to come down to their office for cooperation.

Q. All right, all right.

When you appeared before the grand jury in connection with your own tax matter, were you cooperating with the Government then? A. To the best of my recollection and interpretation, yes.

Q. Well, when you were in court on July 19, 1954, Mr. Heffron, an Assistant United States Attorney, was there, wasn't he? A. Mr. Stryker, I don't remember who was in court outside of my lawyer.

Q. Well, did Mr. Heffron say in your presence that you seemed interested only in doing what you could to extricate yourself with respect to your own personal income tax? A. I don't remember that being said.

Q. Well, I will show you, and ask you if this refreshes your recollection, page 49 of the sentence minutes of that particular hearing. Will you look at, tell me if it refreshes (1385)
your recollection.

Mr. Wessel: I object to this way of getting before the jury certain information counsel knows should not be before the jury.

Mr. Stryker: It is a question, whether certain things were said.

The Court: Would you expect him to get up in open court and deny it? In other words, you claim this is an admission by silence or something.

No, I will sustain the objection.

Mr. Stryker: I claim he would——

The Court: I think you can cross examine on anything he said, but I don't think he can be cross examined as to anything his lawyer said in his presence—his own lawyer, the United States Attorney or anybody else, even the Court.

I don't think that in any way has anything to do with him. That statement is in no sense attributable to him.

Mr. Wessel: Moreover, even though I haven't objected, I don't see how this serves to impeach the witness. I don't see how it is within the scope of the direct at all.

The Court: At least, I am going to sustain your (1386)
objection at this time.

Mr. Stryker: Will your Honor hear me on it?

The Court: Yes, I will be glad to hear you.

Mr. Stryker: The point is that according to these minutes, which I won't quote until I am al-

lowed, we find this man in court before Judge Skelley Wright, represented by his able counsel——

Mr. Wessel: I think——

Mr. Stryker: Let me explain my position.

Mr. Wessel: If counsel intends to describe what happened that date or his interpretation, it should be done——

Mr. Stryker: I am not going to describe it in what I am saying. I am not going to put in what was said in anything I am now saying to his Honor here.

Mr. Wessel: If I understood what counsel was about to say, he expected to state conclusions with which I would have to take issue if he did.

The Court: To begin with, here is a man who has testified for three and a half days, and you are going to cross examine him as to what he testified to and as to matters bearing upon his credibility. You can cross examine him as to prior inconsistent statements; you can cross examine as to prior

(1387)

claims, prior improper acts, but what Mr. Heffron's statement has to do with all of that I don't understand.

I will tell you what my quandary is; now perhaps you can address yourself to it.

Mr. Stryker: Bear with me a moment.

The Court: Yes.

Mr. Stryker: Of course, it is for your Honor to rule and me to obey.

The point is that when a man is in court, represented by counsel, able counsel——

The Court: Let's stop this right now. You have made several remarks about Judge Pecora. Now,

that is not before us in any sense, your opinion as to his ability or lack of ability or mine or Mr. Wessel's. Now, I think we ought to leave that out of the picture.

Mr. Stryker: I only want to be sure that I wasn't in any way——

The Court: Reflecting on——

Mr. Stryker: That's it.

The Court: I don't think anyone thinks you are.

Mr. Stryker: That was my only point there. (1388)

My point is that when he is there with counsel and a representative of the Government says something—and I am not going to say what it is until you allow me to—and it is not refuted either by him or by his counsel, I think that that is a relevant circumstance.

The Court: And on that I will disagree with you and I will sustain the objection.

I just think that is unrealistic.

Mr. Wessel: Furthermore, allow me to state, if your Honor please, it is a question, whether or not that was refuted by either Judge Pecora or Mr. Rosenblum, it would require quite a reading of that transcript.

Mr. Stryker: Just so you know what I have in mind——

The Court: I can surmise what you have in mind.

Mr. Stryker: Will you look at it?

The Court: No, thanks. I am generally aware of what has gone on before.

Mr. Stryker: All right, all right.

I will now call upon the Government to furnish me any statements or office memoranda showing

statements as to this witness' testimony before the grand jury in connection with his own return.

(1389)

The Court: Now, in connection with his own return, I am lost again. His own return, you are talking about the '45 return now.

Mr. Stryker: That is right, sir.

The Court: I don't see that that bears on anything except his credibility.

Mr. Stryker: It bears on that, surely.

The Court: Well, I will not direct the Government to comply with that request.

Mr. Stryker: I except.

By Mr. Stryker:

Q. When did you engage Mr. Rosenblum, Mr. Roth? A. About one week after pleading to the first indictments.

Q. Did Mr. Rosenblum tell you that he had any conversations with the United States Attorney about withdrawing your plea of not guilty? A. I do not know of any conversations of withdrawing a plea of not guilty up until about four weeks ago.

Q. When did you enter your plea of guilty to this indictment, the one we are trying now? A. About July, 1954.

Q. It was within two or three days before the interview

(1390)

before Judge Skelley Wright that I have mentioned; that is about right, isn't it?

Mr. Wessel: I object to the form of the question.

A. I don't know about any interview before Judge Skelley Wright, sir.

Mr. Stryker: I think you are right, Mr. Wessel.

By Mr. Stryker:

Q. Your plea of guilty was a few days after you were before Judge Skelley Wright; that is right, isn't it? A. I was before Judge Skelley Wright and I would say that my plea came about one week afterwards.

Q. All right.

Now, without asking you what was said, the question before Judge Wright, in your presence, was whether or not he would send you to jail at once on your plea of guilty to the RFC indictment; is that not correct? A. No, sir.

Q. That wasn't what was involved? A. You said send me to jail. I was up for sentence, but what would have happened to me I do not know.

(1391)

Q. Don't you remember the discussion as to why you had been out so long and that Judge Wright couldn't understand that, and didn't the United States Attorney ask that you be immediately sent to jail, or words to hat effect? A. I do not recall any conversation, not even one word of what you have just mentioned, sir.

Q. Can I refresh your recollection.

Mr. Stryker: May I do that under your Honor's ruling?

The Court: Oh, yes, this is quite a different point. This is a different point from the previous point, yes.

Mr. Stryker: You say I may do that?

The Court: Yes.

By Mr. Stryker:

Q. Now, would this refresh your recollection about the matter that I have just discussed: Do you remember Mr. Bauman saying—page 59——

Mr. Wessel: I think it would be preferable for counsel to show the page to the witness, to see if it refreshes his recollection, rather than read before the jury what it is.

I don't even know what it is he is referring to.

(1392)

Mr. Stryker: I thought your Honor allowed me to do this; am I correct?

The Witness: Is this in open court?

The Court: Well, so far as refreshing his recollection is concerned——

Mr. Stryker: That is it.

The Court: —Mr. Stryker, I think it probably would be better if you showed it to the witness, if it is going to be a long——

Mr. Stryker: It is not so long.

By Mr. Stryker:

Q. I show you page 59 of the sentence minutes of the hearing before Judge Skelley Wright on July 19, 1954, and direct your attention particularly to the center of the page where Mr. Bauman, the Assistant United States Attorney, addressed the Court.

Will you read that, what Mr. Bauman said, from the center of the page down through the words "adjourning the sentence". A. Yes, sir.

Q. Does that refresh your recollection? A. It refreshes my recollection on some items, but not on the items you mentioned.

(1393)

Q. Well, on what matters does it refresh your recollection, referring to about ten lines of Mr. Bauman's statement to the Court? A. It refreshes my recollection that Mr. Rosenblum was right in the midst of arguing the mo-

tions to dismiss, and he needed my presence here, and he requested that sentence be adjourned because I was the accountant, I knew about the matter; I was down at his office practically every day for a couple of hours, and he needed my presence to help me prepare the case, discuss everything there is about the case, and he was requesting that the sentence be adjourned.

(1394)

Q. Now then, what I am referring to is what Mr. Bauman said about that matter; have you read that? A. Yes, sir.

Q. Does that refresh your recollection now as to what the matter before Judge Skelly Wright was? A. No, sir.

Q. What? A. It only refreshes my recollection about an adjourning, please.

Q. Doesn't it refresh your recollection as to the position taken by Mr. Bauman before Judge Wright? A. Mr. Stryker, I don't remember. I was present, I listened, I heard sounds, but I don't remember a word that was said by anybody when I was before Judge Wright. I am not going to deny that that was said, but I just don't remember a word.

Q. You mean you were there in court and when the matter was directly affecting you, you are telling me, as I understand it, that you don't remember a word of what was said or what the discussion was about, is that right? A. I will answer it again this way: When I was standing up there in court, I do not remember. I heard sounds, I do not remember what was said about me or for me, and I am not going to deny that that statement was made.

(1395)

Q. Well, you gathered from the sounds that there was something about your sentence, didn't you? A. I remember—now there comes to my mind of what Mr. Rosen

blum told me, when he said—he says, "Did you hear it?" I said, "I didn't hear a word."

He said, "Well, we were arguing about adjourning the sentence so that I can go to work and have you here in order to prepare your case."

I remember that distinctly, what Mr. Rosenblum was telling me.

Q. And you remember that, but whatever Mr. Bauman said—and at this point I am not permitted to quote it—you have no memory at all about what he said about your sentence, none at all; is that right? A. When you stand up there, Mr. Stryker, you don't know what hit you, and I don't remember a word what was said.

Q. I see. All right. When you mentioned Mr. Rosenblum's preparation of the case, the case you were referring to was this very case on trial, was it not? A. The motions on the case.

Q. Yes. A. And I was permitted to examine the records.

Q. I understand, but when you mentioned—all I am

(1396)

getting *now at the moment*—when you mentioned the case, all I want to be clear is, what case you meant, and I take it that you meant this case, did you not, the case we are trying? A. It was preparation for the motions *on this* case.

Q. All right. Well, now, you were preparing motions on this particular case to dismiss this particular indictment, were you not? A. I don't know whether the motions were being prepared or they were filed, but there was discussions daily about the case.

Q. Well, you know that as a matter of fact you had joined in a motion to dismiss this very indictment on the ground that this indictment was illegally obtained, because

testimony illegally procured was used; didn't you remember that? A. Substantially, that is what Mr. Rosenblum told me that they——

Q. You were filing an affidavit in your own behalf on that motion sometime in April 1954, three or four months before this conference or hearing before Judge Wright; you remember that, don't you? A. I remember filing an affidavit but I don't remember the date.

(1397)

Q. Your memory doesn't tell you when that was about; even? A. I would say prior to the time that the papers were submitted to the court.

Q. All right. Now, were you cooperating with the Government when you filed that affidavit in this case to dismiss this indictment? A. No, sir.

Q. Isn't it a fact that you did not decide to cooperate with the Government here until you were threatened with a jail sentence in the RFC case? A. That is not a fact. I wanted to cooperate with the Government back in 1952, before Mr. Rosenblum was employed as my counsel.

Q. Well, were you cooperating with the Government when in April of last year your counsel prepared and filed an affidavit, asking for the dismissal of this very indictment we are trying? A. I was not called by the Government to cooperate and I did not cooperate——

Q. Well,—— A. —as of 1952, it was lying dormant.

Q. Mr. Roth, don't you know that in July of last year you were threatened with or feared a jail sentence on your RFC plea? A. I was neither threatened nor I feared. I knew I was before the judge, about to be sentenced on the

(1398)

RFC item.

Q. And it was, I think you said, within a week after that that you decided to and did enter your plea in this case

that we are trying here; is that right? A. If you are only asking me about the date, the answer is yes; but there are a great many circumstances surrounding it.

Q. Surrounding the offer to cooperate? A. Surrounding—surróunding the plea.

Q. Surrounding the plea? A. Yes.

Q. Who was present when you made that plea, when you filed that plea of guilty? A. Mr. Rosenblum.

Q. And you conferred with him? A. At great length, prior to the filing of the plea.

Q. Don't you remember, in substance, Mr. Rosenblum saying to the court, Judge Skelley Wright, that he needed time to investigate the books and records before he could tell whether you would cooperate or not, in substance? A. I don't know. I don't know what Mr.—I can't recall either what Mr. Rosenblum or Mr. Heffron said when I was standing up there in front of that—in the courtroom.

Q. But you have recalled for three days transactions that you say took place ten years ago, in great detail; is

(1399)

that not so? A. It is a different situation.

Q. Yes, but is that not so? Is that not so, Mr. Roth? A. The reason I recalled them is because I was part of those transactions at that ten years ago or nine years ago, and I was not part of when I was sitting there, standing up in court, just like I——

Q. You mean—— A. Just like a piece of clay. My lawyer was taking——

Q. You mean you were no part of the transaction when you were there before Judge Skelley Wright, to determine whether you would go to jail right away on your RFC plea? You mean you weren't part of that transaction? A. I——

Q. Is that what you mean? A. Sir, if you will give me a chance to answer, I will answer you.

Q. Go ahead. A. I wasn't a part in the same degree that I was part of the conspiracy that we had ten years ago. Mr. Rosenblum was taking care of me when I was before Judge Skelley Wright, but I was part of the conspiracy ten years ago and I knew exactly what happened.

Q. Well, weren't you a part of the indictment of filing that false RFC return, to which you pleaded guilty? (1400)

Weren't you a part of that? A. I was. I am talking about the conversations before the judge.

Q. I am, too. And I think you said you can't remember a word of what happened, and my next question was, is it not a fact that what was before Judge Skelley Wright was your own matter, the question of a jail sentence on the plea of guilty that you had entered in the RFC case; isn't that so? A. I answered that question, Mr. Stryker. When you say a threat of a jail sentence, you are correct. I was up there for sentence.

Q. Well,—— A. Whether the judge would have given me a jail or life, I do not know. I do not know. I was there for sentence.

Q. Don't you remember that the judge commented very adversely on the fact that sentence had not yet been made, although your plea on the RFC case was about two years before that? A. I don't remember even what the judge said.

Q. You don't remember anything about it? A. You just stand up there, you hear sounds, and you don't know what is happening to you.

Q. So by telling me that, you hope to deprive me of an opportunity of showing from the record what was said; (1401)

isn't that it?

Mr. Wessel: I object, if your Honor please.

A. No, sir.

Q. Is that the reason you are saying that? A. No, sir; that is not a correct statement.

Q. All right. A. Now, Mr. Stryker—by the way, have you ever been up in front of a judge, so that you can remember every word they tell you when you have been ready for sentence?

The Court: Strike it out.

Mr. Stryker: I have never been up for sentence, no, not yet.

A. You wouldn't remember either, sir.

Mr. Stryker: Well, I have been before a good many judges. I remember quite well what they said, if you are asking me.

The Court: Let's not get into any——

Mr. Stryker: He is asking me a question. I thought I was on the stand.

The Court: Go on to the next question.

Mr. Stryker: All right.

Q. You remember the conference on Mr. Ronayne's office, do you not, where Lubben stated that he was being threatened with prosecution on his withholding taxes, and (1402)

asked you for money, and the others present, for money; do you remember that? A. I don't remember it the way you are saying it, sir.

Q. All right, and do you remember on that occasion Mr. Lubben said to you and those present, in effect, "If you don't pay me, I will go up and buy my peace with the authorities"? Do you remember that? A. No, sir. You are——

Q. You testified before the Kefauver Committee——

The Court: You cut him off in the middle of his answer.

What were you saying?

Mr. Stryker: He said he doesn't remember. I thought that was the answer.

A. I don't recall saying it that way, sir.

Mr. Stryker: All right, let me see.

Q. You testified before the Kefauver Committee, did you not? A. I was one of the many.

Q. Well, is there anything about my question that you can't give a direct answer to? Did you or did you not testify before the Kefauver Committee? A. We all testified before the Committee.

Q. Did you testify, is my question? A. I did. I did, (1403)
sir.

Q. Under oath? A. I think—yes—I don't know whether they swore us. I don't know whether they swore us in at that time or not, sir.

Q. I will be glad to help you on that.

Mr. Stryker: I don't know whether I can find it.

Q. At all events, you testified before the committee? A. I did, sir.

Q. All right. Did you say before the Kefauver Committee; as follows:

"Approximately one year after the liquidation of the partnership of Eatsum Food Products Company, I was called by attorney James A. Ronayne to his office at a conference with Mr. Giglio, Mr. Lubben, and Mr. Ronayne.

"At that time Mr. Lubben said, 'I am indebted to the Federal Government for approximately $200,000 worth of withholding taxes which I deducted from my employees, and they are about ready to prosecute me.'"

Mr. Wolfram: $20,000.

Q. "Approximately $20,000 worth of withholding taxes"——

Mr. Wessel: May I have the page reference?

(1404)

Mr. Stryker: Yes, 1172.

Q. (Continuing) "—which I deducted from my employees, and they are about ready to prosecute me, and I would like you gentlemen to give me the money in order to avoid prosecution.'

"Mr. Ronayne told him, 'I am not obligated to give you the money.'

"Mr. Giglio said, 'I am not obligated.'

"He said, 'Let Louis Roth give me the money. He just sold his home in Brooklyn about six months ago. He has the money.' And he threatened at that particular time that if I did not pay him, if I did not give him the money to pay the Government the withholding tax, he would buy his peace with the tax authorities himself."

Did you say that before the Kefauver Committee? A. I would like to read that, Mr. Stryker.

Q. Fine. By all means. Here it is, page 1172 (handing). A. I would like to explain that question.

Q. My first question is—I have no doubt you will be given an opportunity to explain it—did you say that? A. Was that last one a question, Mr. Stryker, no doubt you will be good enough to explain it? Was that a question?

(1405)

Q. I intended it as such. It may have been a very poor question. Pardon it.

Mr. Stryker: I think I will withdraw it and put one this way. Did you say to the Kefauver Committee what I read you a moment ago, page 1172, and a page of which you asked to read and have now read? Now my simple question is, did you or did you not say what is there recorded?

A. The answer to that is yes, but it requires an explanation.

Q. All right. Well, was that statement true? Was it the fact? A. Partially.

Q. Part true and part not true; is that right? A. Yes, sir.

Q. And at about that time did Mr. Lubben call you a vile name? A. He did, me personally.

Q. That is you, yes, you? A. Just me—no, the vile name was to me personally.

Q. That is what I am asking about. A. Yes, sir.

Q. I mean, he said, he called you a vile name? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. Now let me see if I understand it thus far: part of

(1406)

what you said before the Kefauver Committee was true and part was not true, is that it? A. That entire statement requires an explanation.

Q. Well, I am not going to read it and I don't think his Honor will let me if I tried, the whole thirty, forty pages. I can only deal with them as I come along. Was the statement that I have read and that you have now been allowed to look at carefully by yourself, was that part true, all true, all false—which was it?

The Court: You started to answer the question. Now complete your answer.

A. Taking that statement out of context and not reading before and after, to the best of my recollection that was partially true and partially not true. What you did is take a sentence out of a paragraph and you are asking me a question.

Q. Well, I took the sentence that related to the matter I am talking about. I didn't read the whole testimony. A. The entire context is important to me.

Q. W[illegible], which part of the statement that I read to you and that you read yourself, was true? May I have that?

Q. Sure (handing). A. And I am answering the question out of context, not before or after, just that spe-

(1407)

cific thing, and my answers require an explanation.

Q. I asked you which part of what I read to you is true and which part isn't true? Take your time. What do you want? A. I just wanted to jot down the line numbers which are true and which are not true. Could I have a sheet of scrap paper?

Q. Here you are. I will give you a pencil. Do that (handing). A. May I answer that now?

Q. Yes, go ahead. A. I will read you—I will read you the statement I will tell you what is true and what is not true.

Q. Before you do, Mr. Roth, will you have my question in mind, and just so you will try to answer that——

Mr. Stryker: Would you read it, Mr. Reporter, my question, the last one.

(Question read.)

A. All right, starting to read—and I am going to tell you, I am going to tell you what is true and what isn't true.

Q. Go ahead. A. (Reading) "Approximately one year after the liquidation of the partnership of Eatsum Food Products Company comma"—that is true—"I was called

(1408)

by attorney James A. Ronayne to his office at a conference with Mr. Giglio, Mr. Lubben, and Mr. Ronayne." That is true except for the fact that I do not know whether Mr. Ronayne called me or whether Mr. Giglio called me.

Q. All right. A. (Continuing reading)

"At that time Mr. Lubben said, 'I am indebted to the Federal Government for approximately $20,000 worth of withholding taxes which I deducted from my employees." It is untrue, the words "worth of withholding taxes which I deducted from my employees." The truth was, "I am indebted to the Government for taxes," and I did not know whether they were for withholding taxes or his past due income taxes from the Eatsum partnership or not.

Q. Well, Mr. Roth—— A. And they——

Q. Go ahead, finish your answer. A. "And they are about ready to prosecute me." It is untrue, the word "prosecute." "They are ready to give me trouble."

"And I would like you gentlemen to give me the money in order to avoid prosecution." That last part is untrue, except the word "prosecution."

"Mr. Ronayne told him, 'I am not obligated to give you the money.'" That is true.

(1409)

"He said, 'Let Louis'——

Q. "He" being Lubben? A. Lubben——

"Let Louis Roth give me the money. He just sold his home in Brooklyn about six months ago. He has the money,' and he threatened at that particular time that if

I did not pay him, if I did not give him the money to pay the Government the withholding tax"—is not true—"he would buy his peace with the tax authorities himself."

Instead of the words "buy his peace," he would go down and explain the entire situation to the tax authorities.

Q. All right. I am not interrupting you, am I? A. One second, sir.

Q. Take your time. A. This entire thing requires an explanation. It is still out of context.

Q. Well, do you want to take the book and give me any context that explains that? If you do, I would be glad to have you. A. Well, if you want the story, Mr. Stryker, I will give it to you, if you will ask me the question.

Q. Tell me what fact in your testimony before the Kefauver Committee would put this in context, as you say it is not now? A. The conference that we had at the Statler

(1410)

Hotel before the Kefauver Committee with a Chicago attorney by the name of Hemsley, with his assistant.

Q. Just a minute, Mr. Roth. A. I want to put it into——

Q. I know what you want to do. A. I want to put it into context.

Q. You have suggested to the jury that what I have read you is not in context with the balance of what you said.

Mr. Wessel: I object to the form of the question.

A. I didn't say to the balance, sir.

Q. Well, if it is in something somebody said at some other time, I am not asking for that. I am asking you whether or not there is anything in this Kefauver testimony that changes or alters or affects——

The Court: What was the question which you asked him, Mr. Stryker, before this?

Would you read back the question before this man started to answer.

(Question read.)

Mr. Stryker: You see, I was confining my question to just that.

(1411)

The Court: All right, we will stop the answer at the point where it is stopped.

In other words, Mr. Stryker is asking you not about matters outside of the testimony itself, and you are limiting your questions to that, Mr. Stryker?

Mr. Stryker: That is right; I think my question did.

Will you strike out the part that was not responsive to my question at all? You see, I made a very clear question.

The Witness: Your Honor, maybe I have different definition of "context."

Mr. Stryker: I guess you have.

The Witness: If "context" is only the written word, then maybe I am wrong. But "context" is the entire picture. That is what I mean by "context."

The Court: I understand the interpretation you put on Mr. Stryker's word. I don't think that is the one he meant. We are going to limit the question to what he meant.

Mr. Stryker: Will you strike out the part that is not responsive?

Without reading it, you have it before you, will you strike out the answer? It is definitely not responsive.

(1412)

The Court: All right, I think I will strike the answer.

Mr. Stryker: All right, and instruct the jury to disregard it.

The Court: Yes, you will disregard it.

Mr. Stryker: All right.

By Mr. Stryker:

Q. Now let me see. You lied under oath in the receiver hearing; is that right? A. Based on prearrangement, I lied under oath.

Q. Well, regardless of what you say was prearrangement, did you lie under oath? A. Based on prearrangement, I lied under oath.

Q. Regardless of any prearrangement that you say you had, did you lie under oath? A. Based on prearrangement, I lied under oath.

Q. Well, is there any doubt that you lied under oath, no matter what you say the prearrangement was? A. Yes, sir.

Q. You mean you did lie under oath? A. Yes, sir.

Q. All right, and in that testimony did you tell some things that were true and some that were not true? A. I would have to read the testimony.

Q. No, but I mean from your recollection? A. I can

(1413)

tell you——

Q. No, Mr. Roth, please. All I am asking is, I am not asking what you said at all; I am asking whether when you testified falsely under oath in the receiver hearing, whether you said some thing that were true—I am not asking what they were—and some things that were false? I am not asking what they were. A. The answer to that is yes, sir.

Q. And that was also true when you testified before the grand jury regarding your own income tax return; is that not so? A. Yes, sir.

Q. Did you lie to that grand jury about your own return by prearrangement? A. No, sir.

Q. That was just yours? A. At the disappointment of Judge Pecora.

Q. I know, but you can't bring in some prearrangement on that one. A. I cannot, sir.

Q. Part of what you said before that grand jury was true and part was not true; is that right? A. Correct, sir.

Q. Well, have you not found it then in your various experiences in perjury—have you not adopted in your various experiences of perjury—— A. Adopted?

Q. Adopted—the course of taking some things that (1414)
were true and saying other things that were not true? That follows from what you said, doesn't it? A. Only in connection with these matters affecting Mr. Giglio, Mr. Livorsi, Mr. Lawn and myself, by prearrangement I adopted that policy.

Q. Well, didn't you adopt that policy in regard to your own—and your own testimony about your own indictment? A. That was not a policy, sir.

Q. That was just the way you thought you would do best? A. No, that was with the hopes——

Q. All right. A. I told you there are special circumstances on that.

Q. Oh, yes, all right. A. But you didn't want to listen to me.

Q. Well, I have listened quite a while. I will some more.

Mr. Stryker: Has your Honor ruled yet on showing me the minutes, I think the grand jury minutes that you said——

The Court: As to the 1945 personal income tax return?

Mr. Stryker: I think that was it.

The Court: I have denied your request for that because the only question is did he lie. The facts as

(1415)

to that return are not material to this case.

Mr. Stryker: I agree with you.

The Court: The question is, did he lie? He says he lied. What do we gain by giving you the grand jury minutes?

Mr. Stryker: I think we might gain something by showing this jury the manner and respect in which he lied there.

The Court: Oh, no. I think that fact is established. We will go on to something else.

Mr. Stryker: All right, I will respectfully except.

(1416)

Q. Now, let me see, you testified on your direct examination, did you not, that you met in the Pennsylvania Station, in the summer of 1953, to discuss the engagement of counsel; is that right? A. Maybe——

Q. Isn't that what you said? Is there any question?

The Court: Now, wait a minute. Read the question back. Now, let's see, what is the question.

Mr. Stryker: All right.

By Mr. Stryker:

Q. Did you not say that?

(Question read.)

A. I don't recall the exact date, but it was a question of engaging counsel, either you or Mr. Rosenblum, or other eminent counsel, to represent the group.

Q. Now, then, so I will be accurate, did you say—and this is before this Court and jury—did you testify as follows:

"Q. Now you referred to another conversation at which Mr. Livorsi was present. When was that conversation? Is that the one in 1953 you referred to? A. Yes, but that was absolutely nothing to (1417) do with the United States, the candidate for the United States Senate.

"Q. I understand. Would you state what happened, what was said during the conversation at which Mr. Livorsi was present, in the middle of 1953. A. At that time a conversation was had regarding retaining counsel to represent us on a defense. Former Judge Pecora represented me on one matter. He represented me on arraignment of these indictments; and it was not a question of choosing counsel to represent all the four of us; and it was a question of raising money or contributing money toward a defense fund . . ."

Mr. Wessel: Counsel read the word "not." It was not a question of choosing counsel. It reads, "and it was a question".

Mr. Stryker: Show me that, will you? You are quite right.

By Mr. Stryker:

Q. (Continuing) ". . . and it was a question of choosing counsel to represent all the four of us; and it was a question of raising money or contributing money toward a defense fund; and I told him that I haven't got any money and I am going to (1418) retain my own counsel.

Mr. Livorsi said to me, 'Well, you earned a lot of money with us.' I said, 'It is very true, but I don't owe you any money. I want to separate and have my own counsel.'

Mr. Giglio blamed me in the manner in which I kept the books, that a great deal of this fault and this trouble is due to me; and I pointed out to him in front of Mr. Livorsi, that it isn't my fault, that it is the fault of our depending on the contacts and influence of Jim Ronayne in the Treasury Department to forestall any future tax examination, any fraud, any indictment, and we lulled ourselves to sleep with Howard Lawn's contact with the Department of Justice in Washington, in New York, and in New Jersey, in order to prevent any indictments; and gradually we are going on the road to ruin, because all that protection and contacts have fallen down.

"Mr. Livorsi just didn't say anything, and at that time I told Bill Giglio that 'If you will stop being a lawyer and a judge and let's turn over all these things to experts, we would be better off instead of being our own lawyers.'"

(1419)

Was that question asked you, and did you give that answer in this trial before this jury? A. That is my testimony. That is my testimony. That is my testimony.

Q. That was true? A. Yes, sir. I may be wrong as to the year and the date because we have had thousands of discussions——

Q. Now, wait a minute. A. May I finish, Mr. Stryker?

Q. Yes, go ahead. A. This is not one discussion or two discussions. These discussions were daily, weekly, semi-weekly, semi-monthly on all matters, and I may be wrong

as far as a year is concerned or a date, but I am not wrong as to facts.

Q. Now, you mentioned more than once the middle of the year or the year 1953 in connection with that supposed conversation, did you not? A. I may have.

Q. You were asked on page 1301 by Mr. Wessel:

"Can you fix the year? A. I would say in the middle of 1953."

And 1302 and 1303:

"Q. Now, you referred to another conversation at which Mr. Livorsi was present. When was that (1420) conversation? Is that the one in 1953 you referred to?"

You answer "Yes." and go on.

Now, you mention the year 1953, 1953, more than once in connection with this supposed talk about counsel; that is right, isn't it? A. I mentioned the year 1953 a number of times in connection with conversations.

Q. But in connection with this conversation about engaging counsel—— A. Mr. Stryker, I will answer the question in the following manner: Ever since 1947, up to this date, we have had hundreds of conferences regarding defense, contacts, counsel, and every conceivable thing you can think of in order to defend ourselves, but I cannot remember dates. I could remember facts.

Q. But didn't you swear under oath and say it more than once that that conference about engaging counsel—and you placed the place in the Pennsylvania Station—was in the summer of 1953?

Mr. Wessel: I object to the form of the question. I would like your Honor to look at page 1301.

The Court: I will sustain the objection.

(1421)

Mr. Stryker: I have forgotten now what the——

The Court: You were saying, hadn't he sworn under oath that it was the year 1953.

Mr. Stryker: I have read him from the testimony; that is all I could do.

The Court: If you want to read——

Mr. Stryker: Anything you say.

The Court: There are six questions here—beginning in 1301—where he is asked about a conversation regarding somebody from the Indiana Senate, then he says United States Senate.

Mr. Stryker: That's right.

The Court: Then he says, "I recall one conversation," and he goes on.

Mr. Stryker: That's right.

The Court: And there are six or seven questions in which Mr. Wessel tries to pin him down on the date.

Mr. Stryker: That's right.

The Court: And he says, '50, '51 or '52. Then he says, "I would say the middle of 1953."

Mr. Wessel's objection is that the form of your question suggests that he had been firm and fixed

(1422)

in his reference to the date, and so I am going to sustain the objection.

Mr. Stryker: I guess I will grant what the witness said. I hope I have read it correctly. I find the date of this conversation——

The Court: This is 1301, Mr. Stryker. There is a whole interchange.

Mr. Stryker: Yes, I have followed that, and at the bottom of that page:

"Q. Can you fix the year? A. I would say in the middle of 1953," after he has wavered around on dates, he is asked about——

The Court: I don't think the characterization is correct.

Mr. Stryker: I don't mean that. After he has discussed various dates——

The Court: In other words—well, I don't want to argue. I am going to sustain the objection as to form. I don't think a fair reading of that is that he fixed the date as 1953. It was his best estimate.

Mr. Stryker: Well, on that question, if I haven't asked this before:

Q. Was this question asked you and did you give this (1423)
answer, page 1301, the very page the judge is referring to, by Mr. Wessel:

"Q. Can you fix the date? A. I would say in the middle of 1953."

Mr. Wessel: Object. The word was "year" and not "date."

Mr. Stryker: What is that?

Mr. Wessel: I did not ask "Can you fix the date?" I said, "Can you fix the year?"

Mr. Stryker: You are right.

By Mr. Stryker:

"Q. Can you fix the year?"

I am glad it is that way.

"Q. Can you fix the year?"

And the answer was:

"I would say in the middle of 1953."

A. I gave you my—I answered that question the best of my recollection.

Q. All right. Now, you know there were many occasions during this trial, after a day's session, Mr. Wessel—and I am not criticizing it at all—would come in and refer to various items in the testimony you have given before, and have you correct it.

(1424)

You know that happened several times, didn't it? A. I don't know how many times, but it happened.

Q. Well, several times? A. It happened.

Q. All right. Now, after you gave this testimony, did Mr. Wessel ask you whether or not the date you had given wasn't mistaken? A. No, sir.

Q. All right. Now, the reason you are saying that now, Mr. Roth, is, isn't it, that you now see where placing that conversation in 1953 puts you, isn't that it? A. What is your question, sir?

Q. You now see where that date puts you? A. Mr. Stryker, excuse me—you started with a statement; then you started with a question, and I don't know what you want.

Mr. Stryker: Withdrawn. Withdrawn. Withdraw it all.

Q. Now, let's see: In the summer of 1953 you had had Judge Rosenblum as your counsel. A. Mr. Rosenblum.

Q. Mr. Rosenblum—well, I thought maybe he was a judge, too; I guess not—former Assistant United States Attorney Rosenblum—you had had him as your counsel

for sometime, hadn't you? A. I had him since the--about

(1425)

one week after I was arraigned on the indictment.

Q. Well, that was the summer of 1952, wasn't it? A. Yes.

Q. So you had had Mr. Rosenblum as your counsel since 1952; is that right? A. Yes.

Q. What? A. Yes, sir.

Q. Well, weren't you satisfied with him? A. I am very satisfied with him.

Q. All right. Now, you know, also, don't you, that I had represented these gentlemen, my three clients here, since sometime prior to the time that I made a motion in January, 1953, in which you, through Mr. Rosenblum, joined; you knew that, didn't you? A. Well, Mr. Rosenblum was there. I don't know whether "joined" is the word.

Q. He was there and he filed some papers, too? A. Yes.

Q. All right. So that when you had this conference, as you have said yesterday, in 1953 for engagement of counsel, the fact was that you had had Mr. Rosenblum since the previous September, and that my clients had had me since the time I made the motions six months before; that is a fact, isn't it? A. Yes, sir.

(1426)

Mr. Stryker: I would like to stop here, your Honor.

The Court: All right.

We will go to lunch now. Be back at 2:00 o'clock. Don't discuss the case.

(Jury out.)

(Adjourned at 12:45 o'clock p. m. until 2:00 o'clock p. m.)

(1427)

AFTERNOON SESSION.

(2:05 p.m.)

(Jury in box.)

LOUIS J. ROTH, resumed the stand.

Mr. Stryker: Shall I go ahead, your Honor?

The Court: Yes, I think we are all here, Mr. Stryker.

Cross Examination by Mr. Stryker (Continued):

Q. Mr. Roth, when you were before Judge Skelley Wright on July 19, 1954, were you standing throughout the interview, the hearing? A. Yes, sir.

Q. Who stood on your right side and who on your left side? A. I don't remember.

Q. Did your lawyers stand there with you? A. Yes, sir.

Q. Then Mr. Pecora, Judge Pecora stood on one side and Mr. Rosenblum stood on the other, right? A. Yes, sir.

Q. Did Mr. Rosenblum say there, in your presence, in effect, that the Government was holding a gun at your head? A. I don't remember him saying that at all.

Q. It was within a week after that appearance that you pleaded guilty, I think you told us this morning, did you not? A. It was within a week or two after the first appearance before Judge Wright.

Mr. Stryker: Have I the record of the date of (1428)
his plea, Mr. Dilberian, from the indictment? I think it would be on it, wouldn't it?

The Clerk: Which plea, his present indictment?

Mr. Stryker: Yes. Could I borrow your Honor's?

The Court: Sure (handing).

Mr. Stryker: I take it this record is always before the Court, is it not, the indictment?

The Court: Yes, sir.

Q. The back of the indictment, the original indictment in this case, shows that on July 22, 1954, you pleaded guilty to counts 1, 2, 3, 4, 5, 6, 7, 9 and 10 of this indictment; now there is no dispute about that, is there? A. If that is what the official record says.

Q. Do you doubt that I am reading it correctly? A. No, the date.

Q. Do you doubt that I am reading it correctly? Would you like to look at it? A. I don't doubt figures. I am only talking about dates.

Q. Would you look at the original indictment and the notation on the back, which is part of the record of this court, July 22, 1954; is that right? A. Yes.

(1429)

Mr. Wessel: If your Honor please, I think the witness has already answered the question. He doesn't remember the date.

Mr. Stryker: I am going to get the date.

Mr. Wessel: And there is no dispute, of course, as to the date.

Q. Well, there is no dispute that on July 22, 1954, you entered your plea to this indictment here; that is right, isn't it? A. That is correct.

Q. Now then, that was not a week or two after you appeared before Judge Skelley Wright, but, as a matter of fact, three days, was it not? A. I appeared before Judge Skelley Wright two or three times, sir. I am talking about the first time I appeared before Judge Wright.

Q. I show you the official transcript of the stenographer's minutes of that hearing and point to the date, July 19, 1954, and July 22, 1954; those are the two dates you were before him; isn't it? A. I don't know the dates I was before Judge Wright, Mr. Stryker.

Q. Does that refresh your recollection? A. There were two dates.

(1430)

Q. All right. A. If the official record says that I appeared——

Q. Well, it does say it, doesn't it? A. May I answer, please? If the official record indicates that I pleaded on July 22, that is the official record.

Q. All right. A. I recall appearing before Judge Wright two or three times, and I do not indicate, say to you, that July 19th was the first time.

Q. Well, I show you the official transcript of the minutes, not only the cover but the first page, and I point to the date of July 19, 1954, 4:30 o'clock p. m.; does that not refresh your recollection.

Mr. Wessel: If your Honor please, I think this is objectionable; it is a matter of record. The witness's recollection cannot be refreshed clearly.

Mr. Stryker: If it is a matter of record, can I have it?

Mr. Wessel: Of course. July 19th was the first date; July 22nd was the second. He pleaded on July 22nd; I don't think there is any question. It is on the back of the indictment.

Mr. Stryker: All right.

Q. Now let me just get it so I am perfectly clear. On that occasion, with your two lawyers standing either one

(1431)

on either side, you standing, is it your testimony before this jury that you have no recollection whatever of your lawyer, Mr. Rosenblum, saying that somebody, that there was a gun at your head or at somebody's head? A. Are you talking about July 19th?

Q. That is right. A. I have absolutely no recollection of that remark.

(1432)

Q. Well, now, would looking at the transcript of what occurred there refresh your recollection? A. No, sir; I won't deny the transcript, but it won't refresh my recollection because I do not remember that remark.

Q. Well, that would be rather a significant remark, wouldn't it, relating directly to you, that there was a gun at your head? As you think about it, doesn't that come back to your mind?

Mr. Wessel: I object to the form of the question.

The Court: Sustained.

Mr. Stryker: How does your Honor rule?

The Court. I sustain the objection.

Mr. Stryker: I respectfully except.

The Court: I think there are two or three questions.

Mr. Stryker: I did not hear your Honor's last comment.

The Court. I say, I think there are two or three questions.

Mr. Stryker: You do. Well, I will try again.

Q. Well, now, you have remembered, you say, with

(1433)

great particularity the conversations that you say you had with the defendants in relation to, I think, every income tax

return or other document in connection therewith; you have remembered that in your direct examination through, I think, three days, with great, minute detail; isn't that right? A. I remember the conversations I had with the defendants as I testified.

Q. Yes. Now, those conversations were back nine or ten years ago, weren't they? A. Some of them were nine, ten, eight, seven, six, five, four and three years ago, and two years ago.

Q. Well, a great many of them related to the income tax returns for 1945 and 1946, and then later on—I don't care to bother figuring out the time, but it was a great many years before we sat here in this court, wasn't it? A. Yes, sir.

Q. And you remembered, you said, all or you remembered the substance, the detail, I think, of all that you say the defendants said to you on the occasions when those returns were prepared; isn't that so? A. Yes, sir, as I testified.

Q. All right. But you can't remember what happened only last July, about six or seven months ago, as to what

(1434)

your lawyer said about the Government or someone having a gun at your head; you can't remember that; is that right? Is that right? A. Mr. Stryker, I would like to explain to you this way, as I did before——

Q. No; if you can't answer it I will withdraw the question.

Mr. Wessel: The question is objectionable and I object now.

Mr. Stryker: All right, I withdraw it.

The Court: I sustain the objection.

Mr. Stryker: I withdraw it.

By Mr. Stryker:

Q. Your testimony is that you do not remember what Mr. Rosenblum said regarding a gun; that is your testimony, isn't it? A. I do not remember what—anything at all that happened in that courtroom before Judge Wright.

Q. Nothing at all, I see. All right. And that was—all right. Now, how long did that proceeding before Judge Wright take, do you remember that? A. I will estimate 15 or 20 minutes.

Q. It began at 4:30, didn't it, in the afternoon, and I show you this transcript of that hearing. Will you agree (1435) with me that it comprised 67 pages? A. I don't know whether that is the transcript, Mr. Stryker, that you are showing me.

Q. Well, is there any doubt about it? A. I would like to look at it.

Q. Take your time, sure, by all means, see if it isn't the transcript.

Mr. Wessel: I object. This is no way to refresh a recollection which obviously cannot be refreshed.

If counsel wants me to stipulate as to what time it started I will be happy to do so.

Mr. Stryker: Will you? And when it ended, I would like that.

Mr. Wessel: It started at 4:30. I don't know when it ended.

Mr. Stryker: You will agree there are 67 pages there? It will save time.

Mr. Wessel: There are 67 pages.

Mr. Stryker: All right, then I won't have to bother you with that.

By Mr. Stryker:

Q. Now, how long did you say that took? A. To the best of my recollection, 15 to 20 minutes.

(1436)

Q. What did you say a moment ago about it? Didn't you say something else? A. I don't remember saying anything else. You asked me how long it took and I said I estimate 15 minutes.

Q. So let me have this clear and I will pass on to another point.

It is your testimony that a hearing comprising 67 pages of stenographer's minutes did not take more than 15 minutes; is the right?

Mr. Wessel: Object to the form of the question.

The Court: Sustained.

By Mr. Stryker:

Q. Did it take more than 15 minutes? A. I do not know whether it did or not. I am only giving you my best recollection.

Q. And that is your best recollection? A. Yes, sir.

Q. Now, Mr. Roth, do you remember the motions that I made in behalf of my clients, and that Mr. Rosenblum made in your behalf? I think we have the date fixed as January, 1953. You remember that incident, don't you? A. Mr.

(1437)

Stryker, there were——

Q. No, I am talking about the motions. A. To my recollection there were dozens of motions made. Which motions are you referring to?

Q. I am talking to the motions that sought to strike down the six indictments illegally obtained and the appearance before Judge Goddard; was that not July—I mean

January, 1953? A. If the official record indicates that, the answer is yes.

Q. Well, do you mean that that you can't testify about that without some official record? That, after all, is only about two years ago. Is that your testimony? A. I could testify that motions were made. I don't know whether they were in January, 1953, or February, 1953. I know motions were made to have the indictments dismissed.

Mr. Stryker: Can you save time and will you agree with me on the date, Mr. Wessel? It will save a lot of talk.

Mr. Wessel: I will agree, but I would like to state this, if your Honor please, this is the third stipulation I have made because I want it to be clear to the Court that counsel is not trying to cross examine this witness. He is trying to bring in evidence on

(1438)

his own case through this witness; it is not proper cross examination, and the fact that he seeks stipulations from me is proof that he is not trying to cross examine this witness.

I will stipulate——

Mr. Stryker: The only reason I am asking you, Mr. Wessel, is to save time in asking a great many questions of the witness, and if something is of record, and you care to tell me, I would be glad to have it.

Mr. Wessel: I would stipulate the date of the motions—don't know offhand, but I would stipulate the date of the motions, but it is proof that this is not proper cross examination otherwise counsel wouldn't seek such a stipulation.

Mr. Stryker: That doesn't follow at all. Will you or not stipulate the date when that motion was made before Judge Goddard?

Mr. Wessel: Whatever the record shows I will certainly stipulate.

Mr. Stryker: Haven't you the record there?

Mr. Wessel: Not in front of me, sir.

Mr. Stryker: You don't. All right.

(1439)

By Mr. Stryker:

Q. Well, at all events——

Mr. Stryker: Strike that.

Q. You can tell me whether it was January or February; if you are not sure of January, it was one of the two; can you tell me that? A. To the best of my recollection, yes.

Q. All right. Now, do you remember that after those motions were made, and before Judge Goddard struck down the six indictments, that there came a time when you were allowed, and Mr. Holzer in behalf of my clients was allowed to examine certain books and papers in the United States Attorney's office? A. Yes, sir.

Q. Now, that was an interval, was it not, between the argument of the motion and Judge Goddard's decision striking down the indictments; that is right, isn't it? A. When you say "interval," I don't know.

Q. Can't remember that. All right. A. The legal dates, motions, so forth, I don't know, but I know I examined, I examined the books in the United States Attorney's office.

Q. All right. How long did that examination go for-

(1440)

ward? A. As far as myself is concerned, are you referring to?

Q. Yes, that is what I am talking about. A. I would say four or five days, approximately three or four, and sometimes five hours a day.

Q. And then there came a time when that examination ended, did there not? A. Yes, sir.

Q. And the time when that ended was when the indictments were dismissed and there was no more occasion to examine the papers, isn't that so? A. That is correct.

Q. All right. Now, were you cooperating with the Government when you went up there to make that examination? A. I was ready to cooperate with the Government at all times, but on the advice of my attorney he told me that he is going to retain all my legal rights at the same time that I am ready to cooperate with the Government.

Q. Well, now, Mr. Roth, maybe my question is at fault. I had hoped it was simple.

Were you, during the period when you were examining the books and papers in the United States Attorney's

(1441)

office, cooperating with the Government; just during that period, were you or not? A. Physically, and not by the request of the Government, I was not cooperating.

Q. Well, were you cooperating with the other defendants, with Mr. Holzer, who was engaged by our side? A. My answer to that question is only on the advice that my attorney gave me.

Q. Well, irrespective of the advice, I am interested in the fact: Were you cooperating with him? A. I could only give you the advice my attorney gave me.

Q. Can't you tell us what you did, regardless of the advice? A. I don't go against my attorney's advice. I can only quote my attorney's advice to me.

Q. Can't you tell me what you did? A. Did where?

Q. In the United States Attorney's office. A. I examined——

Q. During the days that we have already been over till we are all tired. A. I went ahead to examine the records for the purpose of defense, at the same time guiding myself by my attorney's advice, in which he said that he is not going to give any legal rights that I am entitled to.

(1442)

Q. Well, then, the net answer is that you were up there trying to obtain information, working for yourself? A. I don't understand sir, what you mean.

Q. Well, you went up there to get information in relation to your own defense. A. If there would be a defense, yes.

Q. Now, did you see the books and records, did you see a good many books and records in the United States Attorney's office? A. Only what revenue agents present gave me to examine.

Q. Can you remember what books you examined, what he gave you? A. I will give you my best recollection, sir.

Q. All right, let's have it. A. The Eatsum Food Products general ledger during the life of the partnership.

Q. Go on. A. The Tavern Fruit Juice Company accounts payable and accounts receivable ledger.

Q. Yes. A. American Brands, the complete set of books, American Brands Wholesale, American Trucking—all the American corporations.

Q. And also the partnerships? A. Except of the books that I just indicated, the Eatsum Food Products general

(1443)

ledger and the Tavern Fruit Juice Company accounts payable and accounts receivable ledger.

Q. You examined them? A. Yes, sir.

Q. And they were partnership books? A. Yes, sir.

Q. Did you see the agents working on those partnership books? A. No, sir.

Q. Did you hear the agents telephoning to the banks after they had looked at the partnership books? A. I didn't pay any particular attention to what they were doing at the other end of the room.

Q. Try to think back and see if you heard them calling up banks in regard to matters contained in the partnership records? A. They were calling up on the telephone, but they spoke in such a low voice you couldn't hear what they were talking about.

Q. Did you see them with partnership records before them when they were telephoning? A. No, sir; they were working at one end of the room and I was working in the opposite corner and I couldn't see what they had on their desks.

Q. You know, don't you, that the subpoenaing and procuring of partnership books, individual books, other than corporate books, was one of the grounds on which Judge Goddard struck down the indictment?

(1444)

Mr. Wessel: Object to the form of the question.

The Court: Sustained.

Mr. Stryker: If he knows.

Mr. Wessel: I still object to the form of the question.

The Court: Sustained.

Mr. Stryker: I except.

Q. You were subpoenaed along with the other defendants sometime in June or July of 1952; isn't that right? A. If that is the correct date, the answer to that is yes, sir. Mr. Stryker, my attorney accepted the subpoena for me and I do not remember the date.

Mr. Stryker: Mr. Wessel, would you be kind enough to give me a copy of the subpoena. I don't seem to have it.

Mr. Wessel: At this point, if I may, I object to this line of examination on the following grounds:

It is obviously not cross examination. As direct examination it is beyond the scope, it is making this witness counsel's own witness, and it is irrelevant to any issue in this case.

Mr. Stryker: We have had three days of testimony about what I thought was all phases of this case, including the fact of where he testified falsely,

(1445)

and his various appearances. I think it would take me probably three-quarters of an hour to establish this, but I think it clearly relates to matters brought out on direct examination. Even if I am wrong about that, even if I am, which I don't think I am, I have the right to——

Mr. Wessel: This matter has already been ruled upon.

Mr. Stryker: —to interrogate this man about anything that bears on his credibility.

Mr. Wessel: I don't——

Q. I show you——

Mr. Wessel: Just a minute, Mr. Stryker.

The Court: On that basis, I don't see us getting very far.

Mr. Stryker: Suppose I drop the question at this point and go ahead the best way I can.

The Court: All right.

Q. I show you, Mr. Roth, an affidavit made by you in this case, and ask you if at the end it bears your signature or not? Will you look at it (showing witness)? A. On this sheet alone is my signature.

Q. All right, and that signature appears to be sworn to (1446)

on the 6th day of April, 1954; do I read that correctly? A. Yes, sir.

Q. Did you in that affidavit——

Mr. Stryker: Have you got a copy of it, Mr. Wessel?

Mr. Wessel: Yes, sir.

Q. Page 3, paragraph 7, state under oath as follows, referring to the motions before Judge Goddard:

> "These motions were argued before Honorable Henry W. Goddard, one the Judges of this Court, on January 21, 1953, along with certain other preliminary motions made by the defendants."

Did you say that? A. If that is my original affidavit I would like to look at it and read it, and I will say it.

Q. By all means (handing). There is the item I read you, page 3, paragraph 7. Look at it to your heart's content.

Mr. Wessel: While the witness is looking at it, may I say, if your Honor please, that I have a continuing objection to this line of examination as completely immaterial and irrelevant.

The Court: Will you look at that—you said you would like to look at it and I am showing it to to you. Look at it as long as you wish.

(1447)

A. Mr. Stryker, there are a number of sheets in this affidavit. I only identified the signature on my last sheet. I don't know whether these loose sheets in the middle are mine or not, unless I get the original document from my attorney.

Q. Well, blue sheets? I don't see the blue sheets. A. Loose, loose.

Q. I am sorry, yes. In other words, you are questioning whether this is part of your affidavit; is that right? A. I am not questioning anything. I only made a statement. If I am to identify an affidavit, I want the original affidavit from my attorney that I signed. There are loose sheets here and I don't know whether all these sheets are mine.

Mr. Stryker: Well, in view of that, I would like to, so as to clear up that question now, to call on the Government for a copy or an admission that this is in the affidavit.

The Court: I don't know where we are going.

Mr. Stryker: Well, we are at this point, your Honor: when I show him a paper he says he can't tell unless he sees his lawyer or something else. I am showing one——

The Court: Are you trying to fix the date of

(1448)

the motion before Judge Goddard?

Mr. Stryker: That is only on this one thing.

The Court: I don't see that gets us anywhere.

Mr. Stryker: This is only one item.

The Court: He has testified it was early in 1953. He said it was January 1953 another time. Now I think we have labored that enough.

Mr. Stryker: I am told that what I am reading from is the original from the files of this court.

The Court: The date of the motion, as far as I see, isn't in controversy.

Mr. Stryker: Well, I have only started, your Honor, and so as to settle once and for all what I am showing, I am told—is that right, Mr. Dilberian, those are records of this court?

The Clerk: That's right.

The Court: He has never said they weren't, as far as I know.

Could I see counsel up here for a second and let's see where all this leads us?

(The following discussion took place at the bench, not in the hearing of the jury:)

Mr. Stryker: Your Honor has asked me whether I intend to go into the question of what evidence was (1449) used to obtain this indictment. Was that your Honor's question?

The Court: No, I asked you whether you are going into the question of use of partnership books? Maybe it comes out the same way.

Mr. Stryker: I will answer yes, that is the fact. Now the reason that I am is this: I made a motion in the files of this court, before Judge Palmieri, for a hearing to determine whether or not any illegal evidence had been used before the grand jury that found this indictment, and in that motion I presented an affidavit which contained a great number, I think about two pages of parallel columns showing verbatim substantially the same charges that were made in this indictment as were made in the other, where illegal evidence was used. I thought that that was particularly a case for a hearing to determine

the question of whether or not illegal evidence had been used. Judge Palmieri decided against me and denied the motion, thereby leaving me with the sole opportunity of ascertaining the fact at the trial. The purpose of that preliminary motion, like other similar motions, is to avoid going into matters which otherwise might not be relevant.

Now since I have been denied that application, (1450)

if I cannot do it here, then I am denied utterly from establishing whether or not illegal evidence is used.

Mr. Wessel: Counsel is correct, of course, as to what happened before Judge Palmieri, with the following exception: the evidence presented before Judge Palmieri led him to conclude that there had been no foundation of any kind showing partnership evidence had been illegally been used, and for that reason he denied counsel a hearing. Now I don't dispute that if counsel can present new evidence showing use of such material, that he would be entitled to some other kind of preliminary hearing, and perhaps he would be entitled to such a hearing here. If there were the right to such a hearing, and I don't think there has been any more foundation laid now than there was before Judge Palmieri, then it should be out of the presence of the jury, because it is a preliminary question, that is, the use of illegal evidence presents a question of law with regard to the indictments, and not a question of fact for the jury. Now I don't think there has been any further foundation yet laid other than before Judge Palmieri, so I would say that Judge Palmieri's ruling is the law of the case. If your Honor would find such further foundation, however, I

would then request that the hearing be out of the presence of the jury, because I anticipate that coun-

(1451)

sel is using the same kind of tactic as he did, I think in the Lustig case, which is going to the jury in regard to a question of law.

The Court: Well, now, on this, frankly, I would like to see some cases. I will sustain an objection at this time to proceeding into this question, but I will reserve decision on it, and I will say that I will see whatever cases you want to give me tomorrow morning or at such other time as you wish to give them to me.

Mr. Wolfram: Will your Honor bear in mind that Judge Palmieri referred this very question to the trial?

The Court: Referred to the trial?

Mr. Wolfram: The question of leads and clues, he referred that to the trial.

Mr. Wessel: As I said to your Honor, there is no question but that is true, your Honor, but there has been no other additional foundation.

Mr. Wolfram: I don't think it is a question of foundation at all.

Mr. Stryker: This is what happens through, I think, no fault of mine. Now the Government sought to make light of my parallel colums, which your

(1452)

Honor knows was impressive to Judge Palmieri before he found against us, because of certain affidavits of agents and so forth. My contention was that those agents were mistaken and I wanted to interrogate them.

Mr. Wessel: Let me say about parallel columns, of your Honor please, there is no question that this indictment is very much the same as the old one.

The Court: I don't want to argue it now; I don't want to hold the jury up on an argument on a question of law. Can't we desist on this subject now and give me whatever you can overnight?

Mr. Stryker: All right, let's adjourn a little bit earlier and continue in chambers, and I won't pursue it at this time.

The Court: All right, very good. That is fine. We will do that.

(The following took place in the hearing of the jury:)

By Mr. Stryker:

Q. Now, taking up another subject for the moment, Mr. Roth, it is the fact, isn't it, that you testified before the grand jury in July or August of 1952? Can we have that passed along? That is the fact, isn't it? A. Regarding (1453)

this case?

Q. Yes. A. Is that the testimony——

Q. In regard to the subpoena that was involved in those motions? I am not going into them at the moment. A. Regarding this case?

Q. That is right, yes. A. Yes, sir.

Q. Did you tell the truth before that grand jury? A. Yes, sir.

Q. Were you asked shortly prior to your testimony, were you asked in that subpoena duces tecum to produce any and all books and records, all the books and records which you have recently shown to Mr. Wessel? A. I was asked

to produce all the books and records, to the best of my recollection, in the body of the subpoena, of all the corporations, partnerships and everything else. They asked me, they requested me to produce the books and records.

(1454)

Q. All right. Did you deny before the grand jury that you had any books and records? A. I brought to the grand jury everything that I could find in my files of the corporations and the partnerships, of any papers that I had.

Q. Did you produce the papers that you were asked about here in this court that you said you found in some envelope, as I recall it? A. At that time I did not produce it because I found that just recently, on account of moving from the premises, I found that dug in a cellar in one of the cabinets. Had I found it at that time I would have brought it to the grand jury.

Q. Yes. Now, what was the Van Dyk Corporation? I think we have some testimony about that on your direct. A. Van Dyk Industrial Corporation was a research corporation composed of Dr. Van Dyk and William Giglio. Dr. Van Dyk was employed as a chemist.

Q. You knew that? A. May I finish, sir?

Q. Oh, I am sorry. I thought you did. A. Dr. Van Dyk was employed as a chemist by the partnership and then by the corporation. I think he wanted to go into business for

(1455)

himself, and Mr. Giglio invested money together with him.

What the operations of Van Dyk were I could only say to the best of my knowledge, research, because I never did the work for that company, and I just don't know the type of operations and business they conducted.

Q. Well, you knew something about Van Dyk Corporation, anyhow, did you not? A. Except the fact that there

was a Van Dyk Industrial Company and Mr. Giglio had a 50 per cent interest with Dr. Van Dyk.

Q. Well, didn't you discuss that with Mr. Giglio? According to your direct examination you discussed almost every paper that has been offered. A. Very, very little discussed about the Van Dyk Industrial, because I knew very little about it.

Q. Did you keep the books of Van Dyk or have anything to do with them? A. I don't think I—I don't remember keeping the books of Van Dyk Industrial Corporation.

Q. Were they kept by Scarr or Starr? A. No, I think Dr. Van Dyk had his own accountant in Bernardsville, New Jersey.

Q. You saw the books, I suppose? A. I don't ever recall (1456)

seeing the operating books.

Q. What books did you see if not the operating books? A. I don't remember seeing any books, except at one time Mr. Giglio asked me to—when he sold his interest, I signed some papers as an officer in order to effect him getting $15,000.

Q. Did you ever make any entries in the Van Dyk books? A. I don't recall making any entries in the Van Dyk books.

Q. By the way, this morning, Mr. Lubben—pardon me, Mr. Roth, you asked me whether you were sworn as a witness in the Kefauver investigation, and I told you I would try to put my finger on it. I think I have failed at the moment.

Now, is it not the fact that the chairman said to you, page 1170, Mr. Wessel:

> "Mr. Roth, do you solemnly swear the testimony you will give this committee will be the truth, the

whole truth and nothing but the truth, so help you God"?

Did you take that oath? A. May I read that?

Q. You doubt my reading? A. I don't doubt any-

(1457)

thing. I just would like to read it, sir.

Q. There is the page. I am showing you 1170 of the Kefauver hearing, and I am pointing to the—I have got it red-marked underneath. See if I have not read it to you correctly. If I haven't, correct me. A. The answer to that is yes, sir.

Q. Now, then, when you gave us the details of what you said before the Kefauver Commitee that were not true, you knew that you were committing perjury before the Kefauver Committee; is that right? A. Yes, sir.

Q. Now, not everything you said before the Kefauver Committee was perjury, I take it from your examination this morning? A. I would have to read over my entire testimony to determine what is correct and what is incorrect.

Q. All right. Now, you said in this trial, in substance—I won't bother to turn to the page unless somebody questions my paraphrase—that it was Mr. Lubben who wanted to end the partnership after his return from Cuba, did you not? A. Yes, sir.

Q. Well, now, under oath, before the Kefauver Committee, were you asked these questions and did you give these answers at page 1122——

(1458)

Mr. Wessel: Is that the right page?

I am wrong about the page. 1222.

By Mr. Stryker:

Q. "The Chairman: Did Mr. Lubben talk to you about wanting to get out and said he was tied

upon a five-year contract and could not get out; do you know about that?

"Mr. Roth: I have a faint recollection about the contract, but Mr. Lubben did not talk to me about him getting out. It was rather Mr. Giglio spoke to me that he wanted to get out, and disassociate himself with Mr. Lubben on account of the manner in which he has conducted Eatsum, and it would only result in trouble"?

Was that question asked you and did you give that answer? A. That question and answer and that statement on my part is incorrect.

Q. Well, are you distinguishing incorrectness from falsity? A. That statement was false.

Q. So under oath you again perjured yourself before the Kefauver Committee; is that right? A. That statement was false.

Q. Well, you purjured yourself? A. That statement (1459)

was false.

Q. Well, won't you answer my question? A. At the time I testified before the Kefauver Committee on the quotation you just read, that was a false statement.

Q. All right. Now, Mr. Roth, if the testimony on the same subject that you gave before these ladies and gentlemen was false, then it would follow that the statement that you gave before the Kefauver Committee I just read was true, wouldn't it?

Mr. Wessel: I object to the form of the question.

The Court: Sustained.

A. I didn't follow that.

Q. All right. Then we have your word, yours, as to which statement was true or false, the one given to this jury, or the one to the Kefauver Committee; is that right?

Mr. Wessel: I object.

The Court: Sustained.

Mr. Stryker: I respectfully except.

By Mr. Stryker:

Q. Have you discussed with anyone how you should answer with regard to testimony that you gave in other (1460)
hearings, as to whether you should say it was merely incorrect and deny that it was perjury? Has anybody talked to you about that? A. May I have the question again?

Q. Yes. A. I just did not follow you, sir.

Mr. Stryker: It is long. Read it. If it isn't clear I will reframe it.

(Question read.)

A. If I understand your question, Mr. Stryker, that means other hearings besides the testimony in this courtroom?

Q. That's right, sir. Anyone suggested to you how you should answer when it came to questions of false testimony given in other courts; other hearings? A. Yes, sir.

Q. Talked to Mr. Twohig about that? A. Never.

Q. Any other agents? A. No agents at all except with Mr. Giglio or Mr. Livorsi by planning what the testimony should be.

Q. I am talking about since you have been here as a witness, has anyone talked to you about the way you should answer that? A. No, sir.

(1461)

Q. Not at all.

Now, let's see, you told us on direct examination that you had been working with the agents—correct me if I am wrong—for many hours a day over a considerable period of time; isn't that right? A. I don't recall saying working with the agents. I was working on the records and making up statements, but I don't remember saying working with the agents.

Q. Well, working with the representatives of the Government, whoever they were. A. Mr. Stryker, will you please explain to me the definition of "working with"?

Q. Well, you spent many hours in this building, didn't you? A. Yes, sir.

Q. And I presume you were working with someone, weren't you? A. I was working most of the time alone on the records and other times I was working with Mr. Wessel, enumerating to him all the facts in the case.

Q. And discussing what your testimony was going to be here in this court? A. I never discussed with him what my testimony is going to be in the court, except the instructions that my attorney gave me.

(1462)

Q. Well, I am not, by my question, in the slightest degree implying that Mr. Wessel did not have a right to interrogate you about that. I am sure he did. I am only asking the fact. Did you discuss with him what you say were the facts that you were going to present in this courtroom? A. I discussed with him all the facts.

Q. Were you asked this question, and did you give this answer, in this record, page 1336:

"By Mr. Wessel:

"Q. Have you been working with myself and Mr. Present and Mr. Fichtenholz and Mr. Krane over the last few weeks? A. Yes, sir."

You so testified, didn't you, here? A. Yes, sir.

Q. What? A. Yes, sir.

Q. Who is Fichtenholz and Krane—agents? A. All three, Mr. Present, Mr. Fichtenholz and Mr. Krane are revenue agents.

Q. Well, now, when Mr. Wessel asked you that question, just as I have read it, you did not ask him, as you have just asked me, what he meant by working with these people, did you? A. The reason I did not ask him because there

(1463)

was not that inflection in his tone of voice that you had, "working with."

Q. Well, in all events, regardless of my very unfortunate personal eccentricities in my voice— A. Excuse me, Mr. Stryker, the way you asked that question carried an inference, with an innuendo of "working with."

Q. Has anyone told you that would be a good way to answer questions that I might put to you? A. Nobody told me how to answer these questions.

Q. I see. Well, at all events, regardless of my very poor inflections, the fact remains, does it not, that when Mr. Wessel asked you that question, you did not ask him for a definition; that is right, isn't it? A. If you would have asked me the question in the same tone of voice, I would have answered you that I did work with them.

Q. Would you mind answering my question? I am afraid your answer doesn't quite answer it.

Mr. Wessel: I object to the question.

By Mr. Stryker:

Q. Did you ask Mr. Wessel to explain that to you, just answer yes or no?

(1464)

Mr. Wessel: I object, if your Honor please. The record shows what it shows.

Mr. Stryker: Well, can't I have an answer to that, your Honor?

The Court: Well——

Mr. Stryker: I think the record does show what it shows.

The Court: Nobody begrudges an answer; it is just a matter of how long we take on it.

Mr. Stryker: It would take a short time if he answers the question.

The Court: I think that the record shows that he did not ask for any definition when Mr. Wessel asked him the question. He said he didn't, and he has explained why, and now I think we will go on to something else. As a matter of fact, this might be a good time to take a recess, if it won't interrupt the subject.

Mr. Stryker: I think it would be an excellent time.

The Court: All right. We will take a recess now. Don't discuss the case.

(Short recess.)

(1465)

(Jury in box.)

By Mr. Stryker:

Q. Mr. Roth, have you ever, since you have pleaded guilty and become a Government witness, discussed with Mr. Wessel how best to present the matter of your plea of guilty?

That is my question. A. Did I discuss with Mr. Wessel how best to present my matter of a plea of guilty?

Q. That is right, yes. Do you understand the question? I don't think it is very good. A. I don't understand it, sir, I am sorry.

Q. I don't blame you. It isn't a very good question.

Did you ever talk to Mr. Wessel about how to tell the story of your plea of guilty? A. No, sir.

Q. At no time, ever? A. I never discussed with Mr. Wessel how to present my story.

Q. Well, do you mean that what you have said about that was totally unknown to him before you came here to testify? A. I am answering your question, Mr. Stryker. You said "how." There was never any discussion how to present my story.

(1466)

Q. All right. Well, of what to say in presenting your story? A. With Mr. Wessel. I will tell you a discussion with Mr. Wessel as to what was said with Mr. Rosenblum present.

Q. No, I don't care who; I am just asking you if that was ever discussed. A. There was a discussion——

Q. I don't know whether you had it or whether you did not. A. Mr. Stryker.

Q. Yes? A. There was a discussion between Mr. Rosenblum, Mr. Wessel, myself, Mr. Tilzer was present, I think a Mr. Fraiman was present, and one or two other revenue agents.

Q. When was that? A. That was about January 4th or 5, 1955.

Q. Well— A. There was a discussion at that time as to the word "how."

Q. How to present your plea, how to present the story? I didn't hear you. A. There was a discussion at that time in answer to "how"——

Q. All right. A. And may I finish that, sir?

Q. Yes, sir. A. May I finish that?

Q. Sure. A. Mr. Rosenblum told me, in front of Mr.

(1467)

Wessel, that when I come into this courtroom I have one obligation, to tell the true and exact facts, whether it hurts the Government or helps them, and to tell the true and exact facts, whether it hurts the other defendants or helps them, and I have tried strictly to adhere to those instructions.

Q. And those, in substance, were the instructions that Judge Pecora gave you before you testified in the grand jury about your own 1945 income tax return? A. No, sir.

Q. Didn't he tell you to tell the truth, too? A. He told me to tell the truth.

Q. Whatever it was, tell the truth? A. About my own, yes. I failed him.

Q. You let him down? A. I failed him, and I also confessed to him that I told a lie.

Q. Did you have any discussion with anyone as to your testimony here, that when you were before Judge Skelly Wright you could only hear sounds of voices, but could not remember a single thing that anyone said, including "gun at your head"? A. Including what?

Q. Gun at your head. A. That is correct. I was petrified when I was before the judge.

(1468)

Q. Now, Mr. Roth, turning to another subject, do you remember at this trial you were asked these two or three questions and you gave these answers:

> Mr. Stryker: Page 1013, Mr. Wessel, so you can follow me.
>
> Q. (Continuing) "Q. Mr. Roth, do you recognize the two cabinets sitting on the table opposite Mr. Giglio and Mr. Lawn? A. Those are transfer cabinets, not files.
>
> "Q. Well, do you recognize them in any way? A Yes.

"Q. What are they? A. Those transfer files look like the transfer files that I gave to Mr. Giglio when I gave up my 62 William Street office, which contained all papers in connection with his various enterprises, that I had in the files in my office."

Do you remember testifying——

Mr. Wessel: I object to the form of the question. There is an interpolation.

Mr. Stryker: What have I missed?

Mr. Wessel: The first answer was "Those are transfer files, not cabinets," not as you read it, not "Those are transfer cabinets, not files."

(1469)

By Mr. Stryker:

Q. All right, take that correction, take it with the correction.

Were those questions asked and did you give those answers? A. Yes, sir.

Q. Well, will you, with his Honor's permission, step down from the witness stand and look at these cabinets of which you spoke. Just step right down. I mean, come down and look at them, come close to them; come all the way down. A. I can see it from here.

Q. You can't see the front of it, can you? A. No.

Mr. Wessel: If he is to go over, I request other defendants move away from the table.

Mr. Stryker: Yes, certainly. Move away, by all means.

Q. Now, will you come down, if his Honor allows it.

The Court: All right.

Mr. Wessel: I would request that they move somewhat more away, if your Honor please.

Mr. Stryker: Put them anywhere you want, Mr. Wessel. You designate the place.

(Witness steps down and moves over to where counsel for defense is standing.)

Q. If you will go right over in front. A. I see them, Mr. Stryker.

(1470)

Q. Thank you. A. They still look like two of the transfer files that I gave to Mr. Giglio.

Q. How long ago what that, Mr. Roth? A. I would say the early part of 1952.

Q. Now I will ask you whether on our oath you will say that those were your cabinets, after I have shown you a paper which I am having marked for identification.

(Marked Defendants' Exhibit RR for identification.)

Q. I show you Defendants' Exhibit RR for identification and ask you to examine it, including the date. All I am asking you is, after examining that paper, will you still say that those are or were or look like your cabinets? A. Two of those transfer files look like the transfer files that I gave to Mr. Giglio.

Q. Now, have you looked at the paper I have shown you? A. No, sir. Mr. Stryker, may I explain further? Transfer files is a very, very standard item.

Q. Common item, isn't it? A. Very common.

Q. I thought so. A. And one looks like—you could have a million transfer files and one looks like the other. I say to you that two of those transfer files look like the

(1471)

ones I turned over to Mr. Giglio.

Q. Well, they look like a thousand others, made by the same manufacturer, don't they? A. Yes, sir.

Q. Now will you look at this paper I have shown you and tell me, please, whether or not you wish to leave any implication at all that my clients stole or took your transfer files? Just look at the paper first. A. Mr. Stryker——

Q. Have you read it? A. Yes. Mr. Stryker, I did not say your clients stole or took. I said to you those two, those look like two of the files I gave to Mr. Giglio when I turned over, gave up the William Street office.

Q. Well, the reason you said that was, wasn't it, Mr. Roth, to convey an adverse impression regarding my clients, to indicate that they had stolen or improperly gotten your transfer files? Wasn't that the point you were trying to make? A. You are incorrect, sir. I made a statement that when I gave up the William Street office I turned over two transfer files to Mr. William Giglio. I carried no inference of stealing or taking.

Q. All right. Now, Mr. Roth, I think it was this morning, you remember I asked you about your working with Mr. Wessel and others—I am not stating it absolutely

(1472)

correctly, but you remember what I am talking about, don't you?

The Court: Could I have the question?

(Question read.)

A. If you are referring to enumerating all the facts, all the incidents, my part in the conspiracy, my part in evading taxes, my discussions, working with the revenue agents to explain facts that are in the books, preparing schedules that I referred to the other day, the answer is yes.

Q. That is what I mean. And you have been doing all that over the course of many weeks, have you not? A. I

would say, commencing about January 5th up to last Monday night, sometimes two hours a day, four hours a day, and two or three times I spent the full day.

Q. And you were shown all the defendants' income tax returns, were you not, in these discussions with Mr. Wessel and agents? A. I was shown the copies of the two partnership tax returns, and of the two individuals. I don't recall seeing the consolidated tax returns of American Brands.

Q. And then as each paper was shown to you, as quick as a flash you remembered the conversation that went with the paper, did you not? A. That is an incorrect statement.

(1473)

Q. All right. You may begin to correct it. A. Before I was shown any papers of any tax returns, it was after four or five or six days of explaining to Mr. Wessel all the facts, at the time he showed me a tax return, and then another tax return, and other papers.

Q. Did you in this trial, page 1038——

Mr. Stryker: I am reading from a note, so you be sure I have got it right, Mr. Wessel.

Q.—did you testify as follows:

"Q. And did you in the regular course of your business assign Mr. Hausman as part of his duties to audit the cash in the cash box? A. Yes, sir."

Did you so testify? A. If that is the exact question and answer, it is yes.

Q. Mr. Wessel is following me. If it isn't, I am sure he will point it out. You so testified? A. I don't know whether Mr. Wessel is following you or not. May I see the transcript?

Mr. Wessel: Counsel is asking for the witness's recollection, and whatever I say or don't say can

have no effect on the witness's recollection.

(1474)

Mr. Stryker: I am asking if in this trial he said something. I have a right to do that, surely.

Q. Do you want to look at the book? A. I would like to, sir.

The Court: What is the question?

(Question read.)

Mr. Wessel: All I say is this, your Honor, there is no question of course that that is what the transcript shows. If the question is directed to the witness's recollection, which shows it must be, then the witness's answer that he does or doesn't know should be binding on counsel. He can't say, Well, you must have because here is the transcript. The witness is saying he doesn't remember the exact words, and I am sure he doesn't.

Mr. Stryker: It is obvious that I am not directing the question to what he remembers that he said.

Mr. Wessel: Then I will stipulate that is the answer.

Mr. Stryker: It is obvious that it is directed to something else.

The Court: Well, counsel agrees he so testified.

Mr. Stryker: I beg your pardon?

(1475)

The Court: I say there is agreement between you now that he so testified. Let's go on.

Mr. Stryker: Yes, I hope so.

Q. Did you in the Kefauver hearings, page 1209, testify as follows:—you were being asked, so I will give you

the connotation, about the cash box that appears from the previous page:

> "Mr. Halley. It was black market, it was black market money?
>
> "Mr. Roth. It was money in overages.
>
> "Mr. Halley. It was black market money?
>
> "Mr. Roth. I didn't have anything to do with that. I am only giving you hearsay and I never had had a hand in those transactions."

Did you so testify before the Kefauver Committee? A. To the best of my recollection, yes.

Q. Well, here it is. Do you want to verify what I have read? Would you like to do that? A. I would. I have to read all the minutes to see if you took it out of context, Mr. Stryker.

Q. Well, you can read it all you want, but right now I am asking you this question, that is, what I have read. Take a look at it and see if I read it correctly (handing). A. Begging your pardon, Mr. Stryker, I think you took it out (1476)

of complete context of the entire testimony.

Q. Well, there is about thirty or forty pages. Obviously I didn't read it all. If there is anything you want to read that in any wise changes that, I would be glad to have you do it. My question right now is, did you swear to what I have read? You can read anything else you want. A. Before I answer that question, I don't want to read thirty or forty pages, but just an additional half a page in connection with that question and answer. May I?

Q. Yes, by all means. Take your time. A. (Reading) "Mr. Halley. Just a minute. You know that Hausman kept records of this cash?

"Mr. Roth. I do not recall. He verified all the transactions and all the working papers and all the records that Bercu used in order to prepare a financial report."

Q. Go on. A. In other words, standing before the committee, and being a guinea pig for the first time on a Congressional Committee, it may very well be that I didn't answer one question correctly, but I answered it in essence, that Hausman kept the records and verified all the transactions of Mr. Bercu.

(1477)

Q. Now, have you read all in that record that you think in any wise might throw light on what I asked you? If you have, I then want to ask another question. If you haven't, please take your time. A. Mr. Stryker, I would have to go through the complete record to determine whether it covers it all. I just went one page further.

Q. Well, all right, now, obviously, the Court and jury aren't going to wait for that. I just say now, any time you want to show anything in the record that differs from what you said, it is quite all right with me.

Now, I come back: Would you be good enough to answer my question as to whether or not you did testify in accordance with that which I read to you some ten minutes ago? A. That is one part of the statements that I made before the Kefauver Committee.

Q. All right, all right. How long did this partnership last? A. The business operations commenced approximately May, 1945, with Mr. Lubben, and ceased operations some time around February, 1946, then continued toward a liquidating basis.

Q. Well, the active operation was certainly not more

(1478)

than nine months, was it? A. No, nine months would be a very fair statement.

Q. When did the corn box deal begin? A. I think the corn box deal began about one month or two months after commencement of the partnership.

Q. Well, I think Mr. Lubben has testified—and I will stand corrected if I am wrong—that the corn deal began in August of 1945. If I have correctly stated what he said, will you tell me if that would in any wise refresh your recollection as to when the corn deal began? A. No, sir. I know it began after the partnership was organized, continued for a couple of months during the life of the operation of the partnership.

Q. That was the duration of the corn deal, wasn't it? A. Yes, sir.

Q. Now, there came a time when Mr. Lubben took a trip to Cuba, I think along in November or December, 1945; is that right? A. I don't know when it was, November, December, 1945, as to dates. I can place events.

Q. Can't you place dates within that period? A. I (1479)

would say the nearest date I would estimate would be around February, 1946, within that area of time.

Q. February? A. Or January, 1946.

Q. Well, it wouldn't have been November or December? A. I would have to refer to partnership agreement and dates and the books in order to give you an exact date. I am giving you the best recollection.

Q. Well, there came a time when Mr. Lubben took over the corn box, didn't there? A. No, I think Mr. Lubben had charge of the corn box from its inception, together with Mr. Loperfido.

Q. Mr. Loperfido left about November of 1945, didn't he, left the partnership? A. Yes, but during the life of

the corn box, even while Mr. Loperfido was there, both Mr. Loperfido and Mr. Lubben were in charge of the corn box.

Q. Now, Mr. Roth, I would like to show you one paper before I proceed to the next topic.

Mr. Stryker: I think, your Honor, you may want to adjourn a little earlier because we have quite a bit to discuss with you. Whenever you want us to stop, I will.

(1480)

The Court: We will go to a quarter to four, if it don't break in the middle of some subject that you want to keep in one piece.

Mr. Stryker: Quarter of four, all right.

By Mr. Stryker:

Q. I show you Defendants' Exhibit II for identification, and ask you if you can identify the first half or three-quarters of that page, identify the handwriting? A. No, sir.

Q. You can't identify it? A. I can give you a guess, if you want.

Q. You know Mr. Lubben's handwriting. You saw lots of it, didn't you? A. I cannot identify his handwriting. I saw very little of his handwriting, except the signatures on his checks. I did not see any schedules or figures.

Q. Well, you saw a great many of his signatures on a great, great many checks, didn't you? A. I did, sir. I told you I can't positively identify it. I will guess that it was his handwriting, but not a positive identification.

Q. Well, now, was not that paper, II for identification, kept in the ordinary, usual course of business? A. No, sir.

(1481)

Q. Did you ever see that paper before? A. No, sir.

Q. Do you know what records Mr. Lubben kept in the usual and ordinary course of business? A. Sir, are you referring to corn box records?

Q. Yes, I am, just exactly. A. I never saw the records that he kept, if he kept any records.

Q. Well, let's see, in this court I think you said—correct me if I am wrong—in substance that you had charge of the general records of the corn box. If I am in error in my recollection please correct me. A. I don't think I said that, Mr. Stryker.

Q. Well, quite a few minutes ago I asked you about it, don't you remember, then contrasted that with your testimony before the Kefauver Committee; remember that?

Mr. Stryker: Where is that page?

Mr. Wessel: It is page 1038, and it is not what counsel said it was.

Mr. Stryker: Page 1038. I am much obliged to you.

Are you talking about Kefauver or this trial, Mr. Wessel?

Mr. Wessel: This trial.

(1482)

Mr. Stryker: 1038 of this trial.

By Mr. Stryker:

Q. Well, my paraphrase, I think, was not completely accurate, and I will read you, therefore, what the testimony was.

At 1038 of this record you were asked:

"And did you in the regular course of your business assign Mr. Hausman, as part of his duties, to audit the cash in the cash box?"

And you answered, "Yes." A. Yes, sir.

Q. Now, did you examine Mr. Hausman's work? A. Mr. Hausman reported to me from his working papers, the summaries of his audit.

Q. And you looked at his working papers? A. I looked at his working papers, but I never saw that paper that you showed me.

Q. Well, I never represented it to you as Mr. Hausman's working papers.

Did you see Mr. Hausman's working papers from November 30, let's say, 1945, to Janauary 1, 1946? Was Mr. Hausman working on the box at that time? A. He was working on a box and all other records of the Eatsum Food Products Company. I saw his working papers as to

(1483)

his findings, his audit, his comments. I never remember seeing that paper——

Q. And he never showed you Defendants' Exhibit II for identification? A. No, sir. I never saw it until you put it on the table here this instant.

Q. All right. After Frank Loperfido left the partnership, which I think we have identified as November, late in November of 1945, did you give cash, cash, to Mr. Lubben out of the corn box? A. I don't recall giving Mr. Lubben any cash out of the corn box.

Q. Perhaps you are cavilling at the word "give." Did you hand him any cash? A. I don't recall handing any cash to Mr. Lubben out of the corn box.

Mr. Wessel: I think I should state at this point, in counsel's question was the statement that we identified the date that Mr. Loperfido left as November, 1945. I don't think that should stay uncorrected.

Mr. Stryker: Didn't I get the right date?

Mr. Wessel: I believe the documents in evidence set forth the date of December 24, 1945.

Mr. Stryker: Well, you may be right. I recall some things—my note reads "November," but you (1484)

may be right.

At any rate, it was the last part of the year, all right.

Now, your Honor, you can see how difficult it is, and as we are going to adjourn, the next topic will take quite a bit of time. It is two minutes short, if it is agreeable with your Honor.

The Court: We will squander that two minutes.

Mr. Stryker: All right.

The Court: Don't discuss the case and we will start at 10:15 tomorrow morning.

(Jury out.)

(1485)

(The following proceedings took place in the robing room.)

Mr. Stryker: Your Honor, during the interrogation, cross examination of Mr. Roth, the question arose concerning what was directed to really leads and clues that the Government might have used while they illegally had our partnership books, and your Honor asked me, in substance, as I remember it, what the point of my questioning was, and I tried to say to you, very frankly, that that was just it, that I was just going right after that, so far as I am allowed to.

Now, this indictment that you are trying was found, well, sometime in the summer of 1953—is that right Mr. Wessel?—July, 1953. We never saw

it, of course, until it was opened the following January.

Now, a line-by-line comparison of the present indictment with the various counts of the other six struck-down indictments reveals, as we pointed out, I think, in a very careful affidavit, tremendous parallelism between the allegations in the first six indictments and in this one, and we also pointed out that there was a—well, nearly a complete parallelism (1486) with regard to the counts that related to the partnership return.

Now, what happened before the grand jury that found that indictment, of course, I don't know.

My point, in a motion I made before Judge Palmieri, which came on, I think, in September of last year—is that right?

Mr. Wessel: Yes.

Mr. Stryker: (Continuing) —was that the parallelism was such that it was inconceivable to me how the present indictment could have been found without using the prohibited matter, namely, individual and partnership records which were illegally used in obtaining the six indictments that were dismissed.

Now, I was met by very voluminous papers drawn up by the Government in which, in substance, as I recall it, were affidavits of Mr. Leone and other assistants—I am quite sure Mr. Twohig, and I think other agents—who all averred that despite—in substance—that despite the parallelism of the present indictment and the former one, they had not used any prohibited material, that is, partnership and individual returns.

Now, only as illustrating my argument, not that anything the judge says when he finally makes a

decision is binding on anybody—but this is illustra-
(1487)
tive—a very able, fine judge said to me, or said to Mr. Wessel, in substance, during the argument that, well, in effect—I am quoting ad lib.—he did not see how he could do his job as a judge, couldn't see how he could be other than a—well, I won't use the word "stooge," but——

Mr. Wolfram: Rubber stamp.

Mr. Wessel: Rubber stamp.

Mr. Stryker: —rubber stamp of the Department of Justice if he were to accept ipsi dixit the mere uncross examined statements of these agents and assistants, which was precisely my view.

Now, in the course of, well, I think, two or three weeks, Judge Palmieri handed down a decision, denying me an opportunity to have an inquiry redirected to that particular subject. I think at the end of his opinion—if Mr. Wessel or Mr. Wolfram have it—there was a statement to the effect of remitting this inquiry to the trial court.

Now, frankly, I would not dream of going into what is not the issue, certainly, of this indictment if I had not been prohibited from doing it anywhere else, so that I had no recourse except to do it now,
(1488)
since I wasn't allowed to do it anywhere else.

I felt at the time, with great respect for Judge Palmieri, who I not only respect, but like, that he was quite wrong about it, that the very purpose of these preliminary motions, in these federal cases which have all come about, well, since a decision back in 1911 in the Supreme Court of the United States, well, like search and seizure and things like that, the

reason that they say, the courts say that should be done by a preliminary motion is to avoid the very thing that I am in now.

Now, I can't be charged with trying to mix up this trial, or confuse you or anybody else; that is just exactly where I am, and I really don't see how I can get adjudicated the question of the illegality of the indictment before you without calling all these people who made affidavits before Judge Palmieri.

Now, that obviously would be, well, very disruptive of your trial. I would never think of doing it if, from what I have said, it didn't seem to me that was all I had.

Now, that is about where we are, Judge.

The Court: Mr. Stryker, just so I get this thing (1489)

in focus——

Mr. Stryker: Have I made it plain?

The Court. I think you have, but I want to be sure.

Now, the whole purpose of this is to go to the procedural validity of the indictment.

Mr. Stryker: That is it, yes, sir. That is it, that is just it exactly.

The Court: And it is a question, really, of what happened before the grand jury.

Mr. Stryker: That's it, really, just that.

The Court: Rather than its effect upon what you might call the substantive issues of the case or the guilt or innocence of these defendants, let us say.

Mr. Stryker: My answer is an unequivocal yes, and I don't have to look at a record to answer it.

The Court: All right, Mr. Wessel, you go ahead.

Colloquy

Mr. Wessel: May I say a few things, your Honor?

I think it is important to explain a number of things counsel has said to your Honor on several (1490)

different occasions, and I proceed on the assumption, accepting the fact that Judge Goddard found those indictments to have been illegally obtained in violation of congressional rights, and all the rest, although there wasn't an appeal taken, however, that is binding on the Court, on the Government and everybody else at this time.

(1490a)

Counsel has referred on several occasions to the parallel between this indictment and the struck down indictments. There of course is no question about that and hasn't been ever since this indictment was drafted and filed. The old indictments had a variety of charges, most of which are in the present indictment. At the time that the old indictment was struck down, indictments were struck down, the Government—and I say the Government, I mean the United States Attorney, his assistants, the agents working on the case—sat down and said, "We have used illegal evidence."

Judge Goddard found, "Let's get rid of that illegal evidence and get a new indictment that is not based on the illegal evidence."

They sat down and for some time—and this is all covered in affidavits before the Court—separated the good from the bad evidence, and that resulted in the elimination from the indictment of one charge, just one charge. That is the only place where those documents produced by the defendants were relevant

at all. I might say that most of the partnership documents which counsel is turning up today were not in that group.

The Court: In other words, it runs across my mind, that Eatsum general ledger.

(1491)

Mr. Wessel: I know it does. That is why I am so concerned. That Eatsum general ledger was not part of those documents, nor was the Tavern accounts receivable. They didn't produce a single partnership book, and never have. The Eatsum general ledger and the Tavern accounts receivable come from a source one of the agents found, that is, some abandoned records at 19 Rector Street. He went down there, I believe in 1949 or 1950, on an investigation, maybe 1948. He got to the building, he was looking around and he saw a girl there, somebody who may well be a witness in this case, and he said, "Have you got any papers around here?" and she opened up a closet and said, "Yes, here are some," and picked these up, and that is where the Eatsum general ledger and Tavern accounts receivable came from, I believe, or possibly one of them came from the New Jersey receiver.

They are not part of the documents listed by these defendants.

The Court: I see.

Mr. Wessel: But your Honor has just picked upon one of the reasons I am so concerned in having this before the jury. It is very complicated as to which documents came from where. And this is going to be a complicated enough case without

(1492)

adding on.

Mr. Stryker: It will be. I agree with you.

Mr. Wessel: In adding the new indictments, one charge was eliminated, based on the use of records by the witness whose recollection was refreshed, and we dropped that out, even though that was substantiated without that witness, because some partnership records were used with that witness.

Secondly, in going through the partnership records, there were certain records which corroborated the failure to report cash receipts, and it was decided that that corroborative evidence would never be referred to at any time during the trial, and that we would go along with the evidence we had before that time.

As a matter of fact, what it was was this: we had always said the $140,000 in the cash box was never reported. That was in the Kefauver hearing back two years before the production of these records, when they produced their partnership records, and there were some papers there that corroborated that this $140,000 was not included in gross receipts in the tax return. Now that is corroborative evidence which we decided not to use—when I say "we", I wasn't there at that time.

Thirdly, the new indictments differed from the

(1493)

old, because an error was found, an error in computation. Those are the only differences between the old and the new indictments, and there is no question of the parallelism, and counsel keeps referring to it, but I don't think it means a thing.

Now Judge Palmieri, as I read his opinion, did not leave anything to the trial court if the question of

the use of leads and clues comes up, then of course the trial court must decide that question, and of course that is so. I don't think there is anything before your Honor yet, personally, with regard to that subject, except that counsel is suggesting that Eatsum general ledger and Tavern accounts receivable ledger.

The Court: They have already come in without any objection.

Mr. Wessel: They have come in without any objection at all, and Mr. Roth testified, as I recall his testimony, that those were the only partnership records he examined.

Now, as a matter of fact, the other partnership records which were in Room 438, the agents tell me didn't concern Mr. Present or anybody else—didn't concern Mr. Roth or anybody else—and they were mostly junk, and the first thing he and everybody else went for were the abandoned records that we had, and the receiver's records that they had, which

(1494)

they had not seen before; and Mr. Present went through all the partnership records very carefully, and was helped to some extent by the other agents, and found first of all that all of the good materials had been carefully taken out, the checks that they were looking for, all the receipts, all the books—everything was gone. Most of the checks had been mixed up, so that you couldn't even find anything. It took them several days just to put them into numerical order, and the net of all that was that those —that there was no foundation before Judge Palmieri, and I don't think there is any foundation here, for any charge of the use of these documents by the Government.

Now, as I understand the law—and this is what Judge Palmieri found both as a matter of fact and on the law—it is true that counsel is entitled to a hearing as to the use of illegal evidence where he has laid some foundation that the Government has used such illegal evidence. A good analogy are the wiretap cases or the search and seizure cases. If counsel can show that there is a wire tap and that there is a probability or even a possibility that some of that illegal evidence has been used, then he may be entitled to a hearing as to the extent of that use. But first he must show two things—the probability,

(1495)

that is, some evidence, prima facie evidence, of an illegal wiretap and prima facie evidence of use of the illegal wiretap in some way.

Now he has shown in this case, in fact there is no question about it, illegal obtaining of documents, but there is no showing of use of those documents in any way, and all the Government affidavits in fact contradict that. Now that foundation wasn't before Judge Palmieri, as Judge Palmieri found, and I see nothing now before your Honor that adds anything to those facts. To go through them again before a jury would be extremely complicated, and I want to explain one way in which the affidavits before Judge Palmieri sought to do so.

Mr. Stryker: I agree with that last statement completely. No question about it.

The Court: Yes.

Mr. Wessel: (Continuing) And that is this: there were in room 438 a tremendous amount of documents, (a) partnership records produced under subpoena; (b) records the Government was turning

over for inspection by the defendants—two categories of records. The defendants put in affidavits from Mr. Holzer, and to a limited extent corroborated by Roth, that Mr. Holzer had a conversation with Ted Present, the revenue agent, in which Hol-

(1496)

zer asked how certain things were computed. Present answered, "You can figure it out from the documents in this room in the same way I figured it out."

That is proposition No. 1. No. 2: then they state they were in the room, partnership records produced under the subpoena. Therefore—now the missing gap is, of course, that the computation was from the other records in the room. Now a judge can figure that out. Judge Palmieri didn't do that for two or three weeks. He sat from September 7th to October 21st and did work, even as I understand it, when he was abroad on this problem, because it was so complicated both factually and legally. I would be very hesitant to put this kind of a question before a jury, both because I think it would confuse them, and because I think it is one for a judge. It is a question of—as to the admissibility of evidence, and if there is any further foundation that counsel thinks he can present to the court, I of course can have no objection to his doing so. But I think it should be done out of the presence of the jury.

Mr. Wolfram: How can we do it outside of the presence of the jury, Judge? That is exactly what we were trying to do before Judge Palmieri.

(1497)

Mr. Stryker: That is what we were trying to do outside the presence of the jury before Judge Palmieri.

The Court: As I sit here now, I see no greater basis for my conducting a hearing than there was for Judge Palmieri conducting one, and as I recall the record that has been made before me, I see no basis yet at all for assuming—or I see no possibility of proving the use of these books. Now I think, under the circumstances, we will go along as we are, without going into the subject, and if as the trial progresses there is any basis for my conducting such a hearing at any time on any issue, why, I will do so. But I don't see it yet.

Mr. Wolfram: Isn't it a fact, your Honor, that the only way we can establish whether leads and clues have stemmed from the illegal seizure is through the witnesses as they are presented to us?

The Court: Well, it would all come through the witnesses as they are presented to us or the exhibits themselves. I think if you look at the overall record, I think perhaps—I mean, I will say as the record nears completion, you will have a pretty good picture of where the Government got its evidence from.

(1498)

Mr. Wessel: I didn't object at all to counsel inquiring of Mr. Roth about the documents that he saw. I have no objection and never would have an objection. I am concerned with counsel's summing up and going to the jury on the constitutional question.

The Court: Well, I am concerned on both counts, because I want to keep this trial as simple as I can, in justice to both sides, and I don't want to get off into this question of documents, even though you might have no objection to it. We shift

our sights as the trial progresses, and as this trial progresses it seems to me it becomes complex enough without any unnecessary complexity, and I am probably a lot tighter in what I am taking today than what I was two weeks ago, just because of that, and if you think there is any change in my point of view or in any rulings that I make, or in my tactics, that is the sole explanation of it. I don't want to get afield. There is ample complexity in the issues of the case and on credibility as to the principal witnesses so far, there has been such easily arrived at matters of substantial importance, and I am not disposed to go off into the feathery end of more remote questions because I don't think it does either side any good, and it is just going to increase (1499)

the danger that the jury will reach its verdict on something other than evidence in the case.

Mr. Stryker: Judge, I understand your position. I would say with all sincerity that I am sympathetic with the position, but I have got three people out here whose liberties are at stake.

The Court: I am just as much worried about their liberties perhaps as you, at least.

Mr. Stryker: And I wouldn't be here trying to present by cross-examination an issue that doesn't relate to the issues tendered by the indictment and the plea. If I had had any other course, I mean if Judge Palmieri were here and saw the problem I had, which in my poor way I tried to explain to him, but didn't do it very well, I guess, that is where I am, and all I want to do is to do my job as well as I can and make sure that I don't overlook any constitutional rights that are involved. We have had a number up to this time.

The Court: I believe you have completed the record on it and I am ready to hold now that in the absence of any further foundation, I am not going to go off into the use of these records before the jury, and I am not going to conduct any side hearing at this time either, because that in itself wouldn't be very feasible.

(1500)

Mr. Stryker: Well, that settles that, and your Honor's ruling is very clear to me. I will take a very highly respectful exception, and then that subject is over.

The Court: All right.

Mr. Wessel: May I? Excuse me.

Mr. Stryker: Now in view of Roth's direct examination, a great many segments of which were tendered on the issue of concealment—I think I am perfectly correct in making that statement—in view of the fact that we have had no bill of particulars upon these counts, the defendants claim surprise, as we have more than once before, and at this time respectfully request a continuance of the trial so that they can prepare to meet the issues tendered by the testimony of the witnesses, the witness Roth, particularly, no notice of which was given to us in the indictment or in the bill of particulars, and——

Mr. Wessel: May I just make a statement on this? I have been sitting here listening to counsel for some time make these comments about surprise. I think your Honor has seen first of all how far back all this dates. In the Kefauver hearing the estate of Mr. Livorsi was referred to at great length.

(1501)

That is five years ago. Witnesses in this case have called me on several occasions, saying Mr. Lawn

called him, Mr. Giglio called him, somebody from Mr. Stryker's office called him. I am referring to concealment, what are the concealment aspects that came out through the testimony of Mr. Roth in the estate transfer. Mr. Tepper, the lawyer who handled that transfer, called me several weeks before trial and said Mr. Lawn had telephoned him and wanted to see him, and said should he see him.

I said, "Go ahead and see him."

Mr. Van Dyk, who handled the Van Dyk industrial transfer, which is another concealment, telephoned me several days or a week before trial and said, I believe, that Mr. Giglio wanted to see him, should he see him.

"Yes, of course," and he did see him, as I understand.

Mr. Stryker: That is right.

Mr. Wessel: Cornelison Holding Company—well, of course, that involves Margherita Giglio, Florence LaGrange, Mr. Giglio's sister, and Raymond Giglio. I can't believe there is any surprise on that. This I believe, is not any true issue before this court. I am sure these defendants have known of these things for years. The only thing they

(1502)

don't know is how much the Government knows, and that is all they want to find out in their particulars that they have requested, or in this now attempt at an adjournment, and I would certainly oppose it at this time.

Mr. Stryker: Well, now, let me respond to that. I nave done as well as I could and much as I could to explore every aspect of this case. I have been totally in the dark about that, but I have inquired

and inquired, and everything that I thought conceivably might be the Government's contention I have looked into. There is no question about that in the world. I have looked into everything I could think of, which I believe would be my duty as a lawyer representing three people.

Now, I don't see that that bears at all, if I have been assiduous—and heaven knows I hope I have been—doesn't bear on whether I have been lucky or a good sleuth, or a good imaginer, to determine what might be charged against us. We are entitled under the Constitution to know, to get a plain statement of the charge itself. That doesn't mean that we are entitled to their evidence. I know that. But it means a plain statement of the accusation.

(1503)

Now the law is that where that is not done, and it has not been done with respect to the matters that you have heard me talk about so often, hasn't been done, then the rules, these very wisely drawn rules, most of them I think are superb; I differ with some and argued against them when they were coming up, but they are a great set of rules—provide that you may ask for and the judge may give you, I believe it is discretionary, an amplified bill of particulars.

Now, so rigorously do the courts hold to the necessity of giving the defendants in an indictment a charge which they don't have to speculate about or hunt around about, as I have had to do, that the courts hold that even if a bill is granted, that that would not affect the insufficiency, if there is insufficiency of the indictment. As I said so long ago here, the insufficiency of this indictment, the inadequacy

of it from the standpoint of knowing the charge, to prepare and meet it, and from double jeopardy, is very greatly exacerbated by the fact that even under such counts our applications for clarified bills of particulars were denied.

Now that is my position, and it doesn't answer it at all—and I have heard Mr. Wessel make this statement before—that I have done all I could to

(1504)

find out about everything I could. I looked into everything I could think of that might be—I guessed at it, but that doesn't tell me what I have to meet.

That is the point of my motion.

Mr. Wolfram: Particularly, your Honor, when Mr. Wessel said on several occasions, I think the other day was the first time he said it, that the defendants are charged with concealing all of their assets.

Mr. Wessel: There is no question about that, if your Honor please. There wasn't a penny of tax paid. They must have concealed all their assets. Of course the Government hasn't found all their assets and we are picking out what we have found, certainly.

Mr. Stryker: It is a non sequitur, and the charge —we have had this out in open court. We had some semantics on this. I think you were in the middle of it.

The Court: I got in the middle of it. It is pretty hard to sit up there and keep quiet.

Mr. Stryker: You got in on the question—I said—I forget what I said but at any rate I showed you the indictment and it says, "the assets." It does

not say "all the assets," and it just isn't a question of semantics, but——

(1505)

The Court: We all agree on that. I don't remember how we got that in open court.

Mr. Wessel: Mr. Stryker, if I may say this:——

The Court: Let's keep these things simple. First on the question of surprise, I am not holding against Mr. Stryker his obviously adequate and thorough preparation, but have not seen as yet, and I will say that from the nature of the testimony of Roth, I see no basis for surprise, but I have, on the other hand, seen no evidence of surprise. In other words, the defense has been thoroughly prepared, as I see it. At least they have been magnificently prepared. Whether one is ever thoroughly prepared, I don't know.

As I have watched it, and I have seen, I see no basis there for a claim of surprise.

Now, it is not just because you have actually been prepared, because in the nature of the testimony in itself you shouldn't have been surprised, and I don't think you were—I mean, a lawyer at trial always has some degree of surprise, but I don't think you were surprised here in a way which you are entitled to a bill of particulars to protect yourself against.

Mr. Stryker: Well, I hope that my modest effort to prepare myself here won't militate against my claiming surprise, because I have learned, I have

(1506)

tried to learn, I will admit, everything I could. But it is just as though they handed me an indictment

and said, "A is charged with killing B", without the date or place or anything.

Well, that isn't a very good illustration.

At any rate, Judge, I guess I have made myself clear.

The Court: Yes, you have made yourself clear.

Mr. Stryker: It is for you to rule and for me to bow gracefully.

The Court: Well, I will rule and appreciate the grace with which you bow to it.

Mr. Stryker: Exception.

You had something else?

Mr. Wessel: Yes, sir, if your Honor please, and I have been waiting for a hearing in chambers on this matter.

At page 963 of the transcript, I asked requesting in regard to the arrest of Mr. Giglio, and I now want to make an offer of proof, because under the cases I want to show good faith in that question.

The Court: I never explained to you the basis

(1507)

of my ruling on that, and that was I thought Mr. Stryker's words had opened the door, and I wasn't convinced in my mind that Mr. Stryker intended to open the door, and I therefore ruled in a somewhat tentative manner against your offer because I didn't feel that at that point we should take advantage of the situation. I think you could have insisted on it, and I think Mr. Stryker did to your case the damage that he would have done had he put the reputation deliberately in evidence.

Now, I felt that his question was such that there may have been some doubt. I wasn't sure he in-

tended to do it, and I didn't want to go off on to that without talking to you further about it.

Mr. Wessel: I wanted to make an offer of proof as to the fact of the arrest, because the good faith of the Government in asking a question like that is always important and should be presented to the Court out of the hearing of the jury. In other words, I will never ask a question so prejudicial as that unless I had something behind it.

Mr. Giglio was arrested on March 12, 1947, by the Police Department in Detroit, Michigan. The number is 81945. He was arrested on the charge of armed robbery in the company of one Nicholas Mar-

(1508)

tello, who has a criminal record of several pages, including all crimes, narcotics, firearms, gambling, still, assault, extortion and so forth.

The Court: This isn't Mr. Giglio's sheet.

Mr. Wessel: No, this is Mr. Martello's. I don't intend to bring out all that I have with regards to Mr. Giglio, except with regard to the one question I asked I want your Honor to know the question was asked in good faith and that the Government's information was that the fact was what the question asked.

The Court: I assumed that it was.

Mr. Stryker: I am glad it came up. Is that all you know about that arrest, Mr. Wessel?

Mr. Wessel: I have some more information right here, Mr. Stryker.

Mr. Stryker: Did you know when you asked that question that Mr. Giglio was arrested and that the police discharged him because of mistaken iden-

tity, that there never was a charge pressed against him?

Mr. Wessel: No.

Mr. Stryker: And that it was a false arrest? Did you know that?

Mr. Wessel: No. I knew—at least my informa-

(1509)

tion was—that Mr. Giglio was released on a writ of habeas corpus, but the arrest was not pressed against either one, and apparently because of——

Mr. Stryker: Released on habeas corpus?

Mr. Wessel: Yes, according to my information, and I have it in a memorandum before me. The following morning both Martello and Giglio were released on writs of habeas corpus, and it is believed that Martello's attorney represented Giglio, also, although this is supposition, the last statement.

Mr. Stryker: Let me make myself a little clearer, because you remember I regarded this as serious enough to make a motion for a mistrial. I tell you how I would like to settle this: I haven't any facilities for making the—what was it, the Detroit Police Department?—tell me anything, obviously, but I am told from what I believe to be good sources that after the arrest was made Mr. Giglio was brought before the police lieutenant, or what, and said, "This is a case of mistaken identity," and that the pictures which were taken—Mr. Wessel has just one apparently—were promised to be returned if he didn't sue.

Now the only way I can get at the bottom of this, because I don't think Mr. Wessel's information is

(1510)

adequate, or else mine isn't——

Mr. Wessel: Mine is based on the police records in Detroit, Mr. Stryker. Of course, it is all hearsay to me.

The Court: I am not going to get off into this issue because it is not yet before me, unless Mr. Wessel wants to press—I don't remember, but the witness is gone anyhow.

Mr. Wessel: I just wanted to show good faith to your Honor, that is all.

The Court: If you are not going to press to go ahead and cross examine on the basis of character testimony, I am not going to worry about that problem at this time. We may have to worry about it at some future time.

Mr. Wessel: I don't intend to press it since your Honor has ruled.

The Court: I do want to tell you in frankness, I think that Mr. Stryker did open the door there; I think you did ask for reputation testimony, but I wasn't sure that you meant to, and it was sort of a half-hearted overruling.

Mr. Wessel: Your Honor, when he asked the question, your Honor, I think I made a statement about a page in length, and I am sure no lawyer

(1511)

could not have known that I as saying this now opened the door, and then when Mr. McCue was on redirect I asked him about five questions, "Did I ask you about reputation?" and so forth, to show that again he was beyond the scope of the direct, and I am sure counsel could not have failed to know what I was trying to do.

The Court: Well, I am not sure that you are proper—whether you had objected to the form of

Mr. Stryker's question and got it cleanly around to a general—I mean he said, "How is he regarded?"

Mr. Stryker: Regarded.

The Court: It was awfully close.

Mr. Wessel: "Was he regarded the same as Mr. Lawn?" That was the question, I believe.

The Court: Well, if you pressed it to get it cleanly, I think perhaps we could have done that. But I gave—I mean, if I had been pressed, I think I would have decided in your favor, Mr. Wessel, but you didn't press me, so I——

Mr. Wolfram: May I add two things for the record: One, I think that Mr. Stryker's inquiry was directly related to facts that Mr. Wessel brought out with respect to Mr. Lawn, but not with respect to Mr. Giglio.

(1512)

The Court: That doesn't have anything to do with it.

Mr. Wolfram: That made a very sharp—it could have left a very sharp impression with the jury, that although Mr. Lawn was a person of good reputation, Mr. Giglio wasn't, because this man was testifying about both of them, and both of them lived in the same community.

The Court: We are getting off into long speculation. I think that Mr. Lawn's previous connections with the witness had some bearing on the development of the transaction. That is why I assume it was brought out.

Mr. Wessel: I think it is also clear that I have been trying to prove in this case that Mr. Lawn's background, his intelligence, his standing is some proof of his knowledge that what he was doing was illegal. His education and experience, which I asked

the witness about, is quite relevant to this lawsuit. The witness went on to say about his reputation, which I hadn't asked about and never intended to ask about.

Mr. Stryker: Mr. Wessel, do you mind, have you any objection to showing me whatever reports you have of that matter? I would like to study it.

(1513)

I am not satisfied that you have the correct statement at all. I know he was discharged without any charge being made against him.

The Court: Mr. Stryker, let me tell you the way I look at this now. What Mr. Wessel wants to give you voluntarily is fine. As far as I am concerned, I have sustained your objection to the line of testimony. I have instructed the jury to disregard it. I don't think it had any effect on them whatever, especially in view of your statements, which were very strong as to the lack of importance of an arrest, and I think I told them to disregard any facts recited in the question; and I am convinced of Mr. Wessel's good faith. Whether his reports are accurate to the last detail or not, I mean, they certainly furnish the basis for asking the question. I think that Mr. Wessel was proper in what he did, under the circumstances. He might have been missing the boat, or failing to do everything he should have done, if he hadn't done so, but I am going to let it drop now.

What you and Mr. Wessel see fit to do on your own, I leave to you.

Mr. Stryker: Judge, Mr. Wessel brought this

(1514)

up. I didn't.

Mr. Wessel: I had to make this offer to the Court.

Mr. Stryker: I would not be satisfied with the offer unless I have the whole record, and if my understanding of the case is correct, I think very serious injury has just been done Mr. Giglio. I have known many fine people, fine people, not many, but I have heard many people be arrested for charges for which they, well, obviously weren't and couldn't have been guilty.

Now, if a person, if it is let that somebody was arrested, I think, for armed robbery, true, you instruct them in the law tell them to disregard it, but if you heard that somebody came in for club membership and had been arrested for armed robbery you forget all about your law school training and you say, "Well, there must be something wrong with the fellow."

Mr. Wessel: I can assure the Court and Mr. Stryker that I did not believe and do not believe that arrest was based on mistaken identity. I believe his client is giving him misinformation. I believe that.

(1515)

Therefore, I do not intend to give Mr. Stryker what I have because I want to see him, I want to see if he is going to put reputation in issue in this case, and I don't intend to let him see what I have got on that subject.

The Court: All right, we will let it drop.

(1515a)

Mr. Wolfram: One other point on that so we won't be accused of having come up with an afterthought, and that is this, that Mr. Wessel's ques-

tion, in our view, was not in proper form under the Michaelson case. I am just stating that.

Mr. Wessel: Did you know——

Mr. Wolfram: I have investigated it.

Mr. Wessel: I have investigated it, too. The Michaelson case refers to the words "Have you heard that" and it indicates that "Did you know" might not be so bad, but I have two other cases in circuit courts which say that "Did you know" is just the same as "Had you heard" and it makes no difference.

The Court: Well, you have got the authority; I don't doubt the authority, but if form makes any difference, it is "Did you ever hear".

Mr. Wessel: That was the form of the objection, and the objection was sustained.

The Court: Have you got anything else?

Mr. Wessel: Well, the matter of checks, if your Honor please, to get it out of the way.

The Court: What happened on the matter of checks?

Mr. Wessel: You said to come back——

(1516)

The Court: You and Mr. Wolfram are going to get together and show me what you need those checks for.

Mr. Stryker: Everybody is exhausted. Why don't you make that another time? Maybe you have time on that yet, unless you want to do that now.

I suggest that we defer that for another session.

The Court: All right.

(Discussion.)

(Adjourned to February 1, 1955, at 10:15 a. m.)

(1517)

New York, February 1, 1955.
10:20 o'clock a. m.

Trial resumed.

(Jury in box.)

LOUIS J. ROTH, resumed the stand.

The Court: All right, proceed.

Cross Examination Continued by Mr. Stryker:

Q. Mr. Roth, do you remember in the Kefauver investigation Senator Toby saying to you——

Mr. Stryker: Page 1088, Mr. Wessel.

Q. (Continuing) This was while Lubben was on the stand:

> "Thank you very much. Be thinking up the right answers, will you please, Mr. Roth. We will give you a chance later on."

And you answered: "Senator, it is unnecessary for me to think up the right answers to a bunch of lies."

Did you say that? A. Yes, sir.

Q. Now you were there in Mr. Goldhill's office when the partnership articles were signed, were you not? A. Yes, sir.

(1518)

Q. Is it not a fact that the Doughnut Company's offices were set aside distinctly and separately —is it not a fact that Mr. Goldhill's suite——

Mr. Stryker: Withdraw the question.

Q. Is it not a fact that Mr. Goldhill's suite was set aside distinctly and separately from the Doughnut corpora-

tion, and that the Doughnut corporation and Mr. Goldhill's office were not one suite? That is a fact, isn't it?

Mr. Wessel: I object to the form of the question. It calls for a conclusion.

Mr. Stryker: I don't think it calls for a conclusion. I don't know how it could.

Mr. Wessel: What is the meaning of the term, "separate and distinct"? I think the witness should describe the office, if that is what counsel wants to know.

Mr. Stryker: I will make it plainer.

Q. Is that not a fact, Mr. Roth?

The Court: Did you say you were going to make it plainer?

Mr. Stryker: I am going to in a minute.

Mr. Wessel: Counsel has overruled my objection, if your Honor please.

(1519)

Mr. Stryker: I think your Honor did not sustain an objection.

The Court: I understood you were going to withdraw the question. I will sustain the objection.

Mr. Stryker: Very well.

Q. Did you testify in the Kefauver hearing as follows, at page 1204:

"Mr. Halley. Where is Mr. Goldhill's office?

"Mr. Roth. On the fifteenth floor."

The Witness: Mr. Stryker, excuse me. The gentleman just walked in and I just didn't get the first few words.

Mr. Stryker: Very well, I will start again.

Q. You were asked by Mr. Halley:

"Where is Mr. Goldhill's office?

"Mr. Roth. On the fifteenth floor of the Equitable Building.

"Mr. Halley. Where is the office of the Doughnut Company of America?

"Mr. Roth. Also on the fifteenth floor, but it is a suite set aside distinctly and separately from the Doughnut Corporation.

"Mr. Halley. Are they not one suite?

"Mr. Roth. No, sir.

(1520)

"Mr. Halley. You cannot walk from one to the other?

"Mr. Roth. Unless you go out into the hall."

You so testified, did you not? A. Yes, sir.

Q. That was correct, was it not? A. Yes, sir.

Q. When Mr. Lubben was there in Mr. Goldhill's office, he went there——

Mr. Stryker: Well, do you want to object?

Mr. Wessel: I am waiting for counsel to finish his question to object. He is assuming something which I don't think is tied to anything specific in the record.

Mr. Stryker: I will start again.

Q. You did go to Mr. Goldhill's office with Mr. Lubben, didn't you? A. I made my office with Mr. Goldhill. At no time did I go with Mr. Lubben to Mr. Goldhill's office. I was in that office every day for about fifteen years.

Q. At all events, Mr. Lubben came to the Goldhill office when you were there? A. Yes, sir.

Q. On the occasion of the signing of the partnership articles; is that right? A. It is my opinion—it is my recollection that he was there about once or twice before that in connection with discussing the terms of the part-

(1521)

nership, before the actual date of signing.

Q. And you did not walk through the Doughnut offices with Mr. Lubben, did you? A I do not recall walking through the offices with Mr. Lubben.

Q. Or introducing him to any official of the Doughnut offices? A. No, sir, but I will say, Mr. Stryker, he knew the purchasing agent of the Doughnut Corporation and the assistant purchasing agent, because he mentioned the fact to me that he traded with them on some food commodities.

Q. All right. Was any statement made in your presence there to the effect that Lubben was going to become associated with the Doughnut Company? A. No, sir.

Q. When you finally took the stand in the Kefauver hearings, after Senator Tobey had stated to you what I read, after you had given your name and address, page 1170, did this happen:

> "Mr. Halley. Would you care to make any statement about the testimony you have heard here today before answering questions?
>
> "Mr. Roth. Yes."

You said that, did you not? A. Yes, sir.

(1522)

Q. Then you did make quite a lengthy statement? A. Well,——

Q. Isn't that a simple question, Mr. Roth? A. Well, I made a statement for a few minutes before they started to interrogate me.

Q. That was after you were sworn though as a witness? A. Yes, sir.

Q. Now taking up another topic, Mr. Roth, you have testified here in this trial, have you not, that when the American Brands-Michigan plant opened, Mr. Livorsi said, "Lawn can't have an interest in the operation because this would be a different process than was used in the American Agar." You said that, did you not? A. I would like to look at the record, Mr. Stryker.

Q. Can't you remember back even in this trial a day or two, maybe three or four days?

Mr. Wessel: I object to the form of the question, because that is not my recollection, either.

Q. Can't you remember what you swore to?

The Court: Let us not go into that. Have you got records now you want to ask him about, Mr. Stryker?

Mr. Stryker: Well, my question might also bear on this man's memory.

The Court: No, I don't think that is a clear (1523)

test of memory.

Mr. Stryker: Sorry. I will have to find the page.

The Court: All right. (1523a)

Mr. Stryker: I will have to find that page.

The Court: All right, can you go on with something else while you are looking for the page?

Mr. Stryker: I really can't. It is part of a sequence that I wish to pursue, if I can.

The Court: All right. Very well.

Mr. Stryker: If I can find the page. Of course, if I can't, I won't hold you up very long.

The Court: All right.

Mr. Wessel: Page 1102.

Mr. Stryker: Thank you very much; 1102.

Did you say 1102, Mr. Wessel?

Mr. Wessel: Yes, sir.

Mr. Stryker: That is not what I am looking for. What I am looking for, Mr. Wessel, is talk about the Michigan plant, the talk about it with Mr. Livorsi.

Mr. Wessel: 1194.

Mr. Stryker: Here we are, yes page 1198, Mr. Wessel.

By Mr. Stryker:

"Q. Did you ever have any discussion with Mr. Giglio about Mr. Lawn having an interest in any other corporation, specifically American Brands Cor- (1524)
poration-Michigan operation."

Mr. Stryker: I will finish in a minute.

By Mr. Stryker:

Q. (Continuing) "A. No, he never got an interest in the American Brands-Michigan operation because that was a different method of accomplishing or trying to accomplish the process and being they were not successful in organizing and accomplishing it in American Agar, they are going to use new money under American Brands and keep the benefits under American Brands.

"Q. Did Mr. Giglio ever say anything about Mr. Livorsi not wanting Mr. Lawn to have an interest

in the company other than American Agar? A. Yes, because Mr. Lawn had absolutely nothing to do in the production of profit, in manufacturing jelly of the original Tavern, American Brands Corporation, American Wholesale; therefore he is not entitled to any stock, only as an employee.

"Q. When was that discussion? A. The discussion as to whether he is entitled to any stock in American Agar?"

That is your answer.

"Q. In any of the other companies? A. I would

(1525)

say prior to the opening up the Michigan branch checking account."

Were those questions asked and did you give those answers in this case? A. Yes, sir.

Mr. Stryker: Page 1195, Mr. Wessel.

By Mr. Stryker:

Q. Speaking still of the Michigan operation:

"Q. Did you have any discussions with Mr. Giglio in connection with this operation; that is, the Michigan operation? A. Mr. Giglio discussed with me, not from a technical point of view, that the operation of finding the substitute for sugar at the American Agar plant and pilot plant is unsuccessful, and they have found a new way in order to accomplish that through an ion method"—and you spell it out—"i-o-n, which evidently is a chemical term, and they were—and he found a sugar plant of the Isabella Sugar Company. They did not use their physical facilities 12 months a year, only ap-

proximately three or four months, and it had the necessary physical facilities for an ion operation, and they attempted to find the substitute for sugar through an ion method."

(1526)

Was that question asked you and did you give that answer? A. Yes, sir.

Q. When did the Michigan plant first operate? A. I can give you an exact date if you will show me the American Brands records, but I will give you an estimated date without the records.

Q. Well, we will do it both ways. What is your estimated date? A. I would say about, in the area of July or August, 1946.

Q. Now, what record did you say would give you a more accurate answer? What records did you want to look at? A. The American Brands-Michigan section of records.

Q. Is that here in evidence? A. I don't know, sir.

Q. Well, it would not have been between February and March, 1947? A. I do not know. I am giving you my best recollection without referring to the books, when the check account was opened on Isabella Sugar Company.

Q. Would you be good enough to describe for us in detail what process the Michigan plant used? A. I am not familiar with the technical process of chemicals or even

(1527)

with the process of sugar, only by conversation that was told to me. I have no conception of chemistry or description of process.

Q. But you remember the ion method; is that right? A. I remember the expression "ion method" because it was used so very often in the business office discussions.

Q. Can you tell us what the ion process is? A. Absolutely—I do not know what the ion process is.

Q. All right. A. Much less, Mr. Stryker, do I know what the process is, was, at American Agar before they adopted the ion method.

Q. All right. You mean they had some other method at American Agar before they used the ion? A. It is my recollection that—yes.

Q. When was that? A. The method that they commenced to use back in Tavern Fruit Juice Company.

Q. What method was that? A. The method that was instituted by the chemists, Mr. Schwartz, Mr. Warsaw, Mr. Capdeville.

Q. Well, I think you just said there was a change in method. Can you tell us when that was?

Mr. Wessel: I object, if your Honor please.

(1528)

A. I have no knowledge——

Mr. Wessel: Beyond the scope of the——

A. —of the technical——

Mr. Wessel: Just a moment. Beyond the scope of direct, certainly has nothing to do with cross examination of this witness, and he has denied any technical information.

Mr. Stryker: I think he has mentioned "ion" and spelled it out, and I have a right to inquire into that part of the examination.

Mr. Wessel: He said "which evidently is a chemical term. Mr. Giglio discussed with me, not from a technical point of view."

I don't see what is gained by this kind of examination.

Mr. Stryker: Maybe you don't but I think we might gain a good deal.

The Court: Mr. Roth, you answer the question, if you know. If you don't know, why, you say so.

Mr. Stryker: Will you read the question?

The Witness: Will you please read the last question?

(Question read.)

(1529)

A. If that question refers, "method," to the ion method, to the best of my recollection the change took place when they opened up the Michigan plant.

Q. Were you ever in the plant, the Michigan plant? A. No, sir.

Q. You yourself, I take it, do not know, from what you have said, the difference between the ion process in Michigan and the process used by American Agar. I think you have said that, haven't you? A. I have no—I do not know the——

Q. All right, all right——

The Court: Let him answer.

A. I do not know the difference in methods or chemistry——

Q. All right. A. —or anything.

Q. When was the first time you ever had a conversation about the ion process? A. I could give you the conversation that Mr. Giglio discussed with me as an informative matter, but not as a discussion as to my knowledge of ion.

Q. Mr. Roth, I think I just asked you when, the time, as well as you can, when your first conversation about the ion method with Mr. Giglio took place. Can you do that? A. I would say around February or March, 1946.

(1530)

Q. Have you discussed recently the ion process with Mr. Wessel? A. No, sir.

Q. Did Mr. Wessel show you some books and articles in chemical or engineering journals on the subject of the ion process? A. No, sir.

Q. Did you ever see the first laboratory experiments of the work done in sugar processing at the Tavern plant at Trouton Street, Brooklyn, early in 1945? A. I know there was a small laboratory there, but the type of work that they did, I don't know what they were doing.

Q. I think my question was, did you ever see the first laboratory experiments in the Brooklyn plant? A. I do not know whether there was any experimentation done at the Brooklyn plant. I couldn't recognize it even if it was done.

Q. Well, then, the answer would be that you never did see the first laboratory experiments at the Brooklyn Tavern plant; is that right?

Mr. Wessel: I object to the question for obvious reasons—and to the line——

The Court: Sustained.

Mr. Stryker: What?

(1531)

The Court: I sustain the objection to the question. I don't think that is a fair summary of his answer.

Mr. Stryker: Well, let me see: My question is, "Did you ever see the first laboratory experiments of the work at Tavern?"

The Court: He described what he saw. He said he had been in the laboratory, he didn't know what was going on, but he was there. How can he say he saw the first, the second or none at all?

Mr. Stryker: All right.

By Mr. Stryker:

Q. Did you mention the ion method to Mr. Wessel in your talks before you came into court here? A. No, sir.

Q. Did Mr. Wessel mention it to you or did any of the Government agents mention it to you? A. No, sir.

Q. The fact is, you did not know what process was being experimented on at the Brooklyn Tavern plant at the beginning, in 1945? A. No, sir.

Q. Did you ever go to the plant at Fairmont Avenue in Jersey City late in 1945? A. Yes, sir.

(1532)

Q. And did you there watch the pilot plant for the sugar process in operation? A. Yes, sir.

Q. Do you know, then, what process was being worked out? A. No, sir, but it was very fascinating to watch a laboratory.

Q. You asked no questions and you learned nothing about it? A. Well, I didn't have enough knowledge to ask any specific questions about chemistry.

Q. I see, all right. Did you ever go to the plant of American Agar in Jersey City at any time in 1946? A. Yes, sir.

Q. And did you go there to see what process was being used in the actual production of sugar syrup on a semi-commercial plant scale? A. I was at the American—I was at the plant, but I do not recall—I know they were doing work in testing, but I do not know whether they were doing that type of testing that you described.

Q. In other words, you did not know what the process was at that time? A. No, sir.

Q. Did you ever go down to Orlando, Florida, with Dr. Van Dyk and William Gordon, chemists—

(1533)

Mr. Wessel: Same objection, if your Honor please, to the line of examination as well as his question.

Mr. Stryker: May I finish?

Mr. Wessel: I am sorry.

By Mr. Stryker:

Q. (Continuing)—and watch the experimental work they were doing down there in the recovery of sugar from citrus fruit wastes?

Mr. Wessel: I think it is perfectly obvious from the questions and the answers thus far that counsel is testifying, and that the purpose of this examination is to get to the jury the nature and the content of the question rather than the answer.

(1534)

Mr. Stryker: Now, one moment. I must seriously object to that statement. This ion process was mentioned, and I have a definite purpose for pursuing this. I didn't introduce the subject. It was introduced on direct examination, and I think the statement that I am testifying is quite out of order.

The Court: Well, I don't understand that on direct or cross examination there has been any discussion of the difference in the processes.

Mr. Stryker: Yes, sir.

The Court: He said that he understood from office conversation that the Michigan plant was set up for this reason, and it had this process which he heard.

Mr. Stryker: Well, I am attacking or approaching—perhaps is the better word—that testimony he gave on direct examination. I can't do it all in one question and I am certainly not testifying.

The Court: All right, go ahead.

Mr. Wessel: Then I think at least the jury should be advised that they are not to regard the question, where the witness says "I don't know," as having any bearing at all on the issues in the case.

The Court: I will tell the jury now, and perhaps (1535)
once a day, that facts recited in questions are not proof of anything. We have no way of knowing whether those facts occurred or whether they didn't, and the fact that they are included in a question doesn't establish them at all. All we can learn is what the witness knows about it, if anything.

By Mr. Stryker:

Q. After Mr. Giglio mentioned the word "ion" to you in 1946, as you have testified, did you ever see or hear the word referred to or mentioned again? A. The word was mentioned many times in office discussions.

Mr. Stryker: I don't think—your Honor will correct me if I am wrong—I don't think the question I asked about Orlando was answered. If I am right, may I have an answer?

The Court: Will you read the question and we will get an answer to that.

(Question read.)

A. I never traveled anywhere, not only Orlando, Florida, but anywhere, with any of the chemists, about processes, because I had absolutely no knowledge of any process.

Q. Well, in view of that answer and your preceding (1536)
answers, then I suppose it is fair for me to assume that you

didn't know anything about the process of this conversion of sugar that was taking place in Florida? A. Correct, except wordage in the office.

Q. Well, you are aware, are you not, that you have sworn here about this conversation with Mr. Giglio, wherein he said, "Lawn can't have an interest in American Brands-Michigan, because we are going to use a new process called the ion process"; you have sworn to that, have you not? A. May I see the exact answer to the question?

Q. Well, I have read it to you once; do you want me to read it again?

The Court: You swore to the testimony Mr. Stryker read earlier. Disregard what he said now. Is that correct?

The Witness: Yes, sir.

The Court: He read you two sets of questions and answers. You swore to that?

The Witness: I did, sir.

Mr. Stryker: Thank you, your Honor.

The Court: All right.

Q. From what has preceded, is it a fact that you are unable to deny that the process experimented on in Tavern

(1537)

plant early in 1945, in a small pilot plant in Jersey City in '45, and the process used in natural production in the American Agar plant, and the process used in experimental work in Florida on citrus wastes, was the same process that was used in the Michigan plant?

Mr. Stryker: I think I had better ask the reporter to read that question. It is a little long. May I have that done so that the witness may have it in mind?

The Court: Yes.

(Question read.)

Mr. Wessel: I think I will object to the words "from what has preceded," because the witness has never testified that there was a change.

Mr. Stryker: All right, leave out the words, "from what has preceded."

The Court: I will let the question stand if it is limited to his own knowledge.

From your own knowledge you won't be able to deny this thing?

The Witness: I do not know anything about chemistry or processes.

The Court: All right.

(1538)

By Mr. Stryker:

Q. Do you not know that there are no less than fifty people who worked on this ion exchange process for Mr. Giglio and Mr. Livorsi during the period 1945 to '48? A. On the ion process?

Q. Ion, yes, the one you mentioned in your direct examination. A. I won't deny that over a period of time there were no less than fifty people working on processes. Whether it was the original process and the ion plan, I do not know.

Q. Do you still maintain that your testimony of the conversation with Mr. Livorsi and Mr. Giglio about the ion process actually happened?

Mr. Wessel: I object to the form of the question.

The Court: Sustained.

Mr. Wessel: And I want to remind counsel that he referred to Mr. Livorsi at the beginning of this

long line of examination, also, and the reading of the testimony has not borne out what he said the testimony was.

Mr. Stryker: Well, I have read the testimony. I hope I have read it accurately. That is all I know.

Mr. Wessel: I fail to find any conversation which the witness had.

(1539)

Mr. Stryker: That isn't an objection, your Honor, of course.

The Court: I am going to sustain the objection.

Mr. Stryker: I respectfully except.

Q. Now, Mr. Roth, you have testified here, have you not, that the Tavern information return is false, because it included a claimed deduction of $74,38205, for laboratory and research and engineering expenses, which you said was an item—well, did you not so testify? I will break it up.

A. I don't think, Mr. Stryker, that that was my testimony.

Q. All right, let's see. Well, I read from page 983 of the record, a question by Mr. Wessel:

"I want to refer you, Mr. Roth, to item 24 on a sheet of paper attached to that tax return and made a part of it, which reads 'Laboratory and Research and Engineers' Expenses,' "——

Mr. Stryker: Maybe I can have the paper you referred to. Will you let me have that, Mr. Wessel?

I am continuing now, Mr. Wessel's question.

Mr. Wessel: I think, however, counsel knows which exhibit it is.

(1540)

Mr. Stryker: Your Honor, I think comments of that kind are very unfair and very uncalled for. I

think there are over a hundred exhibits in this case. There are hundreds of pages of testimony, and I think the comment is very unfair.

The Court: Well, now, Mr. Stryker——

Mr. Wessel: He says "a sheet of paper attached to the tax return;" surely counsel knows which exhibit Tavern tax return is and doesn't want to make me his assistant in that connection.

The Court: Let us not get into a long discussion of this. I would like to avoid the interchange of comment between counsel if I could. These exhibits now are court exhibits; they are on the clerk's table, and I assume, Mr. Stryker, your table is keeping track of exhibits the same as Mr. Wessel's table, and the same as the clerk is. Now Mr. Wessel feels you are calling on him to put him in the position of serving up exhibits for your cross-examination, and you think he is unfair and you are claiming that you don't know the exhibit number. Now I think that is a relatively minor matter for us to take our time on, but I do think there is a relative amount of justice on both sides.

Mr. Stryker: Well, it does seem important, and

(1541)

as my cross-examination proceeds I will have to stop and get the exhibits.

The Court: That is something that just has to happen when we have cross-examination, and I think we will have to stop until you get the exhibit number.

Q. I am going to show you in a moment Government's Exhibit 7 in evidence——

Mr. Stryker: What was the last question?

The Court: Read back the question.

(Question read.)

Q. And the question continues, that I am reading from—— "And ask you whether the figure there set forth in the expense represents in whole a true expense of the partnership? A. Entire amount of $74,000 is not a true expense."

Did you so testify? A. I would like to explain that answer, Mr. Stryker.

Q. Wait a minute. My question now is—I can't do this all at once—just tell me if you testified as I have read. Mr. Wessel has it. If I have made any mistake I am sure he will correct me. A. Mr. Stryker——

Q. Did you so testify? A. I did.

Mr. Stryker: May I have, please, Government's (1542) Exhibits 58-A for identification, concerning which questions were asked this witness.

Is it in evidence now? It may be.

A and B. Are these now in evidence?

The Clerk: They are all in evidence.

Mr. Stryker: I will change the question, "for identification—58-A in evidence.

Q. Did you testify in this trial as follows, page 990:

"Mr. Roth, I want you to refer to Exhibit 58-A, page 3, which is a supporting schedule of that exhibit"—"that exhibit" being the preceding one—"and ask you whether you can tell me what portion of the laboratory and research engineers' expenses of $74,000 in the tax return represents salary payments to one C. Goldenberg, according to the sched-

ule? A. According to the schedule, the amount is $32,780.93."

Were you asked that question and did you give that answer? A. I did.

Q. What? A. If that is correctly quoted, I answered it.

Q. Well, are you suggesting I didn't quote it correctly? Mr. Wessel is following me. A. Well, I don't know whether

(1543)

Mr. Wessel—the answer is yes, sir.

Q. All right. A. Mr. Stryker, I don't know whether Mr. Wessel is following you or not.

Q. Well, now, let's settle it once and for all, and I will show you the page, and if you have doubt about it, I want you to be—I show you page 990 of the official transcript, the one I have read you. Read it yourself. A. Where is it?

Q. Right there, where I am pointing, on page 990, beginning, "Mr. Roth, I want you to refer." Read that and tell me if you did not so swear here? A. May I see 58-A, Mr. Stryker?

Q. Certainly, certainly (handing). A. Thank you. (After reading) That is my answer, sir.

Q. I have read it right, have I? A. Yes. I didn't doubt you read it right, but I wanted to make sure.

Q. Yes, all right. Did you testify at page 991——

Mr. Stryker: Mr. Wessel, I wish you would follow me, and if you have any correction, tell me.

Q. —"Q. Now, sir, can you tell me what part of that

(1544)

32,000-odd you just referred to represents a true partnership expense of salary to G. Goldenberg? A. I could only answer that by an explanation.

"Q. Please explain that, sir. A. This amount of $32,780.93 represents salary given to G. Goldenberg. It may very well be that the salary that was drawn"—I interupted unfortunately; then he goes on—"That the salary of G. Goldenberg was included in the labor account and not under the caption of research expenses. I could only determine that from the books. But looking at the statement here, the salary that Mr. Goldenberg received over a four-month period from this partnership would be in the area of $7,500 to $8,500. Now, if the salary of 75 to $8,500 was charged to this account, then the $24,000 difference between the 32 and the 85 is wrong. However, if the $8,500 salary was charged to the regular labor account, then the entire amount of 32,500 is wrong."

Did you so testify here? A. Yes, sir.

Q. Well, did all the payments under this $32,780.93 represent salary or a part of salary? A. That represented

(1545)

disbursements that was charged to the account of C. Goldenberg, Engineer.

Q. Have you finished? A. I answered your question, sir.

Q. Now my question was, was any part of it salary? A. Except—I answered that, that to the best of my recollection, about $8,500 was part of salaries.

Q. The item of $32,780.93 I referred to is on page 3, is it not, of exhibit, Government's Exhibit 58-A in evidence? It is there somewhere. That is it? A. Yes, sir.

Q. It is the second figure item under Schedule 1, am I right? A. Yes, sir. It is either 1 or I, Mr. Stryker.

Q. What? A. It is either 1 or I.

Q. Well, it is Roman I. A. Excuse me. It is Roman letter I.

Q. All right. Did you ever visit the plant while Mr. Goldenberg, the engineer, was working there? A. Are you referring to the New Jersey plant, sir?

Q. I am referring to the Tavern plant. A. I visited the Tavern plant in Brooklyn.

Q. Did you ever visit it while Mr. Goldenberg, the engineer, was doing work there? A. I recall him doing

(1546)

very little work at the Brooklyn plant.

Q. Now that doesn't quite answer my question. Did you ever visit the Tavern plant while the engineer, Mr. Goldenberg, was working there? A. To the best of my recollection, yes, sir.

Q. How many times? A. I do not recall how many times I saw him, but I visited the plant at least twice a week, from an office point of view.

Q. I wouldn't know what point of view you visited in, but you visited, anyway, you were there in your eyes and you— A. I was in the office and I didn't go into the factory when I came to do office and book work.

Q. Well, then, you didn't go into the plant where renovations were going on? A. I was in the plant, but I wasn't in the plant every time I came to the office.

Q. Well, did you ever go into the Tavern plant, as distinguished from the office, while Engineer Goldenberg was carrying out renovations? A. Yes, sir.

Q. How many times? A. I do not recall how many times, but not often.

Q. Do you know of any contract that was made between Tavern and Goldenberg for $30,000 for the purpose of

(1547)

research and development of a method to more economically produce jelly? A. I do not know of any such contract.

Q. Did you ever issue any financial statements for credit purposes, which you signed, showing the Goldenberg engineering expenses at that plant? A. I do not recall any.

Q. Was Mr. Goldenberg paid by check or in cash? A. To the best of my recollection, his weekly salary was paid part cash and part check.

Q. Did you do that yourself? A. The check part I did.

Q. Did you see cash paid to him? A. Except what I was told.

Q. Well, I am asking you, did you see it? A. Physically no, sir.

Q. All right. Did you ever give any cash to Engineer Goldenberg? A. Yes, sir.

Q. How often and in what amounts? A. I recall giving him cash once or twice in the amounts of about approximately a thousand to $1,500, on instructions of Mr. Giglio, that he needs it for engineering expenses.

Q. Were any— A. The other——

(1548)

Q. Pardon me. I didn't mean to interrupt you. Go ahead. A. Excuse me.

Q. I am sorry. I didn't mean to interrupt you. A. I think I added something to your question, Mr. Stryker, and I didn't intend to.

Q. All right, if you want to add it, add it. A. All other items, I drew the checks to the order of cash and gave the cash to Mr. Giglio.

Q. All right. A. And allocated them as research and engineer expenses, but I do not know what he did with the cash.

Q. Were any expense sheets ever submitted to you by Goldenberg? A. I remember receiving some expense sheets.

Q. How many? A. To the best of my recollection very few.

(1549)

Q. Did you not know that Goldenberg was doing research and development work at the Tavern plant to set up a more mechanical and economical operation for the manufacture of jelly? A. No, sir.

Q. Didn't know that? A. They had an excellent operation and made a tremendous amount of money and it needed no improvement.

Q. I am asking you if you knew, did not know that Goldenberg was doing research and development work in the Tavern plant to set up a more mechanical and economical operation for the manufacture of jelly?

Mr. Wessel: I submit the witness' answer was correct, because the questioning was objectionable.

The Court: Sustained.

Mr. Stryker: Did I hear a ruling?

The Court: Yes, I agree with Mr. Wessel. He said, "No, sir," and explained what he meant.

By Mr. Stryker:

Q. Did you not know in his work Engineer Goldenberg tore down and replaced practically all of the equipment of the old jelly plant? A. I do not know that he did what you just described, sir.

(1550)

Q. Well, do you know that he tore down some of the old equipment in the jelly plant? A. If you will permit me, I will explain.

Q. Well, my question now, if you will be good enough to answer it, is, do you not know that fact? A. I would say

that to the best of my recollection at one corner of the plant he installed one or two additional tanks. I do not recall all the original tanks that were used for manufacturing was torn down and reconstructed.

Q. Didn't you know that as a part of his work Engineer Goldenberg tore down walls, tore up floors, and removed piping to replace the old piping? A. Are you talking about the Brooklyn plant, sir?

Q. Yes. A. No, sir.

Q. Didn't know that, all right.

Do you not remember that he tore down and removed the old high-pressure boiler, which was not functioning properly, and replaced it with a new boiler? A. Are you still talking about the Brooklyn plant, sir?

Q. That's right. A. I do not recall.

(1551)

Q. And do you not know that in that connection, in tearing down the old boiler that wasn't functioning, putting in a new one, new walls were built around the new boiler? A. I do not know—I do not recall that being done. It may have been done, but I do not recall it being done.

Q. Well, now, don't you know that all the jelly equipment out there in the Tavern plant was revised? A. No, sir.

Q. You don't know that? A. No, sir.

Q. All right. Did you not know that the work that Engineer Goldenberg did at the jelly plant at Tavern was done in a way that enabled the plant to produce jelly with about one-third of the labor force theretofore employed? A. I do not recall him doing that work.

Q. How often did you say you were there; I forget? A. I visited the Brooklyn plant twice a week doing office work.

Q. And that was mostly in the office? A. Yes. And I may have walked through the plant. I remember Mr.

Goldenberg being there, working on some boilers, but I am not in a position to tell you as to the efficiency because it was a very profitable organization in production before Mr. (1552)

Giglio ever employed Mr. Goldenberg.

Q. I understand that. Well, your walking through the plant where Engineer Goldenberg worked was, I gather—and if I am wrong correct me—incidental to the work that you were doing on the books in the office; that is right, isn't it? A. That is correct, sir.

Q. All right. Do you not know, Mr. Roth, that this reconstruction, research and development in the Tavern plant enabled Tavern and American Brands, when that came into existence, to save at least $50,000 a year in labor costs alone? A. It may very well be, but this is the first time I heard it.

Q. Well, now, did you not know that the reason that Goldenberg received cash from you was because he had to pay cash for most of the equipment for work done, because the equipment at that time was scarce and the people who sold the equipment in those scarce items wanted to be paid in cash; didn't you know that? A. I paid Mr. Goldenberg cash for the expense slips that he gave me but it was not for the Tavern plant in Brooklyn, because to my recollection 90 per cent of his work was done in the New Jersey (1553)

plant, when you are referring to breaking walls down and installing equipment.

Q. Well, didn't you know that the materials, boilers and what not, that the people that were dealing in those, selling them at that time, demanded payment in cash? A. They may have. I do not know.

Mr. Stryker: Your Honor, do you want to take a recess?

The Court: Mr. Stryker, I unfortunately had to adjourn a sentence in another case until 11:30. They were not here at 10:00 o'clock this morning, as they should have been, so they won't be here until 11:30. So if you can go on to 11:30, fine.

If you can't, we will suspend now.

Mr. Stryker: I can't finish the topic, but if it is more convenient to the Court, I will start it.

Could I have the partnership articles, Mr. Wessel? I am sorry I haven't the number.

I will ask the clerk. I am not going to bother Mr. Wessel. I haven't any right to bother him. Maybe Mr. Dilberian will give it to me.

(Handed to Mr. Stryker.)

(1554)

Mr. Stryker: Thank you.

By Mr. Stryker:

Q. Now, when did the Eatsum partnership begin, Mr. Roth? A. Mr. Stryker, excuse me, I didn't hear your first word, I am sorry.

Q. I am sorry, I will say it again.

When did the Eatsum partnership begin? A. Approximately May, 1945.

Q. It began, then, before the formal articles were signed? A. That requires an explanation, sir.

Q. Well, if you can't tell me that, I will withdraw the question. A. There were retroactive arrangements.

Q. All right, I show you Government's Exhibit 21. Will you identify that? It seems to be a carbon of the original partnership articles. A. I never saw this agreement, sir.

Q. Well, it has been offered here by Mr. Wessel, not by me. My question is, do you identify it as a carbon copy

of the partnership agreement? A. I never saw the original partnership agreement, Mr. Stryker.

Q. Well, would the date when the partners acknowl-
(1555)
edged their signature before a notary assist your recollection? A. Yes, sir.

Q. Now, being refreshed—I used "assisted," maybe I should have said "refreshed"—will you give us the date when the partnership began according to the articles? A. The partnership did not begin when this agreement was signed on June 12, 1945.

Q. It started before then? A. It was retroactive to May 1, 1945.

Q. All right, all right.

Now, do you know how much in money was contributed to the partnership by each of the partners? A. I cannot tell you each, but I can tell you Mr. Giglio and his associates and Mr. Lubben and his associates.

Q. Well, can you examine—I don't know whether this would help you or not, let me see—yes—paragraph 8 of the Government Exhibit 21—it is in evidence so I can refer to it—"that the amount of each contributed by the limited partners is as follows"—am I in your way? A. No, it is all right, sir.

Q. What? A. It is all right.

Q. (Continuing)—"Ronald Stone, $10,000; Roy Hankermeyer, $10,000; Margherita Giglio, $7,370"—do I
(1556)
read that right? I think I do. A. It looks like $7,970.

Q. You may be right, I don't know. It is hard to read it.

Can I get somewhere where I can see?

I think, if you will examine it again, that I read it correctly the first time. A. I may be wrong.

Q. I read it distinctly as 73. It might help you to look at a similar item opposite another partner later on down there which may be a little clearer. That might help you. A. Yes, it looks like 7,300. I am sorry.

Q. That is all right. I am making no point of that.

Now, let's see, I got to Margherita, didn't I, $7,370. "Frank Livorsi," as I read it, "$7,705"; is that right, and "Dorina Livorsi," the same as Margherita Giglio, namely, "$7,370," and "Frank Loperfido, $3,330"? A. Yes, sir.

Q. Is that right? All right.

Now, I didn't ask you what Mr. Lubben and Mr. Giglio each contributed.

Mr. Wessel: I object to the form of the question. (1557)

He hasn't asked what the other partners contributed either.

Mr. Stryker: Well, all I have at the moment is the partnership articles.

By Mr. Stryker.

Q. You know what the partnership articles show as to the contribution made by Mr. Giglio and by Mr. Lubben? A. I have to read——

Q. Yes, take your time. A. I mean, you asked me Mr Giglio and Mr. Lubben?

Q. That's right. A. I have to see if the partnership arrangement——

Q. That is all right. Take your time.

The Court: Can't we have an agreement on that? The partnership articles are in evidence.

Mr. Wessel: It doesn't show anything as far as I know. I don't know why counsel is examining a document in evidence.

Mr. Stryker: I don't know that document by heart by any means.

A. Mr. Stryker, perhaps I can answer it this way: I remember that Mr. Giglio and his associates, their total contribution was $37,000, and I remember that Mr. Lubben and his associates, their total contribution was $37,000. I can

(1558)

deduct therefrom the limited partners that belonged to each——

Q. Group? A. —group, and I can give you the amount that Mr. Lubben——

Q. Put in? A. —contributed——

Q. All right, do that, will you? A. —to the partnership and——

Q. You may be better—I am sure you are—at mental arithmetic than I am. Can I get a pad? A. But there is one thing I wish to call to your attention, sir.

Q. Go ahead. A. In addition to the amount that was actually contributed by Mr. Lubben, there was turned over $75,000-odd worth of excess of assets over liabilities, besides the investment, in addition to $13,000 profit that was earned during the month of May, before the articles were signed.

Q. Well, that is clear, all right. A. Okay, sir. Do you want to give me a pencil?

Mr. Wessel: If I may, if your Honor please, if counsel wishes to do this, to test the witness' recollection, I have no objection. However, may I say this—counsel, I am not trying to bring anything across—but some of the figures that the witness is referring to, and they are not important, but

(1559)

they are off slightly, and there are books and records

and I think books and records ought to be used if this is a matter of accounting.

Mr. Stryker: If your Honor please, I have a witness on the stand, tendered by the Government, and this is certainly one of the central points in this case, this partnership, and I would suppose that he having testified for three days to some extent about it, I would have a right to interrogate him myself.

Mr. Wessel: If I may say, now, for example, he read the investment of Frank Loperfido——

Mr. Stryker: You can refer to any papers you want.

Mr. Wessel: As $3,330, something like that. That isn't even what the document says. It is $3,350.

Now, this is an accounting matter.

Mr. Stryker: He said I read it right finally.

Did I read it right?

Mr. Wessel: I think you both read it wrong.

Mr. Stryker: You come up here. You help us.

Mr. Wessel: Unless counsel wishes to test the (1560)

witness' recollection, as to which I would have no objection; if he is seeking to establish something which he wants to have as a matter of actual documentary figures, I think it should be done with reference to the documents.

The Court: I think that is true.

Now, did this witness testify as to the contribution of both partners, both groups?

Mr. Wessel: I don't think he did. If I may—and I am not trying to give any information out—the investment wasn't $37,000; it was $33,500. The

figures are going to be all off unless we use the books and compute it properly.

Mr. Stryker: I have no objection to correcting any figures this witness gives by any other book at all. At the moment I am not particularly interested in that. If there is anything where Mr. Roth is mistaken, and Mr. Wessel desires to correct it from a book, of course, he has a right to do it.

Right now I am talking about the partnership articles that you offered.

Mr. Wessel: The computations are going to take a while. The partnership articles have been in evidence for a long time.

(1561)

The Court: We will take a ten-minute recess now and we will resume later.

Don't discuss the case.

(Jury out.)

The Witness: May I have my red folder?

Mr. Wessel: I think the witness should have a recess.

Mr. Stryker: Do you want to take that?

The Witness: My eyesight is not so good.

Mr. Stryker: All right, suppose we defer it till then.

The Witness: All right.

(Short recess.)

(Jury present.)

By Mr. Stryker:

Q. Mr. Roth, a few moments ago you said something about an additional $75,000 that Mr. Lubben put into the partnership—am I paraphrasing what you said

correctly? A. The arithmetical amount was approximately $75,000, which represented the excess of assets over liabilities as of May 1st.

Q. What did those assets consist of? A. May I refer to my papers?

Q. Sure. A. Well, Mr. Stryker, I have a long sheet

(1562)

of assets and liabilities, and an excess—would you want me to read them all?

The amount is $78,069.28, identified as excess of assets over liabilities due to Lubben prior to investment of Lubben and Giglio interests.

Q. That is the paper you have prepared, is it? A. From the general ledger of Eatsum Food Products Company.

Q. Is that a recent paper or did you have that in the course of business? A. No, I prepared that within the past ten days.

Q. You have prepared it from the Eatsum general ledger? A. Yes, sir.

I may be of assistance to you if I go further.

Q. Yes, go ahead. A. May I?

Q. Yes. A. At the time of the investment——

Mr. Stryker: Maybe, so that we won't have confusion, I don't think this paper has been marked at all. I will have it marked for identification.

The Court: All right.

Mr. Stryker: The one I have just been talking about.

(Marked Defendants' Exhibit SS for identification.)

(1563)

By Mr. Stryker:

Q. Now, go ahead and tell me about these other assets. A. At the time of—

Q. Do you mind if I read this while you talk? A. No, sir.

Q. Go ahead; I don't want to interrupt you. Go right on. A. Well, you see, these identities refresh my mind.

Q. Yes. A. At the time the partnership commenced, it took one month to examine all the operations of the proprietorship accounts. At that time, instead of being May 1st, it was approximately June 1st, and we used the opening entries of June 1, 1945, as a starting point as to what is due to Mr. Lubben on the excess of assets over liabilities.

We determined the profit during the month of May, which was $27,000, and divided that profit in half between Mr. Giglio's interests and Mr. Lubben's interests.

On June 1, 1945, each one of the total amount of investment of the respective interests were $33,500 each. I suggested to Mr. Giglio or Mr. Lubben that being that there were very many assets and liabilities, and we want to bring this down to a cash liquidating basis, that the cash invest-

(1564)

ment is to be put in separate and distinct, and let the items, let the assets and liabilities liquidate themselves, and whatever the cash liquidation amount is, or will be, that is what the new partnership will owe to Mr. Lubben.

They followed my suggestion and it was done in that manner.

Q. Are you finished? I am not interrupting you, am I? A. No. I tried to explain to you what the $78,000 excess of assets over liabilities is, independent of the cash investment of $33,500. May I go further?

Q. Sure. A. The way I computed this schedule from the general ledger——

Q. You mean this schedule, holding another paper in your hand? A. Yes, sir.

Mr. Stryker: I guess I had better get that marked.

(Marked Defendants' Exhibit TT for identification.)

By Mr. Stryker:

Q. Now we are going to talk about TT for identification; is that right? A. Yes, sir.

Q. That is a paper that you have made up only recently? (1565)

A. At the same time or within a day after I made this (indicating).

Q. All right, and that was made up from the general ledger of the—— A. Eatsum Food Products Company.

Q. The one that is here in court in evidence? A. Yes. I saw it the other day.

Q. All right, go on, go on. A. The summary of this sheet of paper is net investment of David Lubben, see capital account—that refers to the excess of assets over liabilities——

Q. That is the figure—— A. 78.

Q. — mentioned in Exhibit SS? A. Right here, right here, yes (indicating).

Q. All right, go on. A. That is 78,069.28.

Cash deposited by David Lubben's interests on the capital account——

Q. What's that figure? A. $33,500.

Excuse me, I used a figure a little while ago, 37,000. I was in error.

Q. All right. A. When you add the 78 to the 33,000, there was $110,000 due Mr. Lubben.

Then I have an amount less withdrawals of David Lubben, which amounts to $236,000.

(1566)

Q. For what period was that, Mr. Roth? A. During the period that he was active in the partnership.

Q. You mean the whole—until he left the partnership? A. Yes.

Now, the definition of the word "withdrawals" means cash, and also moneys due him from excess reserves for bad debts and taxes or what I would call unused reserves which was considered a liability on June 1, 1945.

Q. Well, the 236—— A. That is the total amount of withdrawals.

Q. Of cash? A. Cash and reserves, unused reserves.

Q. How much of it is cash? A. Cash—I could read you the items, if it is all right with you.

Q. Just sum it up. I don't want to take the Court's time with that. A. 151,392, which applied to the excess amount of assets and capital.

Q. Well, in other words, 151,000 represents the cash that he took out of the partnership during its existence; is that right? A. Correct.

Q. All right, go ahead. A. Deducting the amount that was charged to him by withdrawals and reserves, 236,000,

(1567)

and deducting the amount that he was credited in the capital account for 110,000, the net amount withdrawn from partnership by D. G. Lubben, 124,773.09.

Q. That is cash or what? A. That is cash and reserves and the value of the plant at the time that he left the partnership.

Q. How much of that hundred twenty-four is cash? A. I can't answer how much of the hundred twenty-four is cash because the withdrawal represents cash and physical

plant. I can give you the value, the book value of the physical plant, the unused reserves, then the difference is cash of the 124,000.

Q. Well, do that, give me that, will you.

Mr. Stryker: Give me a pad, will you, Mr. Dilberian?

(Handed to Mr. Stryker.)

By Mr. Stryker:

Q. Here you are. Do you have a pencil? Here, use this one (handing to witness).

Have you got it? A. Yes, sir.

Q. What is it? A. Cash applicable to that arithmetical figure only, so that it is not misunderstood about any other cash, but the cash applicable to that arithmetical figure is (1568)

34—39,823.04.

Q. Well, what I wanted to get at, if I could, from those figures, can you tell us how much cash he withdrew from the partnership during its existence, not naming an arithmetical figure, just tell me if your figures show. A. The total amount of cash withdrawn by David G. Lubben, covering——

Q. What period? A. During his activity as a partner in the company——

Q. Is? A. Is $151,392.32, representing partner's salary, excess of assets over liabilities, and special drawings. (1569)

Q. That is from the period, either June 1 or May 1, '45, to when? A. Till about March or April, 1946.

Q. All right. I am not interrupting you, am I? A. I am trying to answer your question as best I can.

Q. Can I take these? You are handing me Exhibits TT and SS for identification, and they are not my papers.

Mr. Stryker: With the Court's approval, I would like to keep them over the recess and discuss them with my accountants. May I do that?

The Court: I don't know what is on them, myself. Is there any objection?

Mr. Wessel: No objection.

The Court: Very well, do that.

Mr. Stryker: I am holding TT and SS for identification.

Your Honor, I must examine this paper. I personally do not understand it. I need a bit of help. I am going to drop this subject for the moment.

The Court: Very well.

Mr. Stryker: So as not to delay you.

The Court: All right.

(1570)

Q. Mr. Lubben——

Mr. Wessel: This is the second time counsel has done that. I suggest the reporter be instructed to put down what counsel has just said.

Mr. Stryker: I am sorry. You know that was unintentional. I have that habit. It is very bad. I am sorry for it, Mr. Roth.

I think I once called you Mr. Leone by mistake.

Mr. Wessel: I am Mr. Wessel.

Mr. Stryker: Well, I certainly had no malice in mind.

Q. Mr. Roth, were the books of Eatsum worked on and audited by Ben Bercu, or members of his firm? A. You are referring to Eatsum partnership, sir?

Q. Definitely; that is right. A. Yes, sir.

Q. And during how long a period did that happen? A. From the very inception of the partnership to approximately one month prior to Mr. Lubben leaving the partnership.

Q. That would roughly be about say from May or June '45 to—— A. February '46.

Q. —February '46, is that right? A. Yes, sir; that would be approximate dates.

Q. All right. Now, were those books of Eatsum, that you referred to, also audited by you or your assistants? A.

(1571)

I would like to explain that. May I?

Q. I would be very glad to have you, but if you can answer that directly first, I might make a little progress. A. We verified after Mr. Bercu got through with the audit, as representing Mr. Giglio's interest. We made a complete verification of the books and records after Mr. Bercu got through.

Q. All right. Well, was it you or Bercu that was the accountant for Eatsum partnership during the partnership period which ended some time around March 9th I think of '46? A. Mr. Bercu was regarded as the accountant for the partnership. I was regarded as the individual verifier, to make sure that Mr. Giglio's interests were taken care of.

Q. Now, would you mind giving me, Mr. Roth, in some detail, the duties, first that Bercu carried on; what did he do, what did his work consist of? A. I could sum it up, the ordinary duties of an accountant doing a monthly audit for a business concern.

Q. Well, I will have to confess my ignorance. I just don't know what that would be. Would you mind telling me? A. I could tell you what I would do if it would be the ordinary duties, but I wasn't there every day that Mr. Bercu

(1572)

was there, and did not know what he did, or what his practice and procedure is in doing monthly audits.

Q. But you examined what he did, I take it, from what you said? A. Mr. Hausman examined what he did and made independent audits of the books and records, regardless of what Mr. Bercu did.

Q. And you talked to Mr. Hausman and he told you the results of his audit, didn't he? A. Yes, sir.

Q. From that, would you be kind enough to give me such detail as you can regarding just what Mr. Bercu did? I think you said that he followed the ordinary course and something like that. I would like to know what that was, if you don't mind telling me. A. Are you saying Mr. Bercu, what Mr. Bercu did?

Q. That is right. A. Having in mind that I didn't see what he did, I will tell you of necessity what he had to do.

Q. Just a minute, if you please. I am not interested in that because what we are interested in is facts. From your auditing of the books that Bercu was responsible for, and from the auditing done by your assistant, can you tell this jury what Mr. Bercu did, what kind of records he kept? Can you give us that? A. To the best of my knowledge I

(1573)

will tell you what Mr. Bercu did.

Q. That is what I want to know. A. Audited the cash book; audited the cash receipts and disbursements; verified the transactions thereon, with the examination of the cancelled checks and bank statement at the end of the month; the addition of the respective columns of the cash receipts and disbursements; checked the individual postings to the customers and creditors' ledger; vouched all purchase invoices into the purchase book; verified the addition; did the closing monthly postings to the general ledger. I don't know whether he verified, I do not recall whether he verified

the daily arithmetical computation of each respective customer's invoices, but I would say that he added the total amount of sales; posted to the general ledger; made all necessary journal entries; kept a perpetual inventory record of the manufacturing of the candy in the Bronx factory. There were two cash boxes there, one for candy, one for corn. Of necessity he had to use the cash box of the candy in order to get the items of perpetual inventory. I do not know to what extent, if any, he examined the corn cash box. I know that my assistant, Mr. Hausman——

Q. You had charge of the corn box, I take it? A. Who? (1574)

Q. You. A. No, sir.

Q. Well, if it was not you personally, then your assistant? A. No, sir.

Q. Didn't you set up the corn box and its operation? A. I did set up the method of operating the corn box, but I did not have charge of it.

Q. Well, didn't you set up the corn box and the operation of the corn box? A. I don't understand what you mean by the operation of the corn box. Mr. Stryker, perhaps I could explain it and answer your question without referring to the records. I set up the——

Q. Go on, I am listening. A. May I speak to you directly?

Q. Certainly. A. I set up the corn box for the purpose of eliminating the names of the people who were receiving currency, because based on the operation of the Eatsum partnership, where the names of the individuals who received currency was on the purchase invoice, was on the check book stub, Mr. Giglio wanted that eliminated; and in order to set up, in order to eliminate the names of the people who were receiving money, currency for corn, and the names of the people who were purchasing corn syrup

for currency, I set up the cash box for currency going in
(1575)
and out, to eliminate the recording of the transactions and the names of the people in the books of account. If you call that setting up, and if you call that operation, I am telling you exactly what I did.

Q. All right. I gather then you had records of the cash that went in and out? A. The currency?

Q. Yes. A. I did not have any records of the currency.

Q. Well, someone under your supervision did? A. No, sir. That currency box was handled exclusively by Mr. Lubben and Mr. Loperfido. Mr. Hausman verified the currency, arithmetically, but never handled the currency, because it was his duty to verify the currency, to see that no money—well, no money was taken out without Mr. Giglio's knowledge that money is being taken out of the corn box.

Q. All right. A. We could only verify those items that appeared on Mr. Loperfido or Mr. Lubben's sheet. Now, if either Mr. Loperfido or Mr. Lubben wanted to steal $3,000 or $5,000, they never put it on the sheet and we could never verify it.

Q. I see. Well, that was sort of a separate deal, that corn box deal, from the Eatsum business, I gather? A. No,
(1576)
no. It was—I don't know what you mean by a separate deal. I am just telling you the operation of currency during that particular period. I don't know whether it was a separate deal or not.

Q. Who did the accounting work for Eatsum from March 1946 on? A. Whatever accounting work was to be done, I did it, or it was done under my supervision.

Q. I think you have told us here in this trial, in your direct testimony, that the general ledger of Eatsum, which

was shown to you by Mr. Wessel, was worked on and audited in the normal course of business by Ben Bercu's firm and your own; that is correct, isn't it? A. Up to the time that Mr.—if you are referring up to the time that Mr. Bercu was employed, that answer is correct, sir.

Q. Well, you have mentioned several times in this trial accountant's work papers. I am not an accountant. What are accountants' work paper used for? What are they? What does it mean? Just tell me. A. Well, I can give you just my definition of what I understand it to be, Mr. Stryker.

Q. Good, that is all right, do that. A. Accountant work papers represent summaries of the operations of the business, to wit, they wouldn't make—an accountant will

(1577)

not make a copy of the general ledger, but he will make a copy of the balances of the respective accounts of the general ledger. He will not make a copy of every one of the sales, but he may have a record of what all the customers owe him, owe the firm in the accounts receivable ledger; and the same thing is true of the indebtedness of the firm. He may have a supporting schedule of his bank reconciliation, as to what the outstanding checks are. The working papers may have any memorandum of unusual endorsements on the check. The working papers may have memorandums of any unusual transactions that are not in the normal course of business. It all depends on the respective—on the type of business that you are auditing, plus the amount of money that the client is paying, and how much time the accountant is able to devote to the audit.

Q. Well, is it sort of—is it the information from which the books are written, or are the accountant's working papers written from the books? A. Both. Both are, sir.

Q. Both? A. Yes. There are some working papers which are extracts of balances of the books, and there are

some work papers that are memorandums or suggestions
(1578)
or thoughts, or cost system information that appear on the working papers, which the accountant develops from the information from the books, but are not copies of the books.

Q. Well, in general, the books would contain or reflect the substance of what was in the working papers, would they? A. In general, yes.

Q. Now, did both your firm and Mr. Bercu have work sheets and work papers on the Eatsum Company during the period of the partnership? A. Mr. Hausman——

Q. He was your man, wasn't he? A. My man—had the working papers of the Eatsum partnership, and Mr. Bercu had—I must assume that Mr. Bercu had his working papers of the Eatsum partnership.

Q. And what you told me a minute ago applied to both, in general, would be reflected in the books? A. In my opinion, yes, sir.

Q. I think you said a minute ago that you assumed that Mr. Bercu had his working papers; don't you know whether he did or not? A. He did, sir. Those are the ones I destroyed. that I spoke to you, that I testified to.

Q. Well then, you knew he had? A. Yes, sir.

(1579)

Q. You knew he had them? A. Yes, sir.

Q. All right. A. Mr. Stryker, I just want to correct a thought, if I may.

Q. Surely. A. I don't know whether I destroyed all of them, together at the time that Mr. Giglio and Mr. Lubben were there. I know I destroyed those papers that Mr. Bercu had in his red folder.

Q. Will you tell me and his Honor and this jury, referring to the incident that you gave us on your direct examina-

tion, exactly what books and papers or records you say you destroyed? A. There were no books.

Q. All right, let me have my categories, and give me the details as well as you can, of each category, the papers that you say you destroyed? A. I can't do that either, sir. I could give you—I can tell you what happened, but not by categories.

Q. Well, leave out the categories. You went up there, as I understand it, to destroy records; is that right? A. That isn't as I—I met Mr. Giglio there.

Q. Mr. Lubben—I beg your pardon. Mr. Roth, please. A. I destroyed——

Q. If you don't mind. I think my question is one you can answer simply. A. I was part of a group that destroyed (1580)

the records.

Q. But you were there as the acountant to destroy records; is that right? A. I was there as the representative of Mr. Giglio to look at the partnership working papers which were to be destroyed.

Q. Now, what papers did you look at? A. I thumbed—he gave me the red folder—I thumbed through them to see that all the headings were Eatsum partnership.

Q. All right. A. And Mr. Giglio said, "the Eatsum partnerships."

Q. Did you say that, or Mr. Giglio? You would know, wouldn't you? A. Mr. Giglio asked me whether these——

Q. Asked you whether they were—— A. Incidentally, there is another identification of the Eatsum partnership papers. Mr. Bercu, Mr. Giglio, Mr. Lubben and myself retired into another room.

Q. That is what you told us on direct. I have no objection to your repeating. Is that what you told us? A. If you don't want me to repeat, I won't repeat it.

Q. I don't mind. Go ahead. A. As you wish, sir.

Q. What I am asking you is, did you examine the

(1581)

papers that you say you destroyed? A. I examined the papers in the following manner: Mr. Bercu turned over a red folder, which he said "These are the working papers of Eatsum partnership." I thumbed through the top of the sheets for the headings. I did not examine each and every one of the sheets by folding it. I rather thumbed through, and I told Mr. Giglio, "This indicates to be the Eatsum partnership records."

Q. Well, how many sheets of paper were in this red folder? A. I didn't count them but——

Q. Give me an approximation. A. I would say two to three inches high.

Q. Well, here is a folder of exhibits (showing). Thicker than that? A. Slightly thicker.

Q. Show me with your finger how much thicker? A. (Witness indicates.)

Q. That would be something like an inch more, would it? A. Oh, not quite an inch, I would say.

Q. Three-quarters of an inch? A. About a half inch higher.

Q. All right. Now, the sheets of paper that you looked at, were these sheets such as Defendants' Exhibits TT and SS for identification that we discussed about an hour ago? Aren't those regular accounting sheets? A. Those were not

(1582)

sheets like that, sir.

Q. What you showed me, is that regular accounting paper? A. It is accounting paper. I think they were all yellow, and some were five-column sheets, half the size, and some were sheets whereby—I can't destroy that—some of

them whereby the center was cut down, and while it was a folded sheet, you could see the name on it.

Q. Well,—— A. Do you see, follow me? Do you understand me, sir?

Q. I guess I do. A. I could use another sheet and give you a demonstration.

Q. I think you have made it plain enough. The sheets that you saw then were not sheets on what even I recognize as accounting sheets?

Mr. Wessel: I object to the form of the question.

Mr. Stryker: All right, withdrawn.

Q. They weren't on accounting sheets like the exhibits I have just referred to? A. The color, I just said. They were sheets, some sheets were half the size, four columns like those. Some sheets were full size, but this, but the top was torn off, so that when you folded it you were about to see the name, Eatsum Food Products Company.

(1583)

Q. Well, didn't Mr. Bercu keep his work papers on sheets similar to the ones you have shown me? A. I have just said, yes, sir, except for the color.

Q. Oh. A. I recall that.

Q. This is sort of a bluish—— A. White.

Q. —white. And his was yellow. Other than that it was the same? A. Otherwise, substantially.

Q. All these columns? A. Yes, substantially they were the same. I could only tell you by the headings, Mr. Stryker. I just thumbed through them, like you just slip a book.

Q. All right. A. And when I saw the headings, Eatsum Food Products Company partnership, I determined that this batch are the Eatsum working papers.

Q. Now that we have got this—I had misunderstood you, no doubt through my fault. I thought the sheets were

just yellow sheets. They are regular accounting sheets, except yellow, as opposed to the ones you have just shown me; is that correct? A. Yes.

Mr. Wessel: I think different. Some of them were five columns rather than ten columns.

The Court: There were a couple of other differ-

(1584)

ences.

Q. Well, give me the other differences.

The Court: Let's not go through it again. Some were single sheets with three columns, and some were double sheets like that, with the top half, top inch on one cut lower than the other, so you could see the other side.

Mr. Stryker: All right.

Q. Did you not examine these papers over and beyond simply seeing the name Eatsum partnership? A. No, sir.

Q. I don't mean by "examination" that you sat and looked at every figure, but didn't you look at the paper to get a general idea of whether the items below Eatsum partnership related to that or not? A. No, sir.

Q. Didn't even look at it? A. The entire visit was about five minutes because it was extremely distasteful and I wanted to get out of there as quick as possible.

Q. Yes, I understand. Well, you went there to identify Bercu's work sheets, didn't you? A. I went there at the request of Mr. Giglio to identify the work sheets of Mr. Bercu on Eatsum Food Products Co. partnership.

Q. That is just what I asked you. That is what you went there for.

(1585)

Mr. Wessel: I object.

The Court: I sustain your objection.

Q. Did you go there to examine the work sheets of Bercu of the Eatsum partnership? A. Well,——

The Court: Now we have gone over this several times. I am going to let his answer stand as he gave it. There is a slight difference in his answer from the way you are phrasing it, and we are not going to labor that point.

Mr. Stryker: I respectfully except.

The Court: All right.

Q. Did you ascertain whether Bercu had given you all the papers that you say went there to destroy? A. No, sir. Mr. Bercu said—Mr. Bercu said, "Here are the working papers that I have on Eatsum Food Products Company," and it was just taken for granted by Mr. Giglio and myself that those were all his papers. Whether they were or not, I do not know.

Q. And you made no effort to determine? A. I wasn't supposed to make any effort.

Q. All right. Did you destroy all the papers that Bercu gave to you? A. In that folder?

Q. Yes. A. In that specific folder?

(1586)

Q. In any folder, any papers, any work papers he gave you? A. Mr. Stryker, if you please, we are referring to that folder that Mr. Bercu told me that these are the Eatsum partnership papers.

Q. Let's confine it to that for the moment. A. I recall destroying all of them.

Q. Were there any other papers that he showed you? A. No, sir.

Q. Then you destroyed all the papers, you say, of the partnership that Bercu gave you; is that right? A. Inside that red folder.

Q. Did the general ledger of Eatsum reflect the transactions of the work papers? A. I do not know whether the work papers—well, I would say part of the work papers reflected the transactions in the general ledger. May I explain that further, Mr. Stryker?

Q. Well, if your answer is not complete, I don't want to interrupt you. A. No, with your permission I could explain that further.

Q. Yes, go ahead. A. Mr. Bercu kept a perpetual inventory record of the units of items of production of the plant in the Bronx. It was the th ght and instructions of Mr. Giglio that those are the papers that he was primarily interested to destroy, and also the papers that reflected any

(1587)

currency transactions.

Q. Well,—— A. I must assume that based on that pile of papers, and looking at the captions and the headings, to my recollection, I destroyed the summaries of the general ledger, the perpetual inventory records, and currency transactions. I don't know whether the currency transactions referred to the corn syrup box, I do not remember, or they referred to the candy box, you see, but there were two cash boxes there, one for the purchase in the black market of raw material for the manufacture of candy, and one, the box that we so often refer to as buying corn.

Q. Well, now, having in mind the papers that you said Mr. Giglio was interested in, did you examine whatever Bercu showed you, to ascertain whether the papers you say he was interested in, were there? A. Just as the red headings, Mr. Stryker.

Q. Well, the heading, Eatsum, wouldn't tell you that, would it, alone? A. There wasn't only a heading Eatsum, either. It was Eatsum general ledger; Eatsum perpetual inventory, Eatsum trial balances; Eatsum cash. There was a description on top of the working papers.

Q. Did you make any effort to ascertain whether the

(1588)

work papers reflected perpetual inventory? A. No, sir, except for the heading that was on top of the sheet.

Q. Did the work sheets prepared by Hausman, Starr—is that the other man's name, or Sklar? I don't know, your assistant. A. Starr.

Q. Starr, and yourself, reflect the entries on the books of the partnership accurately? A. To the best of my ability they did.

Q. Would not your work papers and Bercu's reflect substantially the same thing? A. There were some differences of opinion as to accruals and interpretations of items but not of any serious consequence.

Q. Then would I be correct, your answer is that your work papers and Bercu's substantially reflected the same things? A. I should say they should have. I never saw Mr. Bercu's detailed working papers and made comparisons with Hausman's working papers, but I could only say from an accounting point of view they should have substantially reflected the same thing.

Q. As far as you know, they did? A. I never saw Mr. Bercu's working papers, but from an accounting—and I never made a comparison between his working papers and

(1589)

Mr. Hausman's, but I assume substantially they should have shown substantially the same thing.

Q. Were your working papers in Eatsum also destroyed? A. I do not know. I do not remember destroy-

ing the working papers of Eatsum. I would say no, sir.

(1589a)

Q. All right. A. Mr. Stryker, may I tell you—go into more detail about the destruction of those papers?

Q. Up at Bercu's office? A. Yes, sir.

Q. Do you want to add something to your direct examination about that? I thought it was quite complete. If you do, I am not asking the question. A. Excuse me, sir, I will withdraw it. I will wait for your question.

Q. I think that might be better. A. I am sorry——

Q. That is all right.

Now, I understood your direct examination to be whatever papers you got from Bercu you flushed down the toilet; is that right? A. Partially they were flushed, if I recall correctly, partially they were torn to bits and thrown in the wastepaper basket, under his assistance, supervision.

You see, Mr. Stryker, Mr. Bercu didn't trust Mr. Giglio. Mr. Giglio didn't trust Mr. Bercu. Nobody trusted each other. They each had to have somebody there to watch to see that those papers were destroyed.

Therefore, the assistant of Mr. Bercu—Mr. Bercu says,

(1590)

"If we ever get into any difficulty, I'll have nothing in order to prove what I did in accounting."

Mr. Giglio says, "I don't want you to have anything to prove."

So in order to go to work and have both ends meet together, I represented Mr. Giglio on the destruction of the papers, and Mr. Bercu's assistant represented Mr. Bercu, and Mr. Lubben was standing by, because he couldn't get title to the property, to the physical plant in the Bronx unless all those papers were destroyed.

That is what, at that time, Bercu told me the purpose of destroying the papers was.

Q. Are you finished now? A. Yes, sir.

Mr. Stryker: Your Honor, I am searching for notes on another topic that I could make some sense out of before the recess. It is five minutes of——

The Court: Would it help you to suspend now?

Mr. Stryker: Mr. Roth has given me a couple of sheets I would like to look at. If we can adjourn now I will appreciate it.

The Court: We will have a recess now until 2:00 o'clock. Don't discuss the case.

(Adjourned to 2:00 p.m.)

(1591)

AFTERNOON SESSION

The Court: While we are waiting for the late juror, I have been over the grand jury minutes that I was given yesterday, and I don't find any basis for turning it over to the defense.

Mr. Stryker: Will you seal that along with the others?

The Court: Sure.

Mr. Stryker: And could I, your Honor, would your Honor request Mr. Wessel to give me just a statement of the papers that are in the envelope that, of course, I haven't seen, that you have sealed? I suppose they contain all I asked for, but I would like to——

The Court: Well, that can be completed at the end of the trial.

Mr. Wessel: I know there was no statement for Mr. Mitchell. I think everything else——

Mr. Stryker: I don't suppose there is any harm in telling me what they are, without describing it, so I will know that everything I have asked for is in; that is all.

The Court: Without taking time to go back over that now, I think that Mr. Wessel has asked to seal

(1592)

the documents that you called for.

Mr. Wessel: I certainly did.

The Court: At some point where it becomes appropriate to examine those documents, if ever, why, at that time you will decide whether he has got the right ones in there or whether he hasn't.

Mr. Wessel: The only thing that was not sealed, that was not referred to in the portion of the transcript that counsel is referring to, was the tax return. That is not sealed. That tax return is necessary for other purposes.

The Court: Yes.

Mr. Stryker: That is Mr. Lubben's tax return?

Mr. Wessel: Yes.

Mr. Stryker: These minutes you spoke of, Judge, are those the 1952 grand jury minutes of Roth——

Mr. Wessel: They are September 11, 1952, and they are the grand jury minutes with regard to Mr. Roth's personal 1945 tax.

Mr. Stryker: All right.

Mr. Wessel: And not this case at all.

If your Honor please, Mr. Mahon reminds me—doesn't remind me; I was incorrect—Mr. Lubben's

(1593)

1946 return is sealed, and it shouldn't be, because the statute of limitations, I understand, is to run on his own tax, so I request that the Lubben 1946 tax

return be unsealed, and the General Confections tax return, which are in the sealed envelope.

The Court: All right.

(Jury in.)

The Court: I guess we are all here now but the witness.

LOUIS J. ROTH, resumed.

Cross-Examination Continued by Mr. Stryker:

Q. Mr. Roth, did you recognize the handwriting on the Bercu reports that you say you tore up? A. No, sir.

Q. What? A. No, sir.

Q. You knew Mr. Bercu's handwriting, I have gathered? A. I saw very little of his handwriting. I just went by the headings of the working papers on top.

Q. Well, my question I don't think was very good. I meant in the course of the time when you were supervising, or whatever the word is, reauditing Bercu's papers, you saw his handwriting, didn't you, from time to time? A. Very, very little, sir.

(1594)

Q. You saw it some? A. I may have seen some, but I had no occasion to refer to his working papers. I practically worked 99 per cent of the time from the working papers of my assistant, Mr. Hausman.

Q. Who was Mr. Bercu's assistant? A. I don't remember his name, sir.

Q. Did you know him? A. Very little. I could recognize him, but——

Q. Did you see his handwriting on the papers when you were reauditing the Bercu audits? A. I never—I—I—no, sir.

Q. What? A. No, sir. I did not see his handwriting any more than that I have seen Mr. Bercu's handwriting.

Q. Would the name Heitman, H-e-i-t-m-a-n, refresh your recollection as to Mr. Bercu's assistant's name, Heitman? A. No, sir. The name Heitman rings a name from a different source, but not Mr. Bercu's assistant.

Q. You can't remember his assistant's name? A. No, sir.

Q. You saw him from time to time, did you not? A. Very little if——

Q. Well, you saw him, met him? A. Well, I may have (1595) seen him once or twice throughout the period that Mr. Lubben was a partner and that particular assistant or some other assistant that was working in Mr. Bercu's office at the time I went up with Mr. Giglio, Mr. Lubben, regarding the working papers.

Q. Well, I have gathered from your testimony that you audited or re-examined the work that Bercu did while he was Lubben's accountant there during the partnership; am I correct in my recollection? A. It was—I think your—begging your pardon, sir——

Q. No, it is all right, just tell me; I may be wrong. A. I think you are wrong the way you are expressing the question to me.

Mr. Stryker: Read the question, will you, to me.

(Question read.)

By Mr. Stryker:

Q. Well, that isn't quite correct, is it? A. That isn't quite correct, sir.

Q. Tell me how it should be corrected. A. I will answer it in this manner: Mr. Hausman reaudited the books and

records of the Eatsum partnership and checked the working papers of Mr. Bercu, those that Mr. Bercu submitted

(1596)

to him. My work consisted mainly in reviewing Mr. Hausman's findings and results at the end of the month.

I do not recall at any time seeing Mr. Bercu's working papers.

Q. Well, wouldn't it be a normal course of procedure if you were auditing or re-examining another accountant's work, that questions arise that you would like to ask him about? A. I, as an individual, did not discuss anything with Mr. Bercu. It was Mr. Hausman that did all the discussions. This was not a normal course of procedure where you have one accountant checking the records and another accountant reviewing the audit and making an independent audit for the same identical month.

That isn't a normal procedure.

(1597)

Q. Well, did you have occasion sometimes when you were examining the Bercu papers to question some entries or inquire about them? A. I never examined the working papers of Mr. Bercu to inquire about them.

Q. You examined only your assistant's, Hausman's? A. I went by the findings of Mr. Hausman's working papers.

Q. Did you never have occasion in going by those findings to refer back to the Bercu work sheets? A. No, sir. If there was occasion to make reference to them, Mr. Hausman may have made reference to them.

Q. But in all events, the papers that you say you destroyed, you recognized as Bercu's work papers; that is right, isn't it? A. I recognized the heading of the name on top of the sheets, Eatsum Food Products partnership, and various working papers had trial balance, perpetual inventory, the word "Summaries." I was primarily interested in the name, Eatsum Food Products Company partnership.

Q. Well, when you were there that day, didn't you want to ascertain whether or not the papers that you were given, as you say, to destroy, were in fact what they purported to be? A. I determined that they were Eatsum Food Products Company partnership papers. I did not examine one sheet of paper.

Q. Did you determine that they were Bercu's work pa-

(1598)

pers of the Eatsum partnership? A. Just from the heading on top of the working sheets.

Q. Now, you say you didn't recognize the handwriting, all you saw was the heading. Didn't you inquire when you had Bercu right there as to whether they were or not his work sheets? A. I did not make any inquiry. Mr. Giglio did all the talking.

Q. Did he inquire to that effect? A. Mr. Bercu brought in a folder and said, "Here are the partnership papers in this folder."

Q. Did you find the name of Bercu printed at the top of some of these papers, these yellow sheets you spoke about? A. I do not recall whether the name was on top or was not on top. All this took a matter of a few moments, as far as my participation is concerned.

Q. Well then your answer is no to my question, is it?

The Court: He said "I don't recall."

Q. Oh, is that it? You don't recall?

Mr. Stryker: Maybe I am wrong.

The Court: Why don't you let the answer stand as it is rather than characterize it?

Mr. Stryker: All right. May I have the answer?

(1599)

I may have misheard it.

(Answer read.)

Mr. Stryker: Your Honor is quite correct in your recollection. I was mistaken.

Q. Now, was it you or Bercu that set up the original partnership books for the Eatsum? A. Mr. Bercu set up the opening entries of the partnership books.

Q. Of the $78,000 additional capital that you described as being part of the original assets of the partnership, am I correct in my recollection that you said $13,000 of that was Mr. Giglio's share of the profit for the month of May? A. That is not—that is not—I do not recall saying that.

Q. Well, whether you said it or not, is that the fact? A. May I have my working papers?

Q. By all means. A. To give you the exact facts on that matter?

Q. By all means. I am giving you the papers that you lent me, SS and TT for identification, Defendants'. A. Mr. Stryker, may I have the question read?

Mr. Stryker: Certainly, read it, Mr. Reporter.

(Question read.)

A. That is not correct the way you ask me the question, sir.

(1600)

Q. All right, then, you correct it, and if you will be good enough, just confine yourself to my question. You say I haven't phrased it right. You phrase it the way it ought to be. A. Well, I could only tell you exactly what the situation is regardless of phraseology.

Q. I don't care about phraseology. I mean, give me the fact. A. The partnership started on May 1st, 1945. The actual signing of documents and deposit of cash investment took place during the month of June. The earnings for the month of May were to be divided between Mr. Giglio

and Mr. Lubben, as if the partnership commenced actually operations on the 1st of May.

Q. All right. A. In setting up the excess of assets over liabilities, there was due to Mr. Giglio $13,485.31, which was deducted from the assets that Mr. Lubben turned over, thereby indicating that he was not entitled to any part of that $13,000.

Q. All right. Now let me see if I get this straight in my mind: Mr. Lubben had a proprietorship, called the Eatsum proprietorship, that is, an individual enterprise, not a partnership or a corporation, down to the time this partnership was organized; that is right, isn't it? A. Yes, sir; Eatsum Food Products Company operated as an individual.

(1601)

Q. That is what I mean. And he had a factory up in the Bronx? A. Yes, sir.

Q. Well, you have been there, have you not? A. I have been there once or twice.

Q. I mean—— A. I said yes, sir, Mr. Stryker.

Q. All right. And he was dealing in candies? A. Manufacturing of candies.

Q. Now, when he joined the partnership he continued on with that plant in the Bronx, did he not? A. You say "joined." When the partnership was organized that plant continued operation.

Q. All right, and when the partnership ended, he went right along with his operations in the Bronx, just as he had been doing before the partnership and during it, isn't that so, except under a different name? A. I don't know what he did after the partnership ended. All I know, sir, is that part of his share in going out represented a transfer back of the physical assets of the Bronx plant. What his operations up there was, I do not know. I assume that he manufactured candy.

Q. And under the name of General Confections? A. General Confections, Inc.

(1602)

Q. Inc.? A. I don't know the exact name. General Confections.

Q. And Reserve Trading, also? A. Reserve Trading, I have to explain that to you in that answer "Yes," because "Yes" will—I can't answer that by answering "Yes" to the words Reserve Trading.

Q. Will you answer this, that when the partnership ended he continued on in the Bronx, his factory; he had a corporation known as General Confections, Inc. and also one known as Reserve Trading; you know that, don't you? A. I don't know whether it was a corporation. I can only explain to you what I know about Reserve Trading, sir.

Q. Well, what do you know about it? A. Excuse me. I didn't hear you.

Q. What do you know about Reserve Trading? A. I did not know about Reserve Trading until about February 1947, when I was about to file the income tax return for Michael Cohen, who was associated with Mr. Lubben in Reserve Trading. He brought the accountant's financial statement, by the name of Sproul Schultz Company, to me. I don't know the exact spelling.

Q. All right. A. And on that financial statement, it indicated Mr. Cohen's share of the participation in with

(1603)

Dave Lubben in Reserve Trading. I used the figure on the accountant's financial statement as an item in the preparation of Mr. Cohen's tax return, and that is all—and Mr. Cohen at that time told me that Reserve Trading——

Q. I don't think—well, go ahead. I won't interrupt you. Pardon me. A. I will stop if you want me.

Q. No, go ahead. Finish. A. (Continuing) That Reserve Trading was dealing in corn syrup after Mr. Lub-

ben left Eatsum Food Products. Whether it was a corporation, a partnership, joint venture, what it was, I used the arithmetical figure on the financial statement that he gave me about a month before I filed Mr. Cohen's tax return.

Q. You understood from Mr. Cohen that the Reserve Trading, since it dealt in corn syrup, was a black market operation; didn't you? A. I understood that Reserve Trading dealt in corn syrup. Whether it was a black market operation or not, I do not know. I could only assume what it was.

Q. And what did you assume?

Mr. Wessel: I object, if your Honor please.

Mr. Stryker: He has volunteered it.

(1604)

Mr. Wessel: In the first place, it is hearsay, and in the second place, his assumption has no relevance in this suit.

The Court: I will sustain it.

Q. Did you gather from what Mr. Cohen told you that Reserve Trading, whatever character of its organization, was a joint venture between Lubben and Cohen? A. I rather gathered that it was a company owned by Mr. Lubben, and Mr. Cohen participated on a profit-sharing plan with Mr. Lubben in its operations.

Q. How much was contributed by each partner at the time of the formation of the Eatsum partnership? A. I could only tell you what was contributed by Mr. Giglio, Mrs. Giglio, Mr. Livorsi and Mrs. Livorsi, because that money was taken out of Tavern Fruit Juice Company.

Q. Can you—pardon me for interrupting you. A. And I remember the checks.

Q. You do? A. (Continuing) Coming out of the partnership check account of Tavern, and going into a special

account to open up the cash investment. I have no knowledge as to amounts or whether anybody else contributed money except to guide myself by the duplicate deposit tickets or the book records.

(1605)

Q. These amounts were checks of the individual partners, were they? A. When you say "these amounts," sir——

Q. I mean the contributions to the capital by the partners? A. I do not know whether they were checks or not. I could only talk about Mr. Giglio and Mr. Livorsi's contribution.

Q. And how about Mrs. Giglio and Mrs. Livorsi? A. A check was drawn for their benefit out of the Tavern partnership checkbook.

Q. And the four that you have mentioned, Mr. and Mrs. Livorsi, and Giglio, that is two, and Mr. Giglio himself, and Mr. Livorsi, were all partners in the Tavern Fruit partnership before the organization of Eatsum, is that correct? A. Yes, sir.

Q. Can you tell me the total amount of the contribution?

Mr. Stryker: Strike that.

Q. Can you tell me the contribution of William Giglio? A. I would have to refer either to the Eatsum books or Tavern books, but I could give you an answer in this manner——

Q. Go ahead, Mr. Roth. A.—between Mr. and Mrs. Giglio and Mr. and Mrs. Livorsi, there was approximately

(1606)

$30,000 taken out of the Tavern partnership to be invested in the Eatsum partnership.

Mr. Stryker: Will you mark this for identification, please.

(Marked Defendants' Exhibit UU for identification.)

Q. I show you Defendants' Exhibit UU for identification, and ask you if you can identify it, and can identify the signatures at the bottom of the paper? Will you tell us what it is? I am not asking you at the moment to read from it. Just tell us if you know what it is? A. You want me to identify each signature?

Q. Well, first can you identify the paper, the whole paper, the whole exhibit? A. I could identify it by reading the caption of the lawyer's legal binder.

Q. I don't care how you do it. Can you identify it? A. On the legal binder it says——

Q. Mr. Roth, my question is, can you identify it? Let's get along. Either you can or you can't identify it. I would like to have your answer. A. This is a partnership agreement drawn by Mr. Goldhill for the Eatsum limited partnership.

(1607)

Q. And can you identify the signatures of the partners at the end of the agreement?

May I come there and look at it with you? A. Yes.

I could identify William Giglio's signature.

Q. All right. A. The second signature looks like—I could identify as David Lubben, but not as positive as the first signature.

Q. You would always be more positive about Mr. Giglio's signature than Mr. Lubben's? A. Because I have seen it more often.

Q. I see. All right, go ahead. A. I could identify Mr. Frank Livorsi's signature.

Q. Yes. A. And this looks like Mrs. Giglio's signature, but I can't identify it as well as I could identify William Giglio's signature.

Q. Yes. And Dorina Livorsi, can you identify hers? A. Except to read the name. I very rarely saw her signature.

Q. Well, in all events, there is no doubt, is there, that the document I have shown you is an original—it looks to me like a duplicate original of the partnership agreement; you have no doubt about that, have you? A. No, if you

(1608)

say so, sir.

Q. Well, you would know more about it than I. You have no doubt that that is correct? A. I never saw the partnership agreement, never read it, and I am trying to be of assistance.

Q. All right, all right. Well, can't you identify this as a duplicate original of the partnership agreement from your long experience there as accountant for Eatsum? Can't you tell me that? A. I never saw the original or the duplicate original agreement.

Q. All the time you were auditing the books and papers you never asked for or saw the partnership agreement; is that correct? A. In the course of auditing the books and records, the partnership agreement is not a factor.

Q. Well, you are an accountant, I am not. I am just asking in the course of your work if you ever had occasion to look at the partnership agreement itself? A. I recall having occasion to look at it once, or Mr. Hausman looked at it for the purpose of determining the percentages of the limited partners and the general partners.

Q. You did look at it with respect to that? A. Either I did or Mr. Hausman.

(1609)

Q. Well, now, I call your attention to paragraph 4 of this paper and ask you if it does not state the capital of the partnership?

Mr. Wessel: I object to the examination of a document not in evidence.

Mr. Stryker: I am not asking anything in it. I am just asking if it states that.

Mr. Wessel: I am sure the document states what it states, but it has no relevance to anything at the present time.

Mr. Stryker: Partnership agreement has no relevance?

Mr. Wessel: If counsel cares to ask if it refreshes the witness' recollection, I have no objection to it. This seems to have a different purpose than that.

Mr. Stryker: I will ask it my way, unless the Court tells me I am wrong.

The Court: I am not sure. Mr. Wessel's point is that this particular document hasn't been received. Apparently there is another copy of the partnership agreement in evidence.

Mr. Wessel: There is Exhibit 21, the certificate.

(1610)

Mr. Stryker: Well, all right. Let me show this to Mr. Wessel, see if I can't—I would like to offer in evidence this duplicate original. Just see if it is a copy.

Preliminary examination by Mr. Wessel:

Q. Do you know, Mr. Roth, the amount of capital contributed by Ronald Stone? A. No, sir.

Q. Do you know the amount of capital contributed by Roy Hankermeyer? A. No, sir.

Q. David G. Lubben? A. Except what the book records indicate on David G. Lubben.

Q. That is the books of Eatsum as distinguished from his return? A. Of Eatsum Food Products Company.

Mr. Wessel: Well, since this record is obviously introduced merely for that purpose, I object to it.

Mr. Stryker: Let me have the one you offered in evidence, then, please.

Mr. Wessel: Exhibit 21.

Mr. Stryker: Mr. Dilberian, Exhibit 21, I am told. We had it out this morning somewhere.

(Handed to Mr. Stryker.)

Mr. Stryker: That is it.

This isn't the partnership agreement you have (1611)

handed me. It is a notice of formation. I want the partnership agreement. I think you said it was in evidence.

Mr. Wessel: I didn't say it was in evidence. I said that document is in evidence. I don't believe there is a partnership agreement in evidence.

The Court: It is not in evidence?

Mr. Wessel: The agreement itself? No.

The Court: Then I misinformed Mr. Stryker.

Mr. Stryker: Well, I thought the same as you did.

The Court: It is my fault.

Mr. Stryker: Then we haven't the partnership agreement. I thought there was discussion that we had.

Mr. Wessel: The only thing I know of—I believe I am correct— is the certified copy of the notice of formation of the partnership.

Mr. Stryker: That is a different paper.
The Court: Then I am responsible for that.
Mr. Stryker: I don't think you are.

By Mr. Stryker:

Q. Here is a document, you identified some of the signatures, and you know that the partnership agreement was formed on June 12, 1945, don't you? A. Yes, sir.

(1612)

Q. Is not this a duplicate original of the partnership agreement? A. I never saw the original, sir, and I don't know whether this is a duplicate original.

Q. Well, isn't it, then an original? I have used "duplicate" because of the appearance of the paper. A. It doesn't appear to be an original because the typing is of carbon paper.

Q. That's right, that is why I said duplicate original. A. I never saw the original, Mr. Stryker.

Q. Well, now, let me just get this, and I will pass on to something else.

Are you telling me that with the signatures you have identified on that paper, you cannot tell me whether that is the partnership agreement or a copy of it, signed by the partners?

Mr. Wessel: Object.
The Court: I will sustain the objection.
Mr. Stryker: I offer it in evidence.
Mr. Wessel: Same objection as before.
Mr. Stryker: That is the very partnership that this case involves, your Honor.

(1613)

The Court: You are saying all these things. All the witness says, "I never saw the original." He

says, "I recognize all these signatures," and he is glad to tell you what the document says, but he can't tell you what that document is.

I think that is about where we end on this thing.

Mr. Stryker: I am afraid we do.

Well, then, I will approach it this way:

Q. Examining paragraph 4 of the document UU, defendants', does that refresh your recollection as to the capital of the partnership and the contribution of the various partners? A. It refreshes my recollection as to the total amount of $67,000 to be contributed as the investment of the partnership. The other items I will have to refer to books and records.

Q. What books do you have to refer to? A. I would have to refer to the Tavern partnership Company books or cancelled checks to indicate the withdrawal of Mr. and Mrs. Livorsi and Mr. and Mrs. Giglio. I don't know where I could get Roy Hankermeyer's investment. I don't know where I could get Ronald Stone's investment.

(1614)

I would have to have the personal check account of David G. Lubben in order to determine whether his amount was $13,500, and I don't know where Mr. Loperfido got his $3,350.

All I do know is that $67,000 was deposited as a credit to the opening investment of the Eatsum partnership.

Q. Is it not a fact, the way this partnership was organized was that the partnership, when formed, bought from Lubben all the assets of the Eatsum proprietorship? A. No, sir.

Q. I show you Defendants' Exhibit—I will give you the number in a minute—for identification.

(Marked Defendants' Exhibit VV for identification.)

By Mr. Stryker:

Q. I ask you to examine this paper, please, and tell me if you can identify it, as well as the signatures at the end. A. You want me to identify it first?

Q. Yes. A. This is the first time I have seen this paper, and it appears to be a contract of sale from David Lubben, with Eatsum Food Products Company, with the binder of the attorney attached.

(1615)

Q. Who is the attorney? A. I could identify the signature on sheet No. 3 of William Giglio, and David Lubben, and on sheet No. 4 I could identify the signature of David Lubben.

There is another signature on here that I could read but I can't identify, it being positive. This one here, sir (indicating).

Q. That is the signature of Bercu, and you can't identify it. I don't mean to say it is a fact, I mean that is the writing. A. The letters spell out Bernard Bercu. I don't know who wrote it.

Q. Well, to be fair to you, it looks to me as though there are initials under it and maybe he didn't write it. A. "C. P. A." is underneath.

Q. Well, you don't know whether it is his or not? A. I don't know whether it is his handwriting. I could only read the name.

Q. Now, can't you, from your work there as an accountant, the books and records, tell this Court and jury what this paper, Defendants' Exhibit VV for identification, is? A. I would have to read that, Mr. Stryker.

Q. Read it, read it, please. I don't mean you have to read every word. Read as much as you can.

(1616)

Mr. Wessel: Object. I am sure counsel isn't asking what the exhibit is. He is asking him if he can identify it as something, and I object to that.

The Court: All right, I will sustain it.

By Mr. Stryker:

Q. Well, look at it and see if you can identify it. A. Am I supposed to——

The Court: You say you never saw that document or an original of it?

The Witness: No, sir, until this very moment.

The Court: Well, that is the end, I think, on that.

Mr. Stryker: Well, could I ask a question or two more on that line, not repeating what I have said before?

The Court: All right.

Q. Now, then, just so I get it clear: During the continuance of the Eatsum partnership, you never examined the partnership articles themselves, nor did you examine the document by which the transfer of property to the partnership was made; is that correct? A. No, sir, that was legal work, not accounting work.

Q. Irrespective of what it was, as an accountant you

(1617)

never saw them or looked at them; is that correct? A. Only in one respect, sir. Either Mr. Hausman or myself looked at a paper—now whether it was that paper or the agreement—in order to see what percentages each one of the partners are entitled to.

Q. Well, did you not set up upon the books of Eatsum the original capital that was put into it? A. It was set up

in a bulk amount by Mr. Bercu, and not the respective shares of each partner.

Q. When did you examine a document to determine what the respective percentages of the partners were? A. I think it was in Mr. Goldhill's office at the very inception of the partnership.

Q. What did you examine? A. Whatever document or memorandum indicated the division of profits between the general, all the general and the limited partners.

Q. Were the papers that you have just testified you examined, were either of those papers Defendants' Exhibit UU or VV for identification? A. Are those the two you just showed me, sir?

Q. Yes, that's right, that's right. A. I do not remember whether I examined those items, those papers.

(1618)

Q. All right. Wouldn't the partnership agreement and the agreement by which the assets of Lubben were transferred to the partnership be the very best evidence, in your mind, to determine, the fact that you were inquiring about? A. I don't know whether it would be the very best evidence, but if those documents indicate the percentage that the partners were entitled to, that may be one of the documents that I referred to or Mr. Hausman referred to in order to determine the percentage.

Q. Well, now, then, in view of your last answer, will you look again at paragraph 4 of UU for identification, and I ask you if you did not examine that very paragraph in connection with partnership contributions? A. I was talking about partnership percentages of profit, not partnership contributions a moment ago, sir.

Q. Well, wouldn't the partnership agreement give the answer to your last question, percentages of profit to part-

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ners? A. If that isn't a document indicating the precentages, I did not see that document, or I didn't refer to it.

Q. Well, isn't it a fact that the net profits of the partnership were to be divided in accordance with the contributions

(1619)

which the partners made to the partnership? A. Yes, sir.

Q. Where did you learn that from? A. I do not recall. Either from the books of account or discussion or original discussion in Mr. Goldhill's office as to what the percentages are to be.

Q. Well, it was your duty, wasn't it, as an accountant to determine that fact by the best evidence that was available? A. I did the best I could, sir.

Q. Well, will you answer my question? Was it your duty to determine that fact from the best evidence available?

Mr. Wessel: I object if counsel wants a yes or no answer to that question.

Mr. Stryker: I think if I am going to ask him for a duty, I don't see how I could ask a more categorical question.

The Court: He doesn't have to answer yes or or no.

Mr. Stryker: Well, if he doesn't have to answer yes or no, I will withdraw the question.

(1620)

By Mr. Stryker:

Q. Will you examine UU for identification, paragraph 8, or, rather, 6, and state whether that does not refresh your recollection with regard to the fact that the earnings were to be in proportion to the capital contributions?

Mr. Wessel: I object. I don't think his recollection needs refreshment in that connection. He has already testified as to his recollection.

The Court: I think Mr. Stryker means, is that the source of his knowledge.

Mr. Stryker: That's it, yes, sir.

The Court: We'll let him answer.

Q. His Honor allows it. Take your time and look at it. A. In addition to other conditions, one of the conditions are that the profit is to be divided in proportion to the investment of each respective partner.

Q. And that document refreshes your recollection or aids in refreshing you in your recollection of that fact, does it? A. That is what it says there, in that paragraph, but whether I referred to this in order to determine the percentage of profit, I do not know.

(1621)

Q. Well, the paragraph that you read correctly states what your understanding as you expressed to the jury was with regard to that matter, does it not? A. In regard to the percentage of the distribution of the profits.

Q. All right. Now, I would just like to have a simple answer to this. I believe his Honor will allow it. If not, of course, I will bow to the Court.

Will you deny that you did not examine Defendant's Exhibit UU for identification when you were engaged as an accountant in figuring out the capital contributions and the partnership divisions under it? A. May I see that document?

Q. Yes, by all means, by all means (handed). A. I will neither deny or affirm. I do not remember seeing this document till today, but I knew of it.

Q. When you were making the determination of the percentages of the contribution and earnings, did you ask for either of the documents I have just shown you? A. Mr. Stryker, I think Mr. Hausman took care of that phase of

it, and there was a working sheet amongst the accounting working papers computing the percentage of profit of each
(1622)
individual partner based on the entire investment.

Now, whether he used those documents or not I do not know. I do not recall computing the percentages except that he submitted it to me.

Q. And you did not inquire further after that to verify what he told you by looking at the original papers? A. Based on the working papers I had confidence in my assistant as to the original documentary data he used in order to obtain his result.

Q. Then your answer is you did not look at those papers or ask for them? A. I, personally, no, sir.

Q. Now, let me see: Mr. Lubben and his fellow partners, or, rather, I will call them his group, I mean his side, contributed, did they not, $33,500? A. Yes, sir.

Q. And Mr. Giglio and his group contributed $33,500; is that right? A. Yes, sir. In answer to the first part of your question, sir, that $33,500 just represented capital investment and not the entire amount of money that was put into the business. That amount was only set up as capital of the partnership.

Q. It didn't involve any checks at all? A. I don't know what you mean by did that involve any checks, sir.
(1623)

Q. Well, you told me $33,500 was Mr. Lubben and his group's contribution. Can you tell me whether the same figure did not represent Mr. Giglio and his group's contribution? A. You mentioned something about checks which I did not understand.

Q. Well, withdraw it for the moment. A. The reason it applies to Mr. Lubben was because he turned over the assets and liabilities of his proprietorship to the partnership

in addition to the cash, while Mr. Lubben—while Mr. Giglio just turned over cash to the partnership; therefore, the difference.

Q. Did there not come a time when the Eatsum partnership drew a check to the proprietorship in the sum of $67,000? A. Mr. Stryker, I drew over a couple of million dollars worth of checks from Eatsum and I would have to refer to the books for that specific item.

Q. Well, let me see if you can tell me from this paper that I am going to show you and which I will ask to have marked for identification first.

(Marked Defendants Exhibit WW for identification.)

(1624)

By Mr. Stryker:

Q. I am going to ask you this, to examine WW for identification, and ask you if that document was issued in the ordinary and regular course of business, if you can identify the document, and the signatures on it? A. This check was not issued in the ordinary course of business. It is a check from Eatsum Food Products Company new account to Eatsum Food Products in the amount of $67,000. It was not an ordinary transaction.

Q. Well, do you recognize the check? A. I recognize that check.

Q. Identify it. A. Well, it is a check, as I just described to you, signed by Mr. Lubben and Mr. Giglio, from a new account to Eatsum Food Products Company, and deposited to another account of Eatsum Food Products Company, but this is a very unusual transaction and not in the ordinary course of business.

Q. I see. Well, now, at all events, you know it was issued and used, do you not? A. It was issued, but I got to explain to you what it was used for.

Q. Well, can you tell me from the date whether that is not within a day or two of the date of the formation of (1625)
the partnership agreement? A. The answer to that question is yes.

Mr. Stryker: I offer this in evidence.

Mr. Wessel: Just one minute. I am going to get another document, if your Honor please.

Could we take a few minutes recess now, please.

The Court: All right, we will take a recess. Don't discuss the case.

(Jury out.)

(Short recess.)

(1626)

(Jury in box.)

Preliminary Questions by Mr. Wessel:

Q. Mr. Roth, I show you Government's Exhibit 107——

(Government's Exhibits 107 and 108 marked for identification.)

Q. I show you Exhibit 107 for identification and ask you first if you recognize that as a copy of a document you have ever seen before? Would you look at it, please. A. Yes, sir; there is two documents here.

Q. That is, this one page is a copy of two separate pieces of paper. A. That's right.

Q. Can you tell me what those pieces of paper, that is, the originals, are? A. The document to the left——

Q. Without describing it in detail, Mr. Roth. A. —is enumerated "Checks and Currency," amounting to $67,000. The document on the right——

Mr. Stryker: I didn't hear the last statement.

A. The document on the right indicates a check deposit of $67,000.

Q. I didn't mean to ask you what the contents of the document were. I want to ask you whether those are copies of deposit slips in June of 1945, relating to the opening of (1627)

the new Eatsum bank account? A. Yes, sir.

Q. Does the deposit slip on the right reflect the deposit of this check for $67,000, which is Exhibit WW, Defendants' for identification? A. Yes, sir.

Q. And does the deposit ticket on the left reflect the several checks which were submitted by the several partners, totaling $67,000? A. A total of $67,000 is checks and currency.

Q. Now I want to show you Exhibit 108 for identification and ask you if that is a photostatic copy of one of the checks which went to make up the deposit ticket on the left? A. Mr. Wessel, the amounts are the same but I never saw this.

Q. And when you say "this," you are referring to Exhibit 108? A. Yes, that check, the amount there, is the same as the amount on the deposit ticket, but I never saw that check.

Q. Now referring to the reverse side of Exhibit 108, do you recognize the second handwriting, that is, the second handwritten signature? I should ask you first of all, is it your handwriting? A. No, sir.

(1628)

Q. Do you know whose it is? A. No, sir.

Q. Does Exhibit 107 refresh your recollection in any way as to what Exhibit WW for identification was, and it was handled on the books of the partnership and the ba... account of the partnership? A. Yes, sir.

Q. Would you state what your recollection is in that connection?

Mr. Stryker: Pardon me. If your Honor please, I think the interrogation is going a good deal beyond the voir dire to determine whether the document that I offered is admissible or not.

Mr. Wessel: I think that is not so, if your Honor please. There are in evidence, as counsel well knows, several hundred checks, or at least a hundred checks, which are not tied in any way into the books, and for which there is no foundation. I am now seeking to lay the foundation for the document which counsel offered, to show how it ties into the books, how it reflects whatever the books do show, and whether or not it adds anything to the evidence now in the record.

Mr. Stryker: Well, if that inquiry at any point is proper, I submit it is not here now. All I am seeking to determine is this a bona fide check, was it used,

(1629)

was it signed in the partnership, was it a document in the partnership? All the other details Mr. Wessel can inquire into to his heart's content.

Now I am offering this check.

Mr. Wessel: The $67,000 check standing by itself means nothing.

The Court: That is what I was going to say, if I ever got the time to say anything about it. I think just identifying it as a check of the partnership doesn't make it admissible. That is about as far as we have gotten in our examination. Mr. Wessel is going to go further. I don't care which one of you does it.

Mr. Stryker: Well, let me ask a question if you don't think I have laid a foundation. Then Mr. Wessel has nothing to do.

Cross Examination Continued by Mr. Stryker:

Q. Is it not a fact that the check which I have shown you—I think it is WW, was drawn to pay Lubben on the old proprietorship account? Isn't that what it was for? A. No, sir.

Mr. Stryker: Can I have the Bercu statement in evidence, January 1946? I think it is in evidence.

Mr. Wolfram: Here it is.

(1630)

Mr. Stryker: Oh.

Q. How is this check I have shown you handled on the Eatsum partnership books? A. This check is the result——

Q. Mr. Roth, I don't want to interrupt you. My question is a simple one. How is it handled on the Eatsum partnership books? A. As an investment of $67,000 to the capital account, divided equally between William Giglio and his associates, and David Lubben and his associates.

Q. That is the check I have shown you? A. Yes, sir.

Q. Isn't that a check drawn out of the new partnership account—it says "New account," doesn't it, at the top—to the old Eatsum Food proprietorship? Isn't that what it is? A. No, sir.

Q. Not that? A. No, sir.

Q. All right. A. That was deposited to the partnership account, not the proprietorship account.

Q. Well, it is a partnership check, isn't it? A. It is a partnership check from a new account, deposited to the

partnership of another account, and if you will permit me, I will explain it to you, sir.

Q. Yes, I wish you would. A. In order that the books, to reflect a distinct cash investment on the part o Mr.

(1631)

Giglio and Mr. Lubben, and the amount of that said cash investment to be distinct and outstanding against any assets or liabilities that were turned over by Mr. Lubben, I suggested that all moneys received from the various partners, a new account to be opened, and then that new account had deposits aggregating $67,000; and I drew a check, or a check was drawn from that new account, of $67,000 to the Eatsum partnership account and credited with $67,000 capital of the Eatsum partnership. Nobody got that money. Instead of depositing each individual partner's limited and general partner's check to the account directly, I just opened up a special account to accumulate the partner's money. When I had all the partner's money, I drew the check and deposited one lump sum to the Eatsum partnership account, and it was called "Capital Investment."

Q. In other words, you are telling me that the maker and the payee were one and the same entity? A. Yes, sir; except two different check accounts.

Q. Well,—— A. (Continuing) One new, one old.

Q. Where did the moneys come from that comprised this check? A. This check? From the new account which was made up of the respective partners' investment. Now

(1632)

I referred a few minutes ago, sir, to the money that was drawn from the Tavern Fruit Juice Company, checks representing the investment of Mr. Giglio and Mr. Livorsi. Those checks were deposited to the new account. When I had those checks together with all other moneys from what-

ever source they came from, that aggregated $67,000, I drew a check of $67,000 and deposited to the Eatsum partnership check account.

Q. Now let me see if even I understand this—— A. Well, I tried to make it——

Q. I am not criticizing you; I am criticizing myself. A. I tried to make it clear.

Q. Yes. As I understand it, you wanted to set up a capital account for the new partnership, capital in the bank for the new partnership; is that right? A. I wanted to show that the capital of the new partnership had a distinct amount.

Q. All right, and in order to do that, you, after accumulating the respective shares of the respective partners, then drew a check which aggregated those accumulations, namely, for $67,000; am I right so far? A. Yes, sir.

Q. Then you took the check drawn by this new partnership—it says "New account,"—and you deposited it (1633) in the new partnership account; is that it? A. Yes, sir.

Mr. Wessel: I think counsel slipped in a word there, which I am sure the witness didn't hear. I suggest the question be read again.

The Court: Will you read the last question again.

(Question read.)

Mr. Stryker: Any objection, or what?

By the Court:

Q. Is that correct, Mr. Roth? Is that the new partnership or the old partnership? A. Your Honor, we opened up the check account just momentarily for the accumulation of those checks, and the bank advised us to call it "New."

There really wasn't any new and old, but in order to distinguish the amount——

Q. You deposited from this new temporary account into the general account of the partnership? A. Of the new partnership. When I said "new partnership" I mean the one commencing May 1, 1945.

The Court: I understand. Thank you.

By Mr. Stryker:

Q. Well, is that the same as though I drew a check on my own account, a check to me, and then deposited it back (1634)
in my account? Is that like that? A. If you wanted to have a special transaction or you had a special transaction, you went to your bank and you said, "I want these checks to clear through this account," and then you drew a check for one, a check to the other in the same bank and deposited it to your other account. It is more than a clearance rather than an effect.

Mr. Stryker: Well, in view of the answers that have been given since I first offered this, I think this is now admissible, and I offer it again.

Mr. Wessel: I don't see what it has any bearing upon at all.

Mr. Stryker: Well, it relates to the start of this partnership, which seems to be one of the central points in this case, as I understand it.

Mr. Wessel: Well, the books show an investment of $67,000. What it is after that I haven't got the slightest idea, except it does confuse, because it shows $67,000.

Mr. Stryker: The books, as I understand—and your Honor will know more about this than I do——

The Court: I am not so sure.

Mr. Stryker: Are really secondary evidence. (1635)

What happens, what checks are drawn, what people do is then recorded in the book, so I should think this would be better evidence than a book.

The Court: At this point I don't see the materiality, Mr. Stryker. Maybe as the trial progresses I will. At that point I will take the check. I think it is just unnecessary. I don't see any harm in it, but I think it is unnecessary.

Mr. Stryker: Supposing I drop it for the moment.

The Court: All right.

Mr. Stryker: Of course, the only difficulty with your Honor's suggestion is that as the trial progresses and we are all much older, this witness may not be here.

The Court: I think this witness has told you about everything—I mean if there is something further you want to ask him about this check, go ahead.

Mr. Stryker: No, I just thought it was admissible on those questions. If you don't think so, of course your Honor rules.

The Court: I understand how the check was drawn. I understand its authenticity. The only question I don't understand at this moment is its relevance, and for that I don't think we need this witness. (1636)

unless you want some surrounding facts.

Mr. Stryker: Well, supposing I drop it at the moment.

The Court: All right.

Mr. Wessel: May I say for the record that I have just looked for the Eatsum general ledger and I find that counsel is using the general ledger, which shows this very transaction.

The Court: All right, let's go on now.

Mr. Stryker: All right.

By Mr. Stryker:

Q. I show you this paper marked——

(Marked Defendants' Exhibit XX for identification.)

Q. (Continuing)—XX for identification, and ask you if you can identify that paper? A. Yes, sir.

Q. What is it? A. Outside of the pencil handwriting——

Q. Well, leave that out. What is the paper itself? A. It indicates——

Q. Just tell me what the paper is. I am not asking for the contents. Just tell me what it is. A. A bank statement.

(1637)

Q. What bank? A. Manufacturers Trust Company.

Q. What account? A. Eatsum Food Products Co.

Q. You have seen that bank statement, I imagine, before, have you not? A. It is the bank statement that was examined by Mr. Hausman. But, Mr. Stryker, the word "New" on this——

Q. What is that? A. The word "New" on this statement, on this document, doesn't click in my mind as being correct at this moment.

Q. Well, that seems to be either a pencil or a pen note. I don't know anything about it, so leave it out if you want to. Here is a bank statement of Manufacturers Trust Com-

pany for the Eatsum Food Products Company. It gives an address at 1841 Broadway, isn't that right? A. Yes, sir.

Q. Did you as an accountant ever see that bank statement? A. May I see that again, sir?

Q. By all means. A. This bank statement was audited by my assistant, Mr. Hausman, but I don't remember seeing it.

Q. Well, you must have done something there yourself as an accountant, didn't you, Mr. Roth? A. I did. I reviewed all the work that he did, but I do not recall just handling this bank statement, because there is a notation

(1638)

on the bottom here, "Audited LJR, AH," meaning Hausman, "July 16, 1945," which indicates that Mr. Hausman handled the bank statement.

Q. Well, he was your man? A. Yes, sir.

Q. Is there any doubt about the authenticity of the paper I have just shown you? A. Except the word "New" that is written on it.

Q. All right. I don't know who it is or who wrote it. I am willing to leave it out or forget it. Is there anything else about the rest of it that isn't authentic? A. No, it appears to be in order.

Q. Was that received by the Eatsum Company in the usual and ordinary course of business? A. Yes, sir.

Mr. Stryker: I will offer that in evidence.

Preliminary Questions By Mr. Wessel:

Q. Is this opening entry, the first righthand top figure, $67,000, is that the opening entry you referred to before? A. Yes, sir.

Mr. Wessel: I object to it. It is completely irrelevant.

The Court: I will sustain the objection. I am not sure whether it is irrelevant, but it is immaterial. It doesn't add anything to what we have already got in the record.

(1639)

Mr. Wessel: Immaterial is what I should have said.

Mr. Stryker: Maybe you can tell me and help me. What in the record have we that shows that so far?

The Court: We have got his testimony in the first place, which completely describes the transaction. How much of the general ledger is in the record——

Mr. Wessel: The complete general ledger.

The Court: If you show me how this is material apart from the general ledger, I will be glad to let it in.

Mr. Stryker: Maybe I can, maybe I can't.

By Mr. Stryker:

Q. You recognize the date of the entry opposite the $67,000 that Mr. Wessel called your attention to, don't you? A. The date is June 13, 1945.

Q. Well, is this a record of deposits of the Eatsum Food Products Company of 1841 Broadway? Just yes or no. Is it a record of that?

The Court: Before——

Mr. Stryker: This is on the voir dire, your Honor.

A. This is a—disregarding the address, this is a record of the deposit of the new Eatsum partnership.

(1640)

Q. Eatsum Food Products Co. was the individual—what do you call it—you helped me before. What is the word I want for the individual operation?

The Court: Proprietorship.

Mr. Stryker: Proprietorship. Thank you.

Q. 1841 was where the proprietorship's office was, wasn't it? A. Yes, sir.

Q. That is where Mr. Lubben's office was? A. But the partnership operated during the month of May at 1841 Broadway before the 19 Rector Street office was opened.

Q. Will you please tell me this, if this document shows to whom the deposit of $67,000 was made? Will you give me that? A. To whom it was made?

Q. Well, that isn't a very good question. In whose account the $67,000 was deposited? A. Eatsum Food Products new partnership account.

Q. I show you Government's Exhibit 96 in evidence. I think you have identified that as the Eatsum partnership general ledger, or am I wrong? Is that what it is? You looked at it many times before. A. Yes, sir.

Q. Would you look at that ledger—some may have been under the impression that $67,000 is indicated there. Will you tell me where it is in that book, in the ledger,

(1641)

and where in the ledger the $67,000 was charged? The ledger is in evidence so you can put in any part you want. A. This $67,000, Mr. Stryker, could not be charged. It could only be credited.

Q. Well, is it credited or what? A. I am looking now. A credit to the capital account of the Eatsum partnership.

Q. What? You didn't finish your answer, did you? A. You asked me where the $67,000 was charged on the books.

I said it couldn't be charged, it could only be credited, and I showed you that the $67,000 was credited to the capital account.

Q. Of the new Eatsum partnership? A. Yes, sir.

Q. Well, that is this very check here we have been boring everybody with, WW, isn't it? A. Yes, sir.

Q. If it was a check drawn on the partnership, wouldn't it be charged, not credited? A. This check was drawn on a temporary new account, just to accumulate the partners' investment. It was money in and out, so it was neither——

That amount of money was neither charged nor credited.

Q. Well, if it was a transaction on the partnership, wouldn't it be charged and not credited in the ledger? A.

(1642)

Are we talking about the new account or the deposit ticket?

Q. I am talking about this check, fundamentally, and the way it was handled in the books. A. Mr. Stryker, there was an Eatsum partnership new checking account opened.

Q. Yes. A. (Continuing) Used for the purpose of accumulating the money from the respective partners. That account served only one distinct purpose for one day, one transaction, to accumulate the money from the partners. After the money was accumulated from the partners, a check was drawn from that new account and deposited to the Eatsum new partnership account. A record in the Eatsum books was not made of that new account, because I had the arithmetical investment of $67,000, from an accounting point of view.

(1643)

Q. Well, before you drew the check, you had in the bank the money to cover it, didn't you? A. In the new account?

Q. That's right. A. I had $67,000.

Q. So that the new account showed $67,000 of money being there? A. Of money being there, received from all the partners.

Q. All right. That was a record both in the bank bank statement, and in the books, wasn't it? A. Only on the bank statement. I just said a few minutes ago, sir, that I did not make a book record of the new account.

Q. Well, was this $67,000 item both credited and charged on the books? A. There was—if you are talking about the new account, there was no record made on the books.

Q. I am only talking about the same thing we have been talking about so long, this check. A. This check was credited on the books in the capital account of the new partnership.

Q. Was it also charged against somebody? A. No, sir, not this check.

Q. Well, I ask you to examine XX for identification, the bank statement, and find out whether or nor it was both

(1644)

credited and charged. I will point out, to save you time, this figure there at the top line (indicating), and then the same figure, I think, three lines down (indicating).

Mr. Wessel: I object because I don't understand the question. You can't charge something on a bank statement.

Mr. Stryker: Well, maybe my language isn't very good. I am doing the best I can, Mr. Wessel.

Mr. Wessel: I don't think the witness can answer the question. That is why I object.

Mr. Stryker: Couldn't he tell us that, rather than you.

A. I see a figure charged, 67,000, but I would like to have the cash receipt book and cash disbursement book in order to determine exactly what it is.

Mr. Stryker: Let me have that general ledger a minute, will you, Mr. Roth, please, so I don't bother you. These, I think, are all my exhibits for identification.

The Witness: Yes, sir.

Mr. Stryker: It is a little difficult for me, your Honor, I apologize——

The Court: I think inadvertently you picked (1645)

up a photostat there which was probably Mr. Wessel's exhibit, and I just thought I would tell you now before they all got scrambled and we would have to take 15 minutes to find out where they all were.

Mr. Stryker: You are right, you are quite right. Now, have I got all my own now?

The Court: That is my fault. I think if I looked out the window today I might help more.

Mr. Stryker: I wish I were an accountant, I would be more help to you.

By Mr. Stryker:

Q. Now, does this 67,000 item on the general ledger, 96, represent the opening balance on the bank statement? I had better give that back to you.

67,000 I am pointing to here, on the general ledger.

Mr. Stryker: Will you read the question again? I have made a couple of interjections that may have confused you.

Read my question so he will have it.

(Question read.)

A. The $67,000 represents the first figure on top of the bank statement, but I do not know whether it is the opening (1646)

balance.

Q. The general ledger wouldn't tell you that? A. No, sir, not without the cash receipts and disbursements book.

Mr. Stryker: That is yours, isn't it?

Mr. Wessel: It is in evidence.

By Mr. Stryker:

Q. Well, isn't it a fact, Mr. Roth, that at the inception of the partnership, Mr. Lubben's 50 per cent contribution of capital was only $33,500? A. Yes, sir, if you put "and his associates."

Q. Well, I would be very glad to do that. I mean Lubben and his side. A. Yes, sir.

Mr. Wessel: If that is the end of the line, and I take it it is, I would like your Honor to know that one of the exhibits defendants put in evidence, Bercu's financial statement of January, 1946, shows exactly that.

Mr. Stryker: Let me see it, will you?

Mr. Wessel: Yes, I will.

Well, apparently it is back at counsel's table.

Q. Does the document Mr. Wessel referred to show that Mr. Lubben contributed $78,000 extra capital?

(1647)

Mr. Wessel: I just said $33,500, counsel.

Mr. Stryker: I'll just ask it my way first, please.

Will you repeat the question, adding to my question that "I show you Government's Exhibit K in evidence."

Now, will you read my question again.

(Question read.)

Mr. Wessel: Objection, that isn't the testimony. He did not contribute $78,000 capital and the witness so testified.

Mr. Stryker: I am asking him as a fact. I cannot remember 1500 pages of testimony. Just the fact.

A. Mr. Lubben's——

Q. Show me what you are talking about so I can see, will you? A. The capital account of Mr. Lubben and associates indicates $33,500.

Q. All right. Do you want to see something else? A. Oh, no, no.

Q. And not $78,000? A. I never said his capital was $78,000, Mr. Stryker.

All right.

Mr. Wessel: May I have that, counsel, for just a moment.

(1648)

By Mr. Stryker:

Q. Didn't I understand you today—I think we are all getting a bit tired—to tell me that Mr. Lubben contributed $78,000 additional capital to this partnership? A. You understood me wrong, sir. The $78,000 as per the working papers that I gave you indicates the excess of assets over liabilities that were transferred from the proprietorship to the partnership, and that excess of $78,000 was due to Mr. Lubben. Mr. Lubben, in addition to that, put in $33,500 capital.

Q. Well, this was a 50-50 partnership, leaving the special partners——

Mr. Wessel: I object, if your Honor please.

The Court: Sustained.

Well, go ahead, let Mr. Stryker get it clarified. Go ahead.

Q. Does Bercu's statement show that? A. I would have to look at Bercu's statement, sir.

Q. All right, do.

Mr. Wessel: My objection, if your Honor please, is that we have now spent about an hour on a subject which I know is positively set forth in the records and could be easily established from that.

(1649)

Mr. Stryker: Let's have it if it is there, then; let's see it.

Q. I am just asking you— A. May I answer your question?

Q. By all means. A. Mr. Bercu's statement is dated January 31, 1946. What I am talking about, and the statement that I gave you, is the opening entries on June 1, 1945, at the very inception of the partnership, which indicates the transfer of assets in excess of liabilities in the amount of $78,000.

Q. Well, the underwriting document back of the entries in the books is the paper that I showed you sometime ago—I think I did not succeed in getting it in evidence—signed by the parties, whose signatures were identified.

Doesn't that show, in fact, what was transferred, not what the books reflect? A. No, sir. What the books reflect, because, for this reason, Mr. Stryker: Regardless of the document, one of the conditions were that Mr. Lubben was to receive the excess amount of cash as per—excess amount of assets as it was liquidated in cash.

Q. Wouldn't the document I showed you, the transfer, show exactly what he was to do and to receive? A. I don't

(1650)

know whether that document would or would not show. I only know what assets were transferred——

Q. You are talking—pardon me. A. What liabilities were transferred——

Q. You are talking—— A. —and what the excess was

Q. You are talking about books? A. I am talking about the opening entries of the partnership books.

Q. Well, now, let me see if I understand this.

Isn't it a fact, Mr. Lubben, that the entries on the books, on any books, these or any other accounts, were made by persons, bookkeepers, who get the facts or alleged facts from the people in the business that know the facts and then enter it? It is really secondary evidence, isn't it? A. No, sir.

Q. Well, let's take part of my question. Is part right? The bookkeepers get the facts from somebody before they put it on the books, don't they? A. If you will talk subjectively about this statement, I could answer it specifically.

Q. Well, I would be very glad to, but I just would like to have you complete my education.

(1651)

Isn't it a fact that books, regardless of the books we are talking about, reflect what a bookkeeper puts down in the books, based on information that the bookkeeper gets from somebody in the business who is supposed to know the fact; isn't that a generally correct statement? A. That is not generally correct, because the bookkeeper puts down what she could support by supporting schedules.

May I explain one item further? If an employer of business tells a bookkeeper, "Put down I got $5,000 in cash in the bank," she puts it down, she is incorrect. But if he tells her, "Put down $1,000" and she can confirm that with a bank statement, then that is correct.

Q. Now, let me ask you this: If Mr. Lubben contributed excess of assets over liabilities in the amount of

$78,000, in addition to the $33,500, shouldn't that have been treated as a liability of the partnership to Lubben and not as a capital asset? A. It was not treated as a capital asset.

Q. My question is, should it have been? A. It was not treated as a capital asset, sir.

Mr. Wessel: That wasn't the question. The (1652)

question assumed it was treated as a capital asset and the witness is answer.

Mr. Stryker: I would like to settle this once and for all. My question was not as you paraphrased it. I asked "shouldn't it be done."

Your Honor, I am tired of these suggestions and criticism, unless I deserve them——

Mr. Wessel: I suggest the question be read.

Mr. Stryker: —I will apologize; if I don't, I don't think I ought to have them.

The Court: Let's read the question. Let's read the question.

(The reporter read the question as follows:

"Q. Now, let me ask you this: If Mr. Lubben contributed excess of assets over liabilities in the amount of $78,000, in addition to the $33,500, shouldn't that have been treated as a liability of the partnership to Lubben and not as a capital asset?")

Mr. Stryker: I said if it was done, if it happened, shouldn't it be treated a certain way.

The Court: You gave him a choice, and——

Mr. Wessel: The question assumed that it was treated as a capital asset and the witness said it was (1653)

not.

Mr. Stryker: I did not assume it was so. I said if it was so, unless I can't use English. I thought that is what I meant.

The Court: I think if you just strike out "instead of a capital asset," there would be no objection to your question.

Now, if you leave that in——

Mr. Stryker: Well, leave out "asset" and just use the word "capital," and then let me have my question again, and I think you will see I am right. Leave out "assets" and——

The Court: Mr. Stryker, as long as you have "instead of a capital asset" in there, that question is defective as to form, because no one has said it was treated as a capital asset. I mean, that language is meaningless.

Now, if you go ahead and ask him the first part of the question or ask either part of the question, one at a time, I think we will get along.

Mr. Stryker: Well, now, let me see—if I strike out the word "assets," would you allow the question then? Then I am talking about capital that we have been talking about.

(1654)

The Court: Why don't we start fresh? We are a little bit overtime now. You have time for about two questions; you go ahead and ask.

Mr. Stryker: Let me try.

By Mr. Stryker:

Q. How did you treat this $78,000 item that you have been talking about as, I think you called it, excess capital? Do you know what I am talking about? A. Yes, sir.

Q. How did you treat that on the general ledger? A. It was recorded on the ledger sheet as $78,000 in the capital account, supported by the excess of assets over liabilities, in the same classification with a line underneath it, $67,000 capital.

Q. Well, shouldn't it, then, have been treated as a liability to Mr. Lubben and not treated as capital? A. By placing it in that account, it was temporarily capital until Mr. Lubben withdrew his own property.

Mr. Stryker: Well, could I have my own question over again and maybe we can get an answer to that and maybe your Honor wants to stop, I don't know.

Just read my question again. I didn't think your answer was responsive.

(1655)

(Question read.)

The Court: Now read the answer. Read the question and answer.

(Question and answer read.)

The Court: Would you like for him to say no, by placing it in that account? Let's not go through that again. I think the answer is good enough. Let's go on to the next one.

Mr. Stryker: I will tell you, it is good enough for the moment, where I can stop. This is tiring, fatiguing, boring stuff, I know, I can't help it.

The Court: I wouldn't say that.

Mr. Stryker: And I think I had better return—I would like to know—I would like to be sure I am returning everything that I have had.

There are your two sheets, Mr. Lubben.

The Witness: Mr. Roth is my name.

Mr. Stryker: I assure you, your Honor, and my family will tell you, I do make mistakes; it is unintentional.

The Court: I don't think you need to talk about mistakes.

Mr. Stryker: I shouldn't do it; it is a habit, and

(1656)

I am sorry for it.

I am showing you, Mr. Roth, of course, SS for identification, TT for identification; they are your property; I am returning them to you.

The Witness: That goes back in that red folder.

Mr. Stryker: Put it anywhere you want.

Now, this goes back to the Government, K.

The Court: We'll adjourn until 10:15 tomorrow. Don't discuss the case.

(Jury out.)

(Adjourned to February 2, 1955, at 10:15 o'clock a. m.)

(1657)

New York, February 2, 1955,
10.15 o'clock a. m.

Trial resumed.

(Jury present.)

LOUIS J. ROTH, resumed.

Mr. Stryker: Can I have Government's Exhibits 53 and 55, please?

Cross Examination Continued by Mr. Stryker:

Q. Mr. Roth, you purchased Mr. Giglio's property in New Jersey on September 1, 1947; that is a fact, isn't it? A. There was an agreement that the property would be transferred to me——

Q. Can't you tell me, a plain answer to that, did you purchase his property on or about that day?

The Court: I am not going to compel a yes or no answer to that, Mr. Stryker.

Go ahead, complete your answer.

A. Looking at the document I saw in the courtroom, it was an agreement of sale, and the property was transferred (1658)
to me.

Q. Can you give me the date? A. About September 10, 1947.

Q. Now, at the time that that transfer of Mr. Giglio's Jersey property was made, he was indebted to you for money, was he not? He owed you money? A. My records would show the exact balance because he owed me some money, taking into consideration the money I received from American Brands and the money that I advanced for him, he owed me the difference.

Q. Then the answer to my question is yes, he did owe you money? A. Some money he owed me.

Q. All right. Now, you knew that Mr. Giglio owed a great deal of money, which he had borrowed to amortize payments to the mortgage company, the company that held the mortgage, the first mortgage on his house? A. I don't know how much money he owed.

Q. I didn't ask you that. I just asked you if he did. A. You asked me, do I know whether he owed a good deal of money that he borrowed to amortize payments on his

house. I said to you, I do not know how much money he owed that he borrowed to amortize payments on his house.

(1659)

Q. Well, then, it is a fact, however, that he owed money, if you can't tell me the exact amount; is that right? A. Well, he owed me some money that he told me was used for amortization payments on a house.

Q. Well, you know that he used the money to amortize the payments on his house, don't you? A. I do not know of my own knowledge except what he told me.

Q. I see. Now, the fact is, isn't it, that you had advanced before you got the deed $20,000 to Mr. Giglio; is that a fact? A. That is what the agreement indicated.

Q. Would that refresh your recollection as to the fact? A. The only thing that will refresh my recollection, if you will permit me to refer to my papers.

Q. Do, do.

(Handed to witness).

By Mr. Stryker:

Q. Mr. Roth, I don't want to interrupt you, but maybe I can save time.

Would you be good enough—I think this might serve the purpose. If it doesn't, why, do anything you want.

(1660)

I show you Government's Exhibit 55 in evidence, and call your attention to the statement which is in evidence:

> "Whereas the said Louis J. Roth is justly indebted to the said party of the second part in the sum of $20,000, lawful money."

Would that refresh your recollection? That is the—— A. Mr. Stryker, that is his statement that is in this agree-

ment, but that is not the actual fact of my money transactions with Mr. Giglio.

Q. All right. Well, is the mortgage—what am I saying—yes, that is the mortgage that you gave back, the purchase money mortgage that you gave back to Mr. Giglio when you took the deed, isn't it? A. I don't know what I gave back because Mr. Tepper, who was brought in by Mr. Lawn, handled the entire transaction. I don't know what I gave back.

(1661)

Q. Well, here is the mortgage in evidence—I presume you read it, didn't you, when you signed it? Doesn't that refresh your recollection? Didn't you read it at that time? I do not want to take the time to read it all through, but just look at it. A. I signed it but I did not read the contents of it.

Q. All right. Now this paper, 55 in evidence, a mortgage, Louis J. Roth to Manuel Giglio and Margherita Giglio, was, as it bears on the back, recorded on September 15th, in the County Clerk's Office of Monmouth County; that is correct, isn't it? This is a Government's exhibit. A. Well, that is what it says on there. I do not know whether it was or was not recorded, Mr. Stryker: I did not handle that transaction.

Q. Would you care to dispute the fact that it was recorded? A. I am not disputing or affirming it.

Q. All right. A. I had nothing—Mr. Tepper, who was Mr. Giglio's and Lawn's attorney, took care of that situation.

Q. Well you knew, did you not, that you were signing a mortgage to Giglio after he had given you the deed? A. I signed a second mortgage to Mr. Giglio.

Q. Well; you knew you were doing that? A. I knew I

(1662)

was doing that, yes, sir.

Q. All right. Well, you said here, in response to one or two of Mr. Wessel's questions, that you were in a conspiracy, haven't you? A. What questions are you referring to, Mr. Stryker?

Q. Well, don't you remember saying that, without making me go back through— A. I do not know whether I said it in response to Mr. Wessel's questions.

Q. Well, have you not said it in this court? A. What is that, sir?

Q. Have you not said in this court that you were guilty of a conspiracy? A. I did, sir.

Q. Now was any request made that this transaction, this mortgage and deed, be concealed and held clandestinely and not filed so that the whole world could see it? A. That is not the way it was explained, Mr. Stryker.

Q. Was anything of the kind what I have said, said? A. Very much so.

Q. "We must not reveal this anywhere"? A. It wasn't the exact word "reveal," but the purpose was to hide.

Q. So then after that conversation both the deed and the mortgage were recorded, weren't they? A. I don't

(1663)

know whether the deed and the mortgage was recorded. I could only tell you the circumstances to hide it.

Q. Well, I won't pursue it except to call attention to the Government exhibit itself which shows on the back with respect to the deed that was recorded September 15, A. D. 1947, in Book 2133 of Deeds, on Page 455, signed J. Russell Woolley, County Clerk.

The Court: What is the purpose in calling that to my attention now?

Mr. Stryker: So that I don't have to ask him. I am calling it to the jury's and your Honor's attention.

The Court: Why do you call it to the jury's attention now? Do you think that is in conflict with what he said? Is that what you are suggesting?

Mr. Stryker: No, no, not at all. I am just—instead of stopping to prove the fact I am stating what is in evidence, that is all.

The Court: I mean, you are going to sum up at the end of the case. I wonder why you wanted to mention this fact now.

Mr. Stryker: Well, does your Honor object to my mentioning it?

The Court: Yes, I do, because I think there (1664)

is a suggestion that that is inconsistent with this witness's testimony, and it is a long and complicated subject, and it is unfair to ask a man a question and then you, with the liberties that a lawyer has to comment on another piece of evidence, and suggest an inconsistency—I don't expect, if there is a conspiracy, that it was a childish conspiracy, and I think it is wrong to work on the premises.

Mr. Stryker: Well, the reason that I have produced these documents and have marked it is because of the fact of their being openly recorded in the County Clerk's Office, does, in my view, conflict with the idea of clandestinity or conspiracy.

The Court: That is a matter of argument between you and Mr. Wessel on all the facts in the case.

Mr. Stryker: All right.

The Court: And not upon a single question to this witness.

Mr. Stryker: All right.

Q. Now at the time of this transaction, did Mr. Giglio say to you, "Please give me a note so that we can conceal this transaction"? A. I don't recall that statement on the part of Mr. Giglio.

(1665)

Q. All right. Now, Mr. Roth, did you, in answer to one of Mr. Wessel's questions, describe the Government's assessment procedure? A. May I see the question and answer, sir?

Q. I am just asking you if you did not. Can you answer it yes or no? A. I answered a great many questions of Mr. Wessel's and I want to be certain that you are referring to the correct question and answer. May I see the written record?

Q. Well, would you repeat from recollection what you said here in this court as to the government assessment procedure? A. Well——

The Court: Well, now, Mr. Stryker——

Mr. Stryker: I will withdraw that.

The Court: I am only interested in saving time. I am not going to have this man try to recast the exact language he has previously used on such a subject as that. If you want to ask him now to describe it again, very well.

Mr. Stryker: That is what I want him to do.

The Court: But to ask him to try to think back how he described it when he was here——

Q. Well, describe it now——

(1666)

Mr. Stryker: I will follow your Honor's suggestion.

Q. Will you describe now the governmental procedure in the matter of assessments? A. When—my answer to you is based upon my knowledge and experience, sir.

Q. Go ahead, that is what I am asking for. A. When a tax return is filed and no payment is made, my experience has been during a period of two or three months you get a typewritten assessment notice from the Government, indicating the unpaid balance of taxes. A Deputy Collector usually handles that matter, and he follows through the collection. In this particular case, subjectively speaking, it would have been more speedier action than two or three months because tax returns were not filed on the proper date and were long past due. So I assume that speedier action would be taken on the part of the Deputy Collector to get in touch with the taxpayers and commence enforcing collection.

Q. The mortgage, Government's Exhibit 55, from you to Giglio, dated September 11, 1947, represented an asset of Giglio, didn't it? A. To my knowledge—yes—to me personally there was equity or an asset that was due to him.

(1667)

Q. All right, and the asset, according to the face of the mortgage, at least was $20,000, wasn't it? A. I would have to look at the mortgage, sir.

Q. I am showing you 55 in evidence (handing). A. The arithmetical amount is $20,000 on this mortgage.

Q. And then that which you have described as an asset as reflected in the mortgage was, according to the record, recorded in the County Clerk's office, wasn't it? A. Yes, sir.

(1668)

Q. All right. Now, the tax returns in this case, that we discussed so much, were filed in September, 1947, weren't they? A. About September 15, 1947.

Q. Did the Government ever attack the asset of Giglio, namely, the $20,000 mortgage which he held on the New Jersey house, to your knowledge? A. I do not know.

Q. Did the Government ever contact you with regard to filing an assessment against Mr. Giglio's tax based on the asset recorded? A. I did not quite understand that question, Mr. Stryker, excuse me, whether the Government attacked me or contacted me?

Mr. Stryker: I think I will withdraw the question.

By Mr. Stryker:

Q. Did the Government ever state to you that they desired to or were going to file an assessment against Mr. Giglio for the recorded asset of $20,000? A. The Government never contacted me for the purpose that you mentioned.

Q. And as far as you know no such assessment ever was filed? A. To my knowledge, I do not know of any

(1669)

assessment.

Q. I see. A. But I do recall invoices, lr, let's—assessment notices. May I distinguish "assessment" between "Assessment notices," so we could understand each other more clearly?

Q. Why, of course. A. An assessment notice, to my mind, represents an invoice or a statement from the Government indicating the amount of money due from the taxpayer. That is an assessment notice.

The word "assessment," to my mind, means an attachment.

Now, I am talking about notices from the Government of indebtedness due for taxes.

Q. Do you know if the Government ever tried to collect from you the $20,000 you owed Giglio according to this mortgage? A. I never was contacted by the Government for that purpose.

Q. You were present at the Jersey receivership hearings, weren't you? A. I was present once when I testified, that is all the hearings I was present at.

Q. That was the place where you told us on your direct examination that you lied? A. I did, sir.

Q. Do you know whether Mr. Twohig attended those (1670)

hearings? A. I do not know, sir.

Q. All right. When, as nearly as you can fix it, did you testify falsely, under oath, in the receivership? A. Approximately June or July, 1948, within that area. There is an official record. I could give you the exact date.

Q. Did you get the minutes of your testimony from Walter Kohn? A. I do not recall where I purchased the minutes from, either the secretary or I gave Mr. Walter Kohn, the attorney, the money for it.

Q. Mr. Walter Kohn was the attorney for the receiver; is that right? A. No, sir. He was not the attorney for the receiver.

Q. Who was he the receiver for? A. He wasn't receiver for anybody. He was the second attorney that was employed when the first attorney was unsuccessful.

Q. All right.

I said "for the receiver." Was Mr. Kohn employed by Mr. Giglio? A. Yes, sir.

Q. All right. A. I believe he——

Q. Now, when you got those minutes from Mr. Kohn, did you promise to return them? A. I do not recall any (1671)

obligation to return them.

Q. I am not talking about an obligation, I am talking about a promise. A. I do not recall that I was obligated to promise to return them.

Q. Irrespective of whether you were obligated or not, did you promise? A. I do not recall promising to return them.

Mr. Stryker: I would like to have this marked for identification.

(Marked Defendants' Exhibit YY for identification.)

By Mr. Stryker:

Q. I show you YY for identification, Mr. Roth, ask you to examine it, and, without reading the contents, see whether it bears your signature and what the paper is? A. It bears my signature.

Q. What is the paper? A. It is an office memorandum sheet of Walter T. Kohn.

Q. Well, I can read that much. I am just asking you, what is the paper. What is the nature of it? A. I didn't read the contents. I can only——

Q. Will you, will you read it; it is short. A. You asked me not to read the contents, sir.

(1672)

Q. If I said that, what I meant was, don't read it out loud until it is in evidence. Will you now read it to yourself. A. Oh, I see.

I read it, sir.

Q. Will you tell me now what the paper is? A. Before I answer that question, I am doubtful about the two handwritings that are on the paper. There appears to be handwriting that is not mine, sir.

Q. Well, is the bottom of the paper your handwriting, the signature? A. The signature is mine, but there looks like an insert right over my signature, which is not in the normal course of the writing of the entire piece of paper.

The Court: There is a light over there, Mr. Stryker.

By Mr. Stryker:

Q. Will you take your papers. I don't want to see your papers. Please put them aside.

Well, you signed this paper, didn't you? A. That is my signature.

Q. And you are claiming something was written in after you signed; is that your point? A. I am not claiming anything. I am only telling you that the handwriting, part of the handwriting on that piece of paper is mine, but

(1673)

right above my signature, between what I could recognize as my handwriting, is inserted different ink, and something that looks like my handwriting, jammed in over my signature.

Q. Well, we will come to that. Is this a receipt signed by you for the minutes, the stenographer's minutes that we are talking about? A. Up to the writing that I referred to, which does not look to be mine. It says that I received from Walter Kohn the minutes, but, Mr. Stryker, if you please, sir, I have paid Mr. Walter Kohn on three different occasions for copies of the auditor's reports, for copy of minutes, and for part fees that he told me that he doesn't want to go ahead with the case because Mr. Giglio is not paying him. I paid him on three or four different times. This may be one of the times.

Q. All I am interested in at the moment, Mr. Roth, is whether that is a receipt you gave Mr. Kohn. We will come to the contents, once I have that established.

The Court: How can you characterize it as a receipt without coming to the contents?

Mr. Stryker: Well, I am asking him if it is not (1674)

that. If it is not, he can tell me.

A. I acknowledge receiving from Mr. Kohn hearings in Chancery Court identified by pages.

Q. And is this the paper you gave him when you got the minutes? A. Except for the specific wordage that I referred to, that appears to be jammed in over my signature, the answer is yes.

Mr. Stryker: I offer it in evidence.

Preliminary Examination by Mr. Wessel:

Q. Do you have your checks with you, Mr. Roth? A. Yes, sir.

Q. Do you recall when—could you quickly, without taking too much time in court here, see if you can find a check to Mr. Walter T. Kohn about the date of this document?

The Court: May I see that, what we are fighting over here?

(Handed.)

Mr. Stryker: I beg your pardon for not showing to you first.

The Court: No, I think in ordinary course of business I am not supposed to see it.

I am not going to take time to establish the authenticity of this document.

(1675)

I don't see that it has any bearing on the issues of this case.

Mr. Stryker: Well, it relates to the minutes of the hearing where this witness says that he testified

falsely. I can't establish the connection of the evidence all in one question, and if it is his receipt, can I have it piecemeal as I go?

The Court: Mr. Stryker, when you establish the relevance of that document, we will go back to the question of authenticity. I am not going to take time now.

Mr. Stryker: All right, I respectfully except.

Will Mr. Dilberian—oh, I call on the Government to produce the minutes of the hearing concerning which this witness was interrogated on his direct examination.

Mr. Wessel: If your Honor please, I have some minutes here which the Government purchased at its own expense. They are not in connection—they are not from this witness' possession.

I would have no objection to letting counsel see Mr. Roth's testimony, but I don't want him to see the testimony of the other defendants.

(1676)

Mr. Stryker: I am not interested at the moment in any testimony but Mr. Roth's.

Mr. Wessel: I will certainly let you see that, sir.

The Court: All right.

Mr. Wessel: Just give me a minute; I will take it apart.

Mr. Stryker: Tear it apart any way you want. While Mr. Wessel is doing that——

By Mr. Stryker:

Q. Will you tell me, please, when you told Mr. Wessel——

The Court: Just a second now.

Mr. Wessel: I want to follow this testimony.

If it is going to take sometime to take that apart, we can take it apart and give it to Mr. Stryker later.

Mr. Wessel: It will just take me——

Mr. Stryker: I thought one of the assistants might do it, but I will be glad to wait. Either way, it doesn't matter.

The Court: All right, we will go ahead.

(1677)

The Court: All right.

Mr. Stryker: I think I started a question, didn't I, your Honor?

The Court: I don't know.

Mr. Stryker: Will the reporter tell me?

(Question read as follows:

"Q. Will you tell me, please, when you told Mr. Wessel"——)

Q. That you denied your testimony before this receiver proceeding in the jury? A. Sometime between January 4th and January 15th.

Q. This trial started on the 10th of January; did you tell him before or after the trial started? A. I don't recall the exact date; I could only give you that it occurred on one of those—Mr. Stryker, I would, to the best of my recollection, it was the first four days that I was with Mr. Wessel together with about five or six other agents. To the best of my recollection, it would be January 4th, 5th, 6th, 7th, provided a Sunday is not between there.

Q. All right.

Mr. Stryker: May I have your Honor's permission now to receive from Mr. Wessel the——

The Court: You have my permission to have you

(1678)

do it if Mr. Wessel wants to give it to you. Incidentally, I think it would be highly desirable, if you are going to call on the Government to produce anything, to tell them at the beginning of the session or at the recess, so that we do not have to hold up the trial while you ask them to produce something like this. If Mr. Wessel has no objection to giving it to you, but we might wait until the recess.

Mr. Stryker: Certainly, by all means, I will be glad to wait.

The Court: I don't like to have Mr. Wessel's staff diverted from the examination of the witness.

Mr. Stryker: No, no.

The Court: Looking for testimony.

Mr. Stryker: Well, this particular paper was not in our subpoena because we did not know of it when the subpoena was served.

The Court: It just seems to me that a little advance notice should have been given.

Mr. Stryker: I quite agree with you and if it occurs again I will try to do that.

Q. Mr. Roth, let me take—let me work for the moment in the line that I am approaching—— A. Yes, sir.

(1679)

Q. On your figures as testified to yesterday by you at pages 1565 to 1568 of this record on the issue of the net amount withdrawn from the Eatsum partnership by David Lubben for the period in which he was a partner. You testified, I believe——

The Court: Just a second. Mr. Wessel, is the gentleman next to you your accountant?

Mr. Wessel: Yes, sir.

The Court: I want him to follow this testimony and never mind those minutes.

Q. You testified, did you not, that the starting capital for David Lubben's fifty per cent of Eatsum partnership was $33,500; is that right, isn't it? A. Yes, sir.

Q. In addition to that you said that Lubben was entitled at the inception of the partnership to an excess of assets over liabilities in the amount of $78,069.28. You said that, didn't you? A. Not exactly that way: excess of assets over liabilities that he as a partner transferred to the partnership.

Q. All right. As amended, that is what you said? A. Yes, sir.

Q. All right. It would follow then, would it not, that the total amount of these two figures, that is, $33,500 and

(1680)

$78,069.28, aggregated the sum of $111,569.28. That is simple arithmetic. Would you agree to that? A. No, those two items added together just is mere addition.

Q. That is all I am asking A. And nothing else.

Q. I am not asking for anything except that. That is a fact? A. Yes, mere addition.

Q. That is right. You also testified, did you not, that the total withdrawn of David Lubben for his fifty per cent of Eatsum partnership was $236,342.37. A. May I refer to my papers, sir?

Q. Yes, surely. Do you want the minutes? A. No, no.

Q. Oh, you mean your papers? A. (After examining papers) Mr. Stryker, may I hear that question again?

Q. Certainly.

The Court: Read the question.

(Question read.)

A. I testified that the withdrawals of David Lubben was $236,342.37, but not as his fifty per cent.

Q. At all events, you testified that those withdrawals were made. A. In addition to the word "withdrawals" that represents the physical property and checks drawn to him. If that is the definition of "withdrawals" yes, sir.

(1681)

Q. I am only taking it from what I understand you testified to. Did you not yesterday at page 1568 of the record, figure for us the net amount drawn by Mr. Lubben, and I quote you as follows from that page:

> "And deducting the amount that he was credited in the capital account for $110,000, the net amount withdrawn from the partnership by David G. Lubben is $124,733.09."

A. Seven fifty-three.

Q. I want to read it again: "$124,773.09." Is that right? A. That statement, as you have presented it to me at this time, is incorrect. I said that the net amount withdrawn which is made up of not checks but adjustments and physical property.

Q. In other words, you wish to correct the testimony that I have read? A. No, sir; it is my opinion that, and recollection, that that is what I said.

Q. Let me read you from 1567 this question asked you and did you give this answer:

> "Q. All right, go ahead. A. Deducting the amount of the charge to him by withdrawals and reserves, $236,000, and deducting the amount that he was credited in the capital account for $110,000,
>
> (1682)
>
> the net amount withdrawn from partnership by D. G. Lubben was $124,773.09."

Was that question asked you and did you give that answer? A. Then I went on. The answer is, "Yes, but I want to

explain." Then I went on further to advise you that the $124,000 represented transferred physical property, and we have computed the net amount of cash that the $124,000 represented, was $29,000 or $30,000; the rest was physical property that was applicable to the withdrawn amount.

Q. He got the property, whether it was cash or property? A. He got the property but I am just defining the word "withdrawn."

Q. On your figures Mr. Lubben got, did he not, his investment of $33,500 back plus the $78,069.28 which you discussed yesterday and that you allege was due him plus $124,773.09; is that not the fact? A. Mr. Lubben received that amount of money but in these three classifications. I do not understand the way you are putting it, Mr. Stryker, humbly begging your pardon, but that $236,000 represented three items: it represented the $78,000 which was his property that he transferred to the partnership; it represented the $33,500 cash that he invested in the business; and it represented $124,000 that he drew over and above those two

(1683)

amounts. Now the word "withdrawn" is adjustments of physical property and money out of the business.

Q. At the Ronayne conference to which you alluded in your direct and I think cross, too, did Mr. Lubben say that he ever got the $100,000? A. I do not recall—if we are talking about the same conference.

Q. You were called to a conference at Mr. Ronayne's office; that is the one I am talking about. A. Yes, sir. There was nothing—I do not recall anything ever being mentioned about $100,000 at that time.

Q. After the dissolution of the partnership you were in frequent touch with Mr. Lubben, were you not? A. In touch? If you mean telephone conversations?

Q. Anything. A. To collect money, if that is a definition of the word, "in touch," yes, sir.

Q. That will do. You were doing that? A. I communicated with him in order to collect the notes and the moneys that were due.

Q. And you collected the notes that were due, all except the last two or three, I think, is that right? A. Whatever the record indicates, sir.

(1684)

Q. Now, that period of collection—just give me the best dates you can; it began about when and ended about when, from your memory? Can you give me that? It ran over many months, didn't it? A. It ran over I would say six, seven, eight, nine months after Mr. Lubben left.

Q. All right. And were those weekly or monthly payments that he made? A. To the best——

Q. Give me your best memory. A. May I have the general ledger? I can give you accurately, and like this I will give it to you approximately.

Q. I don't care about the accuracy of the dates, but if you want the ledger—— A. I say to the best of my recollection, some were weekly and then later on the time was extended after about the seventh, eighth, ninth note. He couldn't get it weekly and the time was extended semimonthly. I am vague on the dates.

Q. I am not particularly interested in the exact dates; I want to get the general period of time. You testified on your direct concerning the collection of those notes, didn't you? A. I recall testimony that I followed up and collected the notes.

(1685)

Q. Did you testify to all the conversations that you could recall that you had with Mr. Lubben concerning the collection of those notes? A. I replied to whatever questions Mr. Wessel asked me.

Q. Well, at any time during that period of eight or ten months, or whatever the period was, when you were collecting—when you were collecting and he was paying those notes, did Mr. Lubben ever say that he was owed $70,000 on the corn box? A. Didn't mention anything to me. I have no recollection of that ever being mentioned to me by Mr. Lubben.

Q. All right.

Did he mention—he was paying these notes right along up to the end, as I understand it. Did he mention the non-payment to him of any other sums of money that he claimed were due him? A. Yes, sir.

Q. What was that? A. When I kept hounding him for the money, he said, "Well, Giglio owes me a great deal of money because in my contract of sale of my share he agreed to pay all my taxes as a result of my share in the business, because I am going out without any money."

(1686)

Q. Now, did that exhaust the conversation on that subject? A. Mr. Stryker, excuse me. I don't know what you mean by did it exhaust the conversation on the subject.

Q. Was that all he said about it? A. Substantially, that is what he said.

Q. Was that the same conversation that you have already described in this record, having had it at Mr. Ronayne's office, where Mr. Lubebn asked for $25,000; is that the same conversation? A. Yes, sir.

Q. Passing to another subject, Mr. Roth, you stated on Friday, did you not, that the Cornelison Corporation building was purchased by members of the Giglio family? A. I did not say that.

Mr. Stryker: Wait a moment. Sorry, I try to have the pages, but maybe I have it now.

The Court: All right.

By Mr. Stryker:

Q. Page 1223 of the record here, were you asked this question and did you give this answer:

"By Mr. Wessel:

"Q. I will reframe the question, Mr. Roth. What was the Cornelison Holding Corporation in 1946?

(1687)

"A. The Cornelison Holding Corporation was a corporation organized by the brother, sister and wife of William Giglio, to hold—to own the property, or as purchasers of the property at 101 Fairmont Avenue, Jersey City, New Jersey."

Were you asked that question and did you give that answer? A. That is my answer.

Q. All right. Then that corporation and the building were, were they not, the property of the Giglio family? A. No, sir.

Q. Did the Giglio family receive any rent from the corporation? A. Cornelison Holding Company did not receive any rent from American Agar.

Q. I didn't ask that question. I said, did the Giglio family receive any rent? A. I do not know of any rent that the Giglio family received from American Agar Corporation.

Q. Is it not a fact that at the time of the receivership this building was turned over to one of the large creditors of the corporation as part payment of the debts of the corporation? A. I do not know of that. It may be.

Q. Who owned the Van Dyk Corporation? A. To the best of my recollection, Van Dyk was owned 50 per cent

(1688)

by William Giglio and 50 per cent by Dr. Van Dyk.

Q. Now, when Mr. Giglio and Mr. Livorsi sold their interest in the Van Dyk Corporation in August or September of 1947, did they take the money that they got and put it in their own pockets as they were entitled to do? A. You said when Mr. Giglio and Mr. Livorsi sold their interest.

Q. Yes. A. I do not know that Mr. Livorsi had an interest in Van Dyk.

Q. All right. A. I just said that 50 percent of Mr. Giglio, and 50 percent Dr. Van Dyk.

Q. Well, leaving out Mr. Livorsi, then, did not Mr. Giglio take the money that he received for the sale of this, his own asset, and put it into the corporation, in order to attempt to bolster up the corporations, I should say—in order to bolster up those dying companies? A. I will go along only for the first part of the question; to bolster up the dying companies, I can't answer. I could only say that the money found its way into American Brands Corporation. For what purpose, I have to look at the books to find out what the disbursements are against that money.

(1689)

Q. I show you this paper, first marking it for identification.

(Marked Defendants' Exhibit ZZ for identification.)

By Mr. Stryker:

Q. I show you Defendants' ZZ for identification and ask you to examine it, state whether your signature is on it, if you identify the other signatures? A. I could identify some signatures on this document.

Q. Will you identify those that you can? A. The signature of William J. Giglio as president; the signature of William J. Giglio as an individual; my signature written; Frank Livorsi; Louis J. Roth, power of attorney; my

signature, Louis J. Roth, Secretary; and the peculiar script which I recognize, which is rather outstanding, of Dr. Van Dyk.

Q. He was a Hollander, wasn't he? A. Well, I don't know whether he was a Hollander, but he was continental.

Q. He was one of the chemists that you have referred to in this trial? A. Yes, he was——

Q. Looking at that paper and having identified the signatures, can you tell us what it is? A. Only by reading

(1690)

it, sir.

Q. Well, take your time and read it. It is very short. You can do it in a minute. A. Yes, sir.

Q. What is the paper? A. To me, my interpretation of this paper is a memorandum whereby Mr. Giglio and Mr. Livorsi are selling their stock in the Van Dyk Industrial Company to Dr. Van Dyk.

Q. Well, does that refresh your recollection, then, that Mr. Livorsi did have an interest in this company? A. Mr. Livorsi may have an interest in that company. I never knew it to be until I read this document, but I always regarded that Mr. Giglio was 50 per cent partners with Dr. Van Dyk in Van Dyk Industrial Company.

Q. Well, doesn't this paper serve to correct your recollection on that? A. No, sir. The paper states it, but it is something brand new to me.

Mr. Stryker: I offer it in evidence.

Mr. Wessel: There isn't any foundation for it, if your Honor please.

Mr. Stryker: He identified the signatures and what it was. I don't know what more I can do.

(1691)

The Court: Well——

Mr. Stryker: Let it go. I withdraw the offer.

Your Honor, I am trying to do this as well as I can by topics. It would only be confusing if I started and didn't finish. May we have a short break here?

The Court: All right, we will take a recess now. Don't discuss the case.

(Jury out.)

(Short recess.)

(1692)

(Jury in box.)

The Court: I guess we are all set now.

(Government's Exhibits 109-A and 109-B marked for identification.)

Mr. Wessel: Those are the pages of the receivership proceeding, pages 60 to 83 being Government's Exhibit 109-A for identification and pages 97 to 109, being Government's Exhibit 109-B for identification.

Mr. Stryker: Thank you very much.

Mr. Wolfram made a request for some papers and since your Honor's suggestion that we do it during recess, I just wondered if they are handy, and if not, I will go on to something else.

The Court: If they have it handy.

Mr. Stryker: It will only take a minute.

Mr. Wessel: As I understand it, that refers to American Brands and the copies of those were given to the defendants years ago.

Mr. Stryker: I would like the originals.

Mr. Wessel: I do not see how that has any bearing; they are not involved in this proceeding.

Mr. Stryker: But they bear very much, in my opinion, and I would like to see them.

Mr. Wessel: Counsel has had the photostats of (1693) it for some time and I do not know how the originals come into play at this time, sir. If they should and if there is some relevance——

The Court: If they are easily available you may give them to him now, otherwise we will get them at two o'clock.

Mr. Stryker: I am told that we did not get photostats—I don't know.

The Court: All right.

Mr. Stryker: Let me go on.

By Mr. Stryker:

Q. Mr. Roth, you testified that the inventory of the Tavern was not included in the Tavern partnership information return, didn't you? A. We are talking about the Tavern partnership?

Q. Yes. A. The inventory at the end of the fiscal period of the Tavern partnership was not used in computing the profits earned by the partnership.

Q. Well, that partly answers me, but what I asked you was whether the inventory of Tavern was or was not included in the Tavern partnership return. A. It was not included in computing the profits of the partnership tax return.

Q. It was not included at all in the return? A. Com- (1694) pletely omitted.

Q. All right. Now let's see. Isn't it a fact that Tavern as a partnership ceased active business late in 1945? A. I would like to refer to the books in order to see the last sale.

Q. What book? I don't know. A. The Tavern accounts receivable, accounts payable ledger.

Q. If the Government has it you may have it. A. Mr. Stryker, may I have my red folder. I think I could help myself.

Q. Have you got it down there? A. I returned it.

Q. I haven't got it, but you are welcome to it.

(Mr. Wessel hands folder to witness.)

(Papers marked Government's Exhibit 110 and 111 for identification.)

Mr. Wessel: Which I now hand to counsel.

The Court: All right.

Q. Couldn't you save the time, Mr. Roth? Don't you know from your knowledge of the business? A. I would say about the end of November 1945.

Q. All right. Now, isn't it a fact that the American Brands Corporation took the Tavern business and conducted precisely the same type of business that Tavern had done.

(1695)

A. It did take over the operations, but it is a question of dates now.

Q. Well, did it take over when Tavern got through and quit? I think you said November 1945. A. Toward the end of November.

Q. All right. Was it at that time or shortly thereafter that the American Brands was organized and took over the business that Tavern had theretofore been doing? A. American Brands operated the same type of business that Tavern did.

Q. And it took over the jams and jellies business and went on with it, is that right? A. Some of the assets of the partnership were transferred to the corporation and the corporation continued operating the jelly business.

Q. By the way, they did a very large business, didn't they, at Tavern, at Eatsum, during the partnership? A. Do you mean Tavern did a large business with Eatsum?

Q. No, no, Tavern Fruit Company did a large business, did it not? A. A large volume of sales to Eatsum but first it was to another company before the Eatsum partnership was organized.

Q. Did the volume of sales exceed four million dollars

(1696)

or something like that? A. I will give you the correct answer in a few moments.

Q. All right. I am talking, of course, about Tavern only. I think I misspoke and said Eatsum. A. You mean the Tavern partnership, the volume of business of the Tavern partnership?

Q. Yes. A. That is what I am looking for now.

Q. Yes. I just wanted to get a general picture. A. If you give me the tax return I will give you the volume of business without referring to books.

Q. Couldn't you give it to me generally?

I don't care about the exact figures. If you give it to me approximately that will be all I want for the moment. Can't you give me that? I don't want it broken down to dollars and cents. Can you give me an approximate figure? A. Approximately a little over a million dollars.

Q. In the Tavern partnership? A. Tavern partnership to Eatsum and another customer.

Q. Now, they had many large and important customers, did they not? A. Tavern partnership?

Q. Yes. A. No, sir.

Q. Eatsum had? Did they sell jams to very well known

(1697)

companies? A. Well, the billing was done by Tavern, billed to Eatsum; Eatsum in turn billed it to large customers.

Q. All right. What were those large customers? Give me just a few of them. A. National Biscuit Company.

Q. Yes. A. Sunshine Biscuit Company.

Q. Yes. A. Wagner Pie Baking Company.

Q. Yes. A. Those are the three outstanding names. There may be one or two others but those——

Q. All the others were in the same class; they were not as large but others were similar? A. I don't know similar but reliable companies.

Q. They were all reliable, reputable companies, customers to whom these jams and jellies were sold; that is a fact, isn't it? A. By Eatsum?

Yes. A. Well, I would say I would like to look at the sales book, but I would say the majority of the sales were made to those type of customers.

Q. All right. Going back to the matter I was trying to pursue: did Tavern conduct through its bank account in its checkbook hundreds of thousands of dollars worth of business for American Brands Corporation? A. I would have to look at the Tavern books in order to determine that.

(1698)

Q. Mr. Roth, when I say hundreds, I am confining it by the words I used to a generality. I don't want to stop to get the exact figures. If you will just give me approximate figures I will go on. I will take your recollection. A. I recall some transactions at the inception of the American Brands Corporation before it had the check account that some items existed, were paid by Tavern for the account of the corporation, until we had the complete check account of American Brands Corporation.

Q. Wouldn't it be true that raw materials were bought in Tavern's name for six or eight weeks for or on account of the succeeding entity, namely, the American Brands Corporation? Is that about the sense of it? A. No, sir.

Q. It is not so? A. No, sir.

Q. What is the matter with it? A. That would be true that while the purchases were made in the name of Tavern Fruit Juice partnership, the liability for those purchases was not recorded on the corporate books of account.

Q. I am going to ask you, Mr. Roth, to examine the (1699) American Brands' books and see whether or not the question that I asked you, the right answer to that question should not be yes. Will you do that? You are very familiar with those books, are you not? A. If you will let me have the books.

Q. What books would you need? A. Well, you are referring to American Brands Corporation?

Q. That is right. A. I would like to look at the American Brands Corporation books.

Q. Go ahead. A. Mr. Stryker, if I may, I would like to look at them during lunch time because it strikes me that it will be a little bit lengthy

Q. You do? Well, I think that is fair enough. What was the fiscal year of the Tavern partnership, Mr. Roth, do you remember? A. May 31st.

Q. That is, the year ran from May 31st to the next May 31st? A. No, the year ran, to the best of my recollection, from April 1st, 1945, or May 1st, 1945, to either April 30th or May 1st, 1946.

Q. All right, sir. A. A twelve-month period instead of a calendar year.

Q. You filed an information return for the fiscal period ending March 1946 for Tavern, didn't you? A. I would like to look at that tax return, sir.

(1700)

Q. Isn't it in evidence? I think it is. Can I have it. That is Government's Exhibit 7.

(Mr. Wessel hands paper to Mr. Stryker.)

Q. Is this the paper that you just asked for? I am handing you Government's Exhibit 7.

Mr. Wessel: While the witness is looking at that, if your Honor please, Exhibit 88, which is the receiver's report in evidence, has a schedule D-12, which I think recapitulates the bank account that counsel is referring to. I would be reluctant to have the witness spend his time during lunch time going over the books.

Mr. Stryker: I don't care how he does it.

Mr. Wessel: This schedule summarizes that whole bank transaction.

Mr. Stryker: If it does, I do not want to interfere with the gentleman's lunch, but what I am on now is, I have passed on to something else.

Q. I just asked you; I think, if the paper, Government's Exhibit 7, if that is the paper that you said you would like to see? A. Yes, sir.

Now, begging your pardon, I have to ask the question to be read to me.

Q. I don't blame you because I don't remember it (1701) clearly, myself.

Mr. Stryker: Would you read it, Mr. Reporter?

(Question read.)

A. March 31, 1946—the answer is yes, sir.

Q. All right. A. Filed on September 12, 1947.

Q. Thank you very much.

Mr. Stryker: That is in evidence, Government's Exhibit 7?

The Clerk: It is.

Q. This is an information return, isn't it, Mr. Roth? A. It is commonly known as a partnership information return.

Q. Let me stop right there. A partnership as such does not pay an income tax; is that not right? A. A partnership as such?

Q. As such. A. Does not pay an income tax.

Q. All right. The people to whom income taxes are attributable are the partners individually; the partnership is unlike a corporation; in other words, it is not an entity that itself has to pay the tax. Do I state that right? A. Mr. Stryker, I did not hear the first part of your question because you were facing the other way.

Mr. Stryker: I must apologize.

(1702)

The Court: Read the question.

(Question read.)

A. A partnership does not have to pay any income tax on the earnings it reflects for the partners.

Q. All right. In other words, an information return is just what the name means: it gives information to the Government as to what the gross receipts have been and the other figures, and what else?

Mr. Stryker: I withdraw the question.

Q. In other words, a partnership return is a document that sets forth among a great many other things the gross receipts from the business and other items, and also the distributive shares of the members of the partnership? Have I got that stated right? A. That is substantially what a partnership return indicates.

(1703)

Q. I just wanted to get that clear. Now, all right, in view of your testimony a moment ago, the Tavern Fruit partnership ceased doing business about the end of November, 1945. There couldn't have been, could there, a final inventory as of March 31, 1946, from the very nature of things. A. While there could not be an inventory on March 31, 1946, there was an inventory at the date they ceased operating, which was at the end of November, 1946. The date March 31, 1946, is only used as the first fiscal period of the year; that necessarily doesn't mean that the partnership operated to March 31, 1946.

Q. Well— A. It is a summary of transactions from April 1, 1946, to March 31, 1946, not necessarily going up to March 31, 1946.

The Court: Can I interrupt just a second? I think you said that the business closed November 30, 1946. It is 1945.

The Witness: Oh, pardon me, 1945.

Mr. Stryker: I am glad you picked it up, Judge, I missed it.

The Witness: I am sorry.

The Court: That is all right.

(1704)

A. Operation ceased November, 1945.

Q. Well, my question is, wouldn't it have been impossible—— A. Excuse me.

Q. I don't blame you.

The Court: Wait until the bell stops ringing. 12:00 o'clock is the worst hour around here.

By Mr. Stryker:

Q. Wouldn't it have been impossible to have an inventory as of March 31st, when the business stopped in November,

1945? A. Physically, on March 31, 1946, there was no inventory for the partnership, but there was an inventory for the partnership at the end of November, when it ceased operations, and the corporation took over its operations.

Q. Did you, in your return, take into consideration, in your profit statement, the inventories taken over from Tavern Fruit Juice Co., Inc., incorporation and entity preceding the Tavern partnership? Is my question clear? A. Yes. May I see that tax return again?

Q. Surely. A. In order to see if the item is on there.

Q. Handing you Government's 7 (handed). A. There is no arithmetical figure of inventory at the commencement

(1705)

of the partnership.

Q. Then the answer to my question is that you did or did not take into consideration in your profit statement the inventories taken over from Tavern Fruit Juice Co., Inc.; the answer would be no, that you did not? A. There was no inventory taken over by the partnership from Inc.

Q. All right. Did you take into consideration in your figures the amount of sugar that had been produced at the Loraine plant in the research program pilot plant? A. You mentioned Loraine there, and I just didn't get your question, sir.

Mr. Stryker. Read it again.

A. We are talking about the partnership and Tavern; then you got Loraine in.

Mr. Stryker: It is a little bit complicated. I would be glad to have the question read to you again.

(Question read.)

A. I do not recall that item, and, to be sure, I would have to look at the books of the Tavern partnership.

Q. Well, would you say that there was no sugar produced at the Loraine plant, pilot plant, and turned over to Tavern? A. I do not know of any Loraine pilot plant.

(1706)

Q. Would you deny that there was any such? I don't mean the plant, but I mean such sugar. A. I never deny nor affirm that sugar was used in the Loraine pilot plant. I do not know of any Loraine pilot plant.

Q. I see. All right.

Now, you said somewhere that Tavern warehoused their finished products late in 1945; you said that, I think, haven't you? A. Yes, sir.

Q. Now, was the amount you insured that warehoused merchandise for based on the cost price or the selling price of the merchandise? A. I do not recall.

Q. Was the warehoused product the result of Tavern's inventory, Loraine Food's inventory, the product manufactured from the inventory that should have been labeled "Starting inventory" or "Product manufactured from sugar produced by the research project"?

Mr. Stryker: I am going to have that read to you again, because I admit it is a little complicated.

A. Mr. Stryker, I have to take it down in parts. I think it got—it is garbled. Excuse me.

Mr. Stryker: All right, that is all right. I will start again.

(1707)

By Mr. Stryker:

Q. Was the warehoused product the result of Tavern's inventory, breaking the question now into parts as you suggested? A. To my recollection, yes, sir.

Q. Was it the result of Loraine Food's inventory? A. There is a bare possibility that there may have been something of Loraine stored in the name of Tavern.

Q. Was the warehoused product the result of what was manufactured from inventory? A. When you say "result that was manufactured from inventory," I do not understand that question.

Q. From the pilot plant. A. I do not recall any inventory from the pilot plant at that time in November, 1945.

Q. Not recalling it, you wouldn't affirm or deny whether there was any or not, would you? A. I would say there was not.

Q. Did the Tavern partnership handle approximately $375,000 worth of purchases of raw material and labor through its bank account, through its bank account in behalf of the American Brands Corporation, its successor? A. I would have to check the records of American Brands Corporation and Tavern partnership to determine the amount that was handled in behalf of one for another.

(1708)

Mr. Stryker: Well, this is Mr. Wessel's suggestion and I am glad to adopt it. I think it may save time. Is this 88 in evidence?

The Clerk: That's right.

By Mr. Stryker:

Q. I show you report of the American Brands Corporation, et al., Bartholomew R. Boyle, Receiver in Chancery, New Jersey, December 2, 1947, and the schedule that Mr. Wessel refers me to is the statement of account to Tavern Fruit Juice Company. It doesn't seem to be numbered, but I am holding my thumb on it.

Mr. Stryker: Is this the paper, Mr. Wessel, you spoke of?

Mr. Wessel: That, and there are one or two other schedules that relate to it.

Q. Will you look at that schedule. I think that helps you to answer the question.

Mr. Wessel: There is another schedule which handles that schedule in summary form.

Mr. Stryker: Will you point it out, Mr. Wessel? I am not familiar with it, you are.

Mr. Wessel: Schedule E12 has three pages, which are pages 21, 22 and 23, and then are handled in summary fashion on Exhibit B, which is the consolidated statement referred to before.

(1709)

The Witness: Your Honor, excuse me. I think I have my own summary.

The Court: You would rather use your own summary?

The Witness: No, I am looking for it, so I may take an extra second.

The Court: Go ahead. No one is going to interrupt you.

Mr. Wessel: May I just ask a question?

Mr. Roth, what are you looking for?

The Court: He thinks he has his own——

Mr. Wessel: When you are looking for something, are you looking for your calculations of the inventory?

The Witness: Yes.

Mr. Wessel: Well, the question, I think, is directed to the bank account; am I correct, Mr. Stryker?

Mr. Stryker: I think the question was, yes. Read back my last question and we will see whether what you are looking for will do with what I asked.

The Witness: Then excuse me, sir.

(Question read.)

A. The answer is yes, because on January—the American

(1710)

Brands only started its bank account in March, 1946, and used the Tavern bank account for its behalf.

Q. In the interim? A. Of its operation.

Q. That was what I was trying to get. Thank you for the answer. And that was true of all the companies and partnerships; sometimes moneys were drawn from one in behalf of the other, and back again, through the various entities; is that not so, in general? A. Are you referring to American Brands and Tavern?

Q. I am talking about all of them, all of them, all these things that were in the affiliated schedule. A. There were transfers of money from one corporation to another up and back, as each corporation needed the money, but not in behalf, in the manner that it was indicated—that it is indicated over here.

Q. Were the raw materials billed to Tavern during that period? A. What period—are we talking about the period from January, 1946, up to March, 1946?

Q. No, I am talking about the period I have been at since the termination of Tavern, I think you said in November, 1945, for, I don't know, some weeks, until March, 1946. I believe that is the period I am talking about. A. Mr.

(1711)

Stryker, there was very little activity, to my recollection, on the part of Tavern from November 23rd up to December 31st—November 23rd—November 30, 1945, up to December 30, 1945.

Then the operations commenced in the name of American Brands Corporation. They did not have a check ac-

count, so from January, 1946, up to March, 1946, the payment of moneys and receipts of moneys were handled through the Tavern bank account.

Q. And were the raw materials also billed to Tavern in that period we are discussing? A. From January to March, everything—the raw materials may have been billed to Tavern or American Brands, but Tavern paid all the bills, because it collected all the money. Then the transfer of all the transactions were placed on American Brands' books.

Q. Finally— A. From January, 1946, to March, 1946.

Mr. Stryker: Well, I have got a chapter of this narrative which perhaps through my ineptitude will take some little time to develop, and I have asked for certain papers that I need in that. Now, I have got that, I may call, homework as well as the minutes your Honor was kind enough to let me see, and really I could shorten this and I know everybody

(1712)

wants me to, if you will give me a chance to study and tie it up together.

The Court: All right, Mr. Stryker. I don't want to impose upon you. If you can effectively work now, fine, because I have an idea that some of the jurors make luncheon engagements in connection with their business, so if they quit at the same time they can come back later, but, on the other hand, if you think——

Mr. Stryker: Wait and see if I have got something that doesn't need these documents. If I have, I will do it. Just pardon me a minute.

The Court: We will give you extra time at lunch, at the other end.

Mr. Stryker: I know. I appreciate that anyway.

Your Honor, when will we adjourn?

The Court: I would quit at quarter of and take the extra time after 2:00 o'clock.

Mr. Stryker: All right.

The Court: But rather than waste time overall, we will quit now.

Mr. Stryker: I can assure you that I want to

(1713)

waste none of your, the jurors' or my own time.

The Court: No one suspects that in the least. It is just a matter of all working together and save the most time we can.

By Mr. Stryker:

Q. Now, Mr. Roth, you testified at page 1283 of this transcript, did you not, as follows:

"Q. Well, how many sheets of paper were in the red folder?"

We are talking about your visit to Mr. Bercu's office, when you say you flushed papers down the lavatory. A. I didn't count them, sir. I could only describe them by height.

Q. I have confused you. I am reading to you what I find in the transcript. All I want is, is that what you said in this trial, two or three questions. A. Oh, oh, excuse me.

Q. It is quite all right.

"Q. Well, how many sheets of paper were in the red folder? A. I didn't count them"——

Mr. Wessel: Excuse me, I don't mean to interrupt, but 1283 doesn't seem to have that.

(1714)

Mr. Stryker: You are quite right, because I read the wrong page, it is 1583.

Do you find it now? It was in my examination.

Mr. Wessel: 1582.

Mr. Stryker: I am still wrong, it is 1582.

All right. Now, how far did I go?

By Mr. Stryker:

Q. I think I said, I went on, as I recall it, reading from your testimony at the page that is now correctly identified, these questions and answers, and my only question now is, did you so testify:

"Q. Give me an approximation. A. I would say two to three inches high.

"Q. Well, here is a folder of exhibits. Thicker than that? A. Slightly thicker.

"Q. That would be something like an inch more, would it? A. Oh, not quite an inch, I would say.

"Q. Three-quarters of an inch? A. About a half an inch higher."

Did you so testify, here in this court? A. Yes, sir.

Q. Did you also say at page 1583——

(1715)

Mr. Stryker: Mr. Wessel, I hope I have this right.

By Mr. Stryker:

Q. (Continuing) —"I think they were all yellow, and some were five-column sheets, half the size, and some"—one-half the size; you had your own double sheet before you, when we were talking, do you remember? A. Yes.

Q. Let's see, "One-half the size * * * some of them whereby the center was cut down, and while it was a folded sheet, you could see the name on it."

And "They were sheets, some sheets were half the size, four columns like those"—pointing to the column sheets that you showed me.

Mr. Wessel: I am sorry, counsel——

Mr. Stryker: Is that not right?

Mr. Wessel: No, sir.

Mr. Stryker: Well, what is it?

Mr. Wolfram: It skips a couple of questions and answers.

Mr. Stryker: I have skipped a couple and gone down to the bottom of the page. You will find it there, I believe, at the bottom.

Q. "They were sheets, some sheets were half the

(1716)

size, four columns like those. Some sheets were full size, but this, but the top was torn off, so that when you folded it you were about to see the name, Eatsum Food Products Company. A. Yes, substantially they were the same. I could only tell you by the headings, Mr. Stryker."

Mr. Wessel: Counsel, again I am sorry, I don't mean to interrupt, but you have skipped four or five questions and I am not sure whether the "substantially the same" refers to the——

Mr. Stryker: I think it does. I am picking out the points that bear on it. If there is anything in between that changes it, I want it.

Mr. Wessel: I don't know, sir.

Mr. Stryker: I will show you where I am reading.

Mr. Wolfram, will you come around here, please. Give Mr. Wessel where I am reading from.

Mr. Wessel: If I may, just to point out to the Court, after what counsel read, "were about to see the name, Eatsum Food Products Company," there is a question:

Well, didn't Mr. Bercu keep his work papers on sheets similar to the ones you have shown me? A. I have just said, yes, sir, except for the color.

(1717)

"Q. Oh. A. I recall that.

"Q. This is sort of a bluish—— A. White.

"Q. —white. And his was yellow. Other than that it was the same? A. Otherwise, substantially.

"Q. All these columns? A. Yes, substantially they were the same."

Now, counsel has skipped all of that.

Mr. Stryker: I have—I have all that there; I am glad to have it in, to save time. Sure it is there. Now I am going on from where you read.

By Mr. Stryker:

Q. "A. Yes, substantially they were the same I could only tell you by the headings, Mr. Stryker I just thumbed through them, like you just"——

Mr. Stryker: "slip" is the word I have got here. Is that the word?

Mr. Wessel: Yes.

Q. (Continuing) —"slip a book."

Mr. Stryker: I think the answer goes on; 1588 is my page, I hope it is right.

(1718)

By Mr. Stryker:

Q. (Continuing) "Q. I must assume that based on the pile of papers, and looking at the captions and the headings, to my recollection, I destroyed the summaries of the general ledger, the perpetual inventory records, and currency transactions. I don't know whether the currency transactions referred to the corn syrup box, I do not remember, or they referred to the candy box."

Mr. Stryker: It goes on. I probably skip a couple of questions, I don't know.

Q. (Continuing) "There wasn't only a heading Eatsum, either."

Mr. Stryker: Do you find that?

Q. (Continuing) "It was Eatsum general ledger; Eatsum perpetual inventory; Eatsum trial balances; Eatsum cash. There was a description on top of the working papers."

And further, 1582, you testified, did you not, that "Mr. Bercu turned over a red folder, which he said 'These are the working papers of Eatsum partnership,'" and you swore at 1587, "I recall destroying all of them."

Did you so testify? A. I testified to everything that is in the record.

(1719)

Q. Well, that doesn't leave me very far. I read you from the record. Did you testify what I said or not. A. Well, Mr. Stryker, my answer to you is, with due respect, that everything that is in the stenographer's minutes I testified to. I do not recall the sequence of the questions. I do not recall one question or skipped questions, but I testified to everything that is in the official record.

Q. You testified to everything that I read just now, and nobody has questioned my reading, I think, and the answer is yes, isn't it, Mr. Roth? A. I testified to everything that is in the official record, Mr. Stryker.

Q. Well,——

The Court: All right, let us go on. We are not having any dispute as to what is in the official record now.

Q. Was the envelope that you looked at about the size of the envelope I am showing you? A. I would say a little higher.

Q. A little thicker than that? A. Yes, sir.

Q. Will you take from the envelope I am showing you the papers and show to the jury the manner and method and way in which you took out the papers from, as you say,

(1720)

Mr. Bercu's envelope and looked them over. Just show me how you did it. A. Yes.

Q. Do you mind not getting them out of order? A. I won't disturb them. I went through twice. I put them face down. I took another small batch. I went through in this manner, face down, and whatever was in that folder——

Q. Just stay with the one question at a time. That is the way you did it? A. Whatever was in that folder.

Q. You destroyed? A. Yes, sir.

Q. Is that right? A. Yes, sir. I will put it back.

Q. Don't bother with that. I show you a batch of papers that I took out of a red envelope, and ask you if you can identify any of those papers. I am first asking you if they are not on yellow sheets? A. Yes, sir.

Q. Look at them. A. Yes, they are on yellow sheets.

Q. All right, now look at them and see if you can identify them. A. What do you mean, look at them?

Q. Yes. A. They are working sheets.

Q. Of what? A. Of Eatsum Food Products Company.

Q. Whose working sheets? A. I don't know; I am

(1721)

just reading the heading to you on the sheets.

Q. You don't know whose sheets those are? A. No, sir; I am just reading the headings that are on the sheets.

Q. I know what you are doing but I am asking you if you don't know whose sheets those are? A. No, sir.

Q. Well, look at them more carefully and see if you can't tell me. I know I have only given you a very hasty opportunity. A. Would you want me to start describing the first sheet I looked at?

Q. They are not in evidence but maybe you could just show me what you are looking at. A. I am looking at this sheet, sir.

Q. All right. Whose handwriting is that? A. I do not know.

Q. You know it is not yours? A. No, sir.

Q. And you know your man, your assistant, Mr. Hausman—— A. Yes, sir.

Q. It is not his? A. Yes, sir.

Q. You mean yes, sir, it is not? A. It is not his.

Q. And you had another fellow by the name of Starr, I think? A. Yes, sir.

(1722)

Q. He was an assistant? A. Yes, sir.

Q. It is not Starr's, is it? A. No, sir.

Q. Did you have any other assistants? A. Yes, sir.

Q. Name them? A. Mr. Schnurr.

Q. Mr. Schnurr? A. Nobody else worked on—regardless of the other assistants or employees, those are the only

two men that could have worked on the Eatsum or the American Brands records.

Q. Then by examining the papers, you say they are the Eatsum partnership papers, you can swear that they are not in your handwriting or in any of your assistants'; have I got that clear now? A. Yes, sir.

Q. All right. Are they not on precisely the type of accounting paper that you described to me as being the Bercu sheets—just the type, isn't that the type? A. Accounting paper, Mr. Stryker, is standard the world over.

Q. You took a good deal of pain to point out that the Bercu papers were yellow——

The Court: These are yellow papers. Now let us go on.

Q. Take that sheet. I don't want to start identifying each one because it will take some time.

(1723)

Mr. Wessel: I would appreciate it if we could have the envelope identified as an exhibit for identification, counsel.

Mr. Stryker: I would be delighted to do that, but I was just trying to obey the Court and not take any extra time.

Mr. Wessel: I don't care about each individual sheet.

Mr. Stryker: I know you don't but I do.

The Court: We will wait a few minutes. What do you propose to do, identify sheet after sheet?

Mr. Stryker: No, of course not. I don't know whether it will be one hundred or a hundred and fifty. I don't propose to do that because it will take

up too much time. Let me just pursue it and if you think——

The Court: All right, go ahead.

Q. Now, do you see any paper among those that I have shown you in this batch, giving a daily material report in Eatsum Food Products Company? A. I can only give you the heading on the sheet of paper.

Q. What? A. I can only give you the heading on the sheet of paper. I have never seen the paper before. I do not know the facts. I can only give you the heading.

(1724)

Q. Will you look at these papers. I am sure you are quicker at it than I am. Tell me if Mr. Bercu's name is not on some of those papers, either written or printed. A. On the two sheets of paper that I have in my hand, a wide sheet and a narrower sheet, there is printed the following: "Bernard Bercu & Company, Certified Public Accountants."

Mr. Stryker: May I have those marked right now for identification.

(Marked Defendants' Exhibits AAA-1 and AAA-2 for identification.)

Q. Have you any doubt that Defendants' Exhibits AAA-1 and AAA-2, were Bercu's papers? A. I have doubts.

Q. Let us have that clearly. You think that paper is a forgery? A. I didn't say that, sir, but I have doubts whether those are the original working papers of the partnership.

Q. That is not the question I asked you; I asked you whether you have any doubts that those papers now marked for identification were Bercu's papers.

The Court: If you are not talking about the original work papers that this man testified that he destroyed, I do not see any relevancy to this.

(1725)

Mr. Stryker: I am trying to find out what the fact is, your Honor, and I can only approach it, as I see it——

The Court: This man said he has not seen these papers before.

Mr. Stryker: Yes, I appreciate that, but I am not just bound by one answer, I should think.

The Court: All right.

Q. Your testimony is that you never saw Defendants' Exhibits AAA-1 and AAA-2, both for identification, before I just showed them to you; is that your testimony? A. That is, sir.

Q. Look at the rest of these papers and see if you find Mr. Bercu's name on any of the other papers? A. (Witness examines papers.)

Q. By the way, all of the papers relate, do they not, that you have looked at so far, to Eatsum Food Products Company, isn't that so? A. I could only give you the headings; I don't know what they relate to.

Q. The headings. A. Eatsum Food Products Company, finished stock inventory analysis. What is your question?

Q. Look at the papers and see if you can verify any

(1726)

others among these sheets I have handed you that contains Mr. Bercu's name on them in any way? A. All of them contain the printed name of Bernard Bercu & Company, Certified Public Accountants.

Q. Show them to me. A. Certified Public Accountant (indicating).

Q. In other words, over at the lefthand side of each of these sheets we have been looking at, including the two I had marked for identification, you see the name, Bernard Bercu & Company, Certified Public Accountants? A. Those that I looked at. I don't know about the balance.

Q. Look at the rest of them. A. Do you want me to go down to the bottom?

Q. Just do it rapidly.

The Court: I think, in view of the time—I do not see the relevancy or I do not see yet the justification of taking the time to go through paper by paper and see whether the name is on each one or not. If you say it is on there, Mr. Stryker, we will assume that it is.

Mr. Stryker: I won't say it unless I am sure. I think it is. Let me say this, I will say it is subject to correction.

(1727)

The Court: All right, let us go on.

Mr. Stryker: If I am wrong, I will be corrected. I think I am right.

The Court: All right.

Mr. Stryker: That will save a lot of time.

Q. Have you any doubt at all, Mr. Roth, that the batch of papers I have shown you, two of which I marked somewhere for identification—I guess I left them on the chair—have you any doubt at all that these at least are some of Bercu's work papers in connection with this Eatsum partnership; have you any doubt about that? A. I do not know whether they are Mr. Bercu's working papers. All I could do is identify that there is a printed name on the sheets, but I don't even know whether it is his work or not.

Q. But at all events you know that those papers that I have shown you were not destroyed, don't you, as you look at them? A. I do not know whether those papers were destroyed or not, when they were prepared, when they worked on them, what they did.

Q. I say that the batch of papers that I have shown you here——

The Court: Let us not take the time. Those papers were not destroyed. They at least exist physi- (1728)

cally.

Mr. Stryker: Can we stop here, your Honor?

The Witness: Mr. Stryker, they exist physically today. I don't know they existed before.

Mr. Stryker: I see. Now I have reached a point——

The Court: Are you through with this subject?

Mr. Stryker: No, not quite.

The Court: I think that you can finish it very shortly, Mr. Stryker. Go ahead.

Q. Can you give me from the papers I have shown you, categories or headings——

The Court: We are not going to talk about these papers until they are marked.

Mr. Stryker: I am not going to go into them—I just say, can he give me without saying what is in the papers—I believe I am quite correct, I hope I am—can he give me categories under which those papers fall. I am not asking him to read from the papers but just that question.

The Court: Without waiting for any objection and solely in the interest of saving time, I will break in at this point and say that I do not see that that gets us anywhere at this point, and I am not going

into any discussion of what those papers contain (1729) unless I see a greater bearing on the issues of the trial which at this moment escape me.

Mr. Stryker: I don't know whether you want me to reply now in the presence of the jury or at the bench.

The Court: I would be perfectly glad to have you come up.

Mr. Stryker: I will tell you right in the open.

The Court: Go ahead.

Mr. Wessel: If it is going to be in the open I would like to have a brief chance——

The Court: If both counsel feel that I am jumping in peremptorily, say so.

Mr. Wessel: I think it is completely irrelevant, if your Honor please.

The Court: Let me make it clear, Mr. Stryker, as to what the basis of my ruling is, just to save time. I don't recall that this witness ever testified that he destroyed all of the papers of Mr. Bercu. He destroyed those that were given to him. Now what this has to do with his testimony at this moment escapes me. He said that he cannot identify them as Mr. Bercu's papers. That is the short view I have and (1730) if it is incorrect, correct me.

Mr. Stryker: Your Honor, I don't believe I could ever correct you; I could only state my viewpoint. The relevance of those papers, in my humble view, is that here are produced a considerable batch —you have seen them, the bulk of them, of Bercu's work papers, and according to what we have so far——

The Court: Papers with Mr. Bercu's printed name on them.

Mr. Stryker: And relating to this particular partnership.

The Court: With the name of this partnership on it.

Mr. Stryker: Maybe I can make my point a bit clearer with a couple of questions.

The Court: All right.

By Mr. Stryker:

Q. Mr. Roth, as I understand it, you went up there to Bercu's office to commit a criminal act, to destroy records, is that not true? A. I don't know what you mean by criminal act, sir.

Q. Well, you went up there to destroy papers of some kind of that partnership, didn't you? A. I went up there (1731)

with Mr. Giglio to look at the working papers that Mr. Bercu had, so that, to destroy them, so that Mr. Bercu has nothing on Mr. Giglio after the termination of the partnership.

Q. That is what I understood. A. Whether it is a criminal act or not, I do not know law sufficient.

Q. In other words, you are telling us here that Mr. Giglio wanted to go up there and destroy these papers and wanted you to go along to see what papers should be destroyed; is that not what you say? A. That is not what I said, sir.

Q. Didn't you say that Mr. Giglio asked you to go along? A. Yes, that is what I said.

Q. Didn't you say that he asked you to go along to do something in connection with the Bercu papers? A. To identify the partnership working papers.

Q. In other words, you were going there because of your knowledge as an accountant to identify the papers, to hope to help him commit the act of destruction, is that right? A. To identify the papers, yes, sir.

Q. You went along there so that—— A. I was there? I was alone?

Q. You went along there so that you could identify for him the papers that you say he wanted destroyed; is that (1732)

right? A. I went up there to destroy the partnership working papers that Mr. Lubben and Mr. Giglio together wanted destroyed.

Q. But you went there not just as a messenger but as an accountant to help pick out the papers that you say he wanted to have destroyed; isn't that so? A. I went there with—the answer to that is, I went up there with Mr. Giglio to identify the partnership papers, to see what they want to destroy.

Q. Well, he asked you to go along as an accountant so that you could see—— A. He asked me——

Q. —what papers you thought should be destroyed? Isn't that a fair statement? A. That is an unfair statement. He asked me to go along to identify the working papers. You put in "as an accountant."

Q. But you went there to identify the working papers, according to your testimony, in order that the act of destruction might be effectively accomplished, isn't that so? A. At that time I didn't know whether the papers were to be destroyed or not destroyed; I was to go there to identify them.

Q. All right. A. Then, sir, by arrangement and agreement with Mr. Bercu, who did not trust Mr. Giglio, and (1733)

Mr. Giglio, who did not trust Mr. Bercu, it was decided to destroy the papers. There, not in advance.

Q. When you got there, having been invited for whatever purpose by Mr. Giglio, you learned before you did anything that he wanted you to commit the act of destruction and wanted you there to help him identify the papers that ought to be destroyed. Now is that right? A. That is incorrect. I was not sent, not invited for the act of destruction. The act of destruction occurred when Mr. Bercu refused to give Mr. Giglio the working papers.

Q. I think if you will look at my question I confined you now to the period after you got to the office of Bercu. At some time there you say that Mr. Giglio said, "Look at the papers," is that right? A. You are not giving me the whole context of that conference, of that discussion.

Q. I will take it bit by bit. "Look at the papers, I want to destroy them," or something like that? Isn't that what he said? A. No, sir. Do you want me to tell you what happened?

Q. I would like to have you answer my question and then you can say anything you want. Didn't you under-

(1734)

stand when you got there as his accountant that the sole point of what he wanted you to do, was to make, was to give your expert accountant's advice as to what papers would be most beneficial to him to have destroyed? A. That is incorrect, sir.

The Court: If you are going to take much longer——

Mr. Stryker: No, I am not. I am trying to do what your Honor said.

Q. Did Mr. Bercu say that he was giving you all his papers to be destroyed? A. No, sir.

Q. Well, you didn't make a very careful search of the papers, I gather from your testimony and from your

demonstration, to determine whether there were any other papers which you thought would be inimical to Mr. Giglio's interest, did you? A. Mr. Stryker, Mr. Bercu took a folder of papers from one of his offices, went across the room, across the floor, the lobby of the floor, into another room, with one folder. Whether he had any additional working papers left in his office that he did not bring along with him in the second room; I do not know.

Q. I am asking you, Mr. Roth, if your testimony about the destruction of the papers is not right in accordance (1735)

with your method, that is, giving some facts, that you were there, and adding others that you thought would injure Mr. Giglio, and that your direct examination on that subject is false? A. That is a very wrong statement and you know it, sir.

Mr. Stryker: That is all, I will stop at this point here, if the Court please.

The Court: All right, I think this is a good time to stop. Don't discuss the case. We will be back here at two-thirty.

(Recess until 2:30 p.m.)

(1736)

AFTERNOON SESSION

(Jury present.)

LOUIS J. ROTH, resumed.

Mr. Stryker: Will you let me have Exhibit 90, Mr. Dilberian, please. Also Exhibit 8.

(Handed to Mr. Stryker.)

Mr. Stryker: Are they both in evidence?

The Clerk: Yes, sir.

Cross Examination Continued by Mr. Stryker:

Q. I show you Government's Exhibit 90 in evidence. That is the carry-back paper, isn't it? A. No, sir, that is not the carry-back.

Q. What is it; what is the paper? A. This is a statement for the purpose of extending time for payment of taxes by corporations expecting carry-backs.

Q. Oh, all right.

Now, that paper shows that American Brands did expect to carry back $350,000, didn't it? A. No, sir.

Q. Maybe I haven't read that right. It shows the estimated amount of expected net operating loss or unusual excess profits credit, net operating loss; opposite that is the figure 350,000. A. That was the expected loss,

(1737)

not the expected carry-back.

Q. All right. Now, how do you arrive at the statement of $350,000 that I have just shown you? A. Sometime during July or approximately July or August, 1947, I determined from the corporate books——

Q. That figure? A. No, sir.

Q. Go ahead, I am sorry, maybe I interrupted you. Go on. A. Excuse me, sir. The accumulated loss of all the corporations, which to my recollection aggregated approximately $200,000. I used—I arbitrarily added on $150,000 to that figure for the purpose of computation on $350,000, it would completely eliminate the amount of tax that was due on the consolidated income tax for the corporation for the year ending December 31, 1946.

Q. All right. Did you prepare the 1946 corporation tax return, filed in September, 1947?

I show you Exhibit 8 in evidence.

Mr. Stryker: Is it?

The Clerk: That's right.

A. I did, sir.

Q. Did you sign this 1946 return? I see your name at the bottom. Is there any doubt about it? A. I did, sir.

(1738)

Q. All right. Now, did you prepare the 1947 and 1948 income tax returns for American Brands or any other corporations? A. May I see them, Mr. Stryker?

Q. By all means. I am showing you Government's Exhibit 110 for identification. A. I prepared this, but it requires an explanation.

Q. Well, first, just let me get the fact. Did you prepare it? A. I copied this return from another financial statement.

Q. Well, you did it at any rate; whatever was done here, you did? A. I copied this return from another financial statement.

Q. When you say "I," you mean you, don't you, you did it? A. Yes, sir.

Q. Add right. And that is your signature at the bottom? A. Yes, sir.

Q. Which states that you prepared the return for the person named; isn't that what the affidavit says? A. No, sir, that is not what the affidavit says completely.

Q. All right, read it, read it. A. "Tax return prepared from the report dated April 24, 1948, submitted"——

(1739)

Q. Where are you reading, Mr. Roth? A. Right here, "Submitted by appointed accountant to Vice-Chancellor of Court of Chancery, Jersey City, New Jersey."

This is a copy of the receiver's accounts' report.

Q. All right, now, I show you Government's Exhibit 111 for identification, and ask you if you prepared that document. That has been identified as an income tax return for American Brands for the fiscal year beginning January 1, 1948, ending August 24, 1948, as I read it.

Is that right? August 24, 1949, I should think it should be. Maybe I am wrong. A. No, it says August 24, 1948, sir. 1949 is dotted out with the typewriter and 1948 is——

Q. I see, it is January 1, 1948, to August 24th of the same year? A. Yes, sir.

Q. Did you prepare that? A. The same explanation for this report goes for the year—as I just explained a moment ago, for the year 1947.

Q. Well, did you prepare it, however it was done. You did prepare it, however the method was? A. This was a

(1740)

duplicate copy of the account's report of the receiver.

Q. You did prepare the paper I have shown you? A. From the accountant's report, the receiver's accountant's report, I prepared this paper.

Q. All right. Were both of these documents, 110 and 111 for identification, filed with the Government? A. I do not know. They were submitted to Mr. Lawn, who turned them over to Mr. Holzer.

Q. Well, you see on both instruments, do you not, the stamp, "Reviewed by Audit Division, by J. B. Mulligan." Isn't that on both of them? A. Well, that is what the rubberstamp indicates.

Q. All right. A. But I don't know what it means.

Q. I see.

Mr. Stryker: I offer both of these, Government's Exhibits 110 and 111 for identification, in evidence.

Mr. Wessel: I obviously have no objection to authenticity, but as to competence and as to materiality, if your Honor please, I do object. They are returns for 1947 and 1948. That is my only objection.

(1741)

Mr. Stryker: I think I will show the competency and relevancy as we go along.

Mr. Wessel: Then why don't we hold these off?

Mr. Stryker: Because my questions will be directed to these.

The Court: This may be taken subject to connection.

Mr. Stryker: Are they being taken subject to connection?

The Court: Yes.

Mr. Stryker: Very well.

Mr. Wessel: I have some question about subject to correction, if your Honor please, because just before the recess counsel made a statement subject to correction with respect to the names on those various papers and I have not yet been permitted or the agents to look at those papers to see whether the name was on there or not.

Mr. Stryker: They are at your disposal at any time.

Mr. Wessel: I will try to do it during the recess. I have no doubt as to what is on, but I just wanted to check it. If this document goes in subject to correction—subject to connection, then there

(1742)

is the question of remembering that it is subject to connection.

The Court: That is for you to remember and to move to strike.

Mr. Stryker: If your Honor please, if there is some criticism there directed at me, the point is, your Honor may remember that I asked for the minutes of the receivership which are quite volumi-

nous, and I have spent, I assure you, every moment I could on that. These papers are here and I believe my statement as to the name Bercu is correct. It is a simple matter to glance at just that. That is all that is involved and he can do it at any time he wants to.

The Court: Mr. Wessel can do that during the mid-afternoon recess.

(Government's Exhibits 110 and 111 for identification received in evidence as Defendants' Exhibit BBB and CCC.)

Q. Now, will you show what was the loss on the 1947 tax return for American Brands? A. I could only read you the figure that I copied from the receiver's accountant's report.

Q. Was that the report of Mr. Nadel? A. Yes, sir.

(1743)

Q. All right read me the figure.

The Court: In order to save time, how can he testify to a figure of loss or profit which he apparently did not prepare?

Mr. Stryker: Well, I think I can answer that.

The Court: Yes.

Mr. Stryker: I am asking him about a paper which he did prepare. He says the method he prepared it and I am now asking what that paper that he prepared, however it was prepared, shows with respect to the loss of American Brands for 1947, that is all.

The Court: All right, go ahead. The paper itself is in evidence, isn't it?

Mr. Stryker: It is now, yes.

The Court: All right.

Mr. Stryker: But I have to make a sequence this intelligible.

The Court: All right.

Q. Just show me the figures. A. May I hear the question again?

Q. Yes. (Question read.)

Mr. Stryker: I better amplify it.

Q. Will you from the report now in evidence which you prepared, tell me what was the loss shown on the tax return (1744) of American Brands for the year 1947? A. The loss shown on the tax return of American Brands for the year 1947, which was copied from the accountant's report, is $205,554.44.

Q. Thank you. Will you give me the same, having those questions in mind will you give me your answer with respect to Exhibit 111 (CCC) if you recall the question—show me the loss? A. The loss shown on the 1948 income tax report of American Brands Corporation as copied from the receiver's accountant's report indicates $207,439.75.

Q. Were the losses shown on these two returns that you have just examined, greater than the profit shown on the 1946 return? A. May I see the 1946 return?

Q. Yes (handing). A. May I see the others, too—— I am sorry.

Q. I will bring them up. (Papers handed to witness) A. The loss was greater.

Q. The loss would figure—the total loss for the two years, the loss less the profit indicated on the 1946 return—— the net loss would aggregate, if my arithmatic is right,

$151,240.53. Just check me on the figures. A. Arithmetically?

(1745)

Q. That is all I am asking you at the moment. A. Arithmetically.

Q. And that is right? A. It is correct, subtracting one from the other.

Q. All right. In the 1946 tax return for American Brands that was filed, it is a fact that the corporation was financially unable to pay any tax? A. I would have to refer to the books and records of American Brands Corporation, to look at the cash and other current assets on hand.

Q. What books do you want? I think they are all in court. A. All of the American Brands books.

Q. Let me have them. A. Mr. Stryker, I wish to call this to your attention: in order to determine, in order to answer your question I have to use the books of all the American companies.

Q. All right. A. That is not a job for an hour or two hours, sir. It is quite a lengthy job.

(1746)

Q. Didn't the Government ever ask you to make the computation that I have asked about? A. No, sir.

Q. You mean in all their interrogation of you they never asked you that? A. They never asked me that question that you just propounded to me.

Q. Well, from your general knowledge of the affairs of these corporations, can't you state generally without giving me the exact point, dollars and cents, whether or not it is not the fact that when the American Brands filed its 1946 tax return, it was financially unable to pay any taxes; any amplification you want to make with the books, it is all right with me. But can't you from your general knowledge know that? A. Mr. Stryker, I think I can reply to your question

fective perjury is usually committed by one who tells some truth and some falsehood, and that applies definitely here. That is what I am driving at.

The Court: I am not, for that added subtle point, going to have him go through and review all of (1758)

his testimony over there and pick out question by question which he answered truthfully and which he did not.

He say he answered them all with an attempt to deceive.

Mr. Stryker: If you don't want to do that, I can understand. Neither do I. Can't I just get an answer to the question, whether some answers were true?

The Court: I think you have an answer there.

Mr. Stryker: I don't think so. He said all were made for a certain purpose.

The Court: No, we will go on to something else. (1759)

By Mr. Stryker:

Q. Mr. Roth, how long was Mr. Lubben absent from the company at the time he took his plane trip to Cuba either in the latter part of 1945 or the early part of 1946? Give me an approximation, I do not want the exact number of days? A. An estimate of two weeks.

Q. Do you know whether he took a party of friends with him on that trip? A. I do not know, sir.

Q. Is it a fact that while he was absent, Mr. Giglio asked you to examine the books with respect to Mr. Lubben's transactions? A. I don't recall such a request.

Q. Do you deny it? A. Yes, sir.

Q. Isn't it a fact that during Mr. Lubben's absence you came to Mr. Giglio and stated that the books showed

a vast number of cash transactions, cash withdrawals by Lubben for which the books did not show what had been done with it? A. No, sir. Mr. Giglio was aware of all the transactions that they took care of daily and did not need to wait until Mr. Lubben left for Cuba.

Q. Then the answer is no, that did not happen? A. I do not recall that.

(1760)

Q. Would you deny it? A. I would deny it, yes, sir.

Q. Don't you remember that when Mr. Lubben returned from his Cuban trip, he was called in and asked about his cash withdrawals, and asked to explain them, and that when he couldn't, Mr. Giglio called the factory and said, "Stop operations now, the partnership ends now", isn't that a fact? A. I do not recall such conversation. It may have existed. I do not deny it. I do not affirm it. I do not recall that that ever existed.

Q. Well, Mr. Lubben's return from Cuba was just about the time, wasn't it, when the Eatsum partnership broke up? A. Date-wise, yes.

(Short pause.)

Q. Now, as I understand it, the $140,000 said to have been in the corn box at the end of the corn operation, that that discovery or the ascertainment of that fact was sometime in November 1945. Am I right about that? A. No, sir.

Q. Well, you know, don't you, that Loperfido left the partnership on November 7, 1945? A. About that date, but I do not know of $140,000 on that date.

(1761)

Q. Do you know of it on some date? A. Testimony at Washington before the Kefauver Committee which was sometime in 1950, I believe.

Q. I am asking not what the testimony was, I am asking you to your knowledge; if you don't know, why we will pass on to something else. A. I would say sometime in 1950 I learned through Mr. Giglio of the $140,000, as to what he told me——

Q. That was the first time you knew it, is that right? A. Just a moment, sir. I would like to correct that. The very first time I knew about money being—now when you say cash, are we talking about greenbacks or are we talking about checks drawn out of the check account?

Q. I am talking about both greenbacks and Lubben IOUs—that is what I mean. A. With your permission may we call greenbacks currency?

Q. Anything you want. A. And may we call checks——

Q. I think I will understand that. A. And may we call checks from the bank account cash, so I will use the word currency and cash.

Q. All right. A. Is that all right with you, sir?

Q. I hope it is. A. Now I have to get the question, now that we have defined currency and cash.

(1762)

Q. That's all right.

Mr. Stryker: Read back my question.

(Record read.)

A. The first time I knew about currency being taken out of the cash box was when the tax return was filed in September 1947 for Mr. Giglio and Mr. Livorsi. Mr. Ronayne was called in for conference. We were told at that time, and Mr. Ronayne instructed me, and at that time Mr. Giglio was present, "Make sure that you include all the currency that you received out of the cash box in your tax return."

Q. All right. A. The $140,000 as a figure, to my mind, occurred at testimony before the Kefauver Committee, as a definite figure.

Q. You don't quite mean that it occurred there; what you mean is that you are telling us that is the first time you heard of it; is that what you mean? A. As an arithmetical figure.

Mr. Stryker: All right. Where are Mr. Giglio's and Mr. Lubben's individual returns? I think they are in evidence. Would you mind giving them to me? I can't remember the number. I meant—I don't know why, but I said Lubben and I meant Mr. Giglio and Mr. Livorsi. I misspoke.

(1763)

I am told that 2 and 4 are the numbers.

Q. While I am getting those, do you remember in your direct examination referring to some item of $50,000 in each of those returns? I will make that more definite, but does that refresh your recollection? A. Mr. Stryker, will you excuse me I didn't quite get your question.

Q. All right. It was probably my fault. I can be more accurate than I have been by asking you about the miscellaneous income in each of those individual returns. I didn't make myself as clear as I should.

I show you these returns, Exhibits 4 and 2, and call your attention—they are both in evidence—to the item on page 2 of each return—I had it here a minute ago—"3. Other sources. State nature." In typing, "Other Income, amount $50,000." Do you see that in both returns? A. Yes, sir.

Q. Let us get that point settled. A. Yes, sir.

Q. I remember on your direct examination—I may not remember it perfectly and you may be able to help me—

in this manner, with your permission: When the American Brands Corporation tax return was filed on September 15, 1947, their cash position was not as good as their cash position of four months ago or five months ago or six months ago.

Whether they were unable or able to pay their tax, I would say their cash position in September, 1947, was much worse than at the beginning, than in March, 1947.

(1747)

Q. It began to go downhill quite a time before that return, didn't it. A. I can't answer that with a yes or no. It began to go downhill for a number of reasons.

Q. I didn't ask the reason, I just asked the time. A. There are a number of events that occurred which made it go downhill.

Q. Mr. Roth, I don't want to interrupt you at all in anything you want to say. A. What's that?

Q. It will be good enough to tell me your recollection of approximately the time when this company began to downhill financially, will you give me that, and I will go on? A. From the time sugar rationing went off——

Q. That was when? A. It is a Government date. I will have to give you an estimated date.

Q. Give me your best recollection. I am not going to stop on every point. A. I would say the early part of 1947.

Q. All right. A. I don't know whether I am accurate on that date.

Q. All right, we all understand that your answer doesn't purport to be exactly accurate. I will take it that way.

(1748)

Mr. Stryker: I want to be sure I return each time the exhibits you hand me. Have I got them all back to you now (handed)?

The Clerk: That's right.

By Mr. Stryker:

Q. Mr. Roth, isn't it a fact that you were the administrator of all these American Corporations, and the supervisor of records of those companies, those corporations, and that you signed 95 per cent of all their checks? A. I would answer yes to the very—to the last part of your question, but I would have to have a definition of "administrator." I would rather say comptroller would cover everything, than administrator.

Q. Now, isn't it a fact that during the operation of the American Corporations, American Brands and others, Mr. Giglio was out of town at least 90 per cent of the time? A. That is not a fact.

Q. I ask you if you did not testify, under oath, in the receivership hearing in 1948, at page 68——

Mr. Stryker: If you have another copy, Mr. Wessel.

Q. (Continuing) "He," referring to Mr. Giglio to (1749) William Giglio, "was away from the city very often, practically 90 per cent of the time traveling. He would telephone to advance the money, 'And I will return it to you,' or do this or do that."

Did you so testify? A. In order to deceive the receiver, I testified that way.

Q. Well, is there any question at all that you did so testify? A. There was a purpose in testifying that way.

Q. Well, is there any doubt at all, regardless of your purpose on that occasion, that you did testify as I have read? A. I testified in that manner for a specific purpose.

Q. Well, so that there will be no doubt about it at all——

The Court: I think there is no doubt about it at all.

Mr. Stryker: You don't?

The Court: He testified that way for some specific purpose.

Mr. Stryker: All right.

By Mr. Stryker:

Q. Now, in the operation of the books of these American Companies, is it a fact that the books were all adjusted (1750)
at the end of the year, and that entries before the end of the year were not necessarily correct: is that fact? A. That is not a fact.

Q. Did you so testify in the Jersey receivership? A. I testified in that manner for a specific purpose.

Q. Well, then, the testimony, whatever you say your purpose was, was false, was under oath and you knew it to be false? A. Yes, sir, by prearrangement with all the defendants.

Q. All right. Now, let's see: Is it also a fact—— A. Mr. Stryker, when I said "all the defendants," I was incorrect. I have to leave Mr. Livorsi out, because he was not present.

Q. Is it also a fact that $18,000 on the books of American Brands was a loan to Roth, that is, you, was money used by you for the benefit of the business; was that a fact? A. That is not a fact.

Q. But you testified to that under oath in the receivership hearing? A. I did not testify in the manner that you just put the question.

Q. Well, let me see. Maybe I had better read it. (1751)

Mr. Stryker: This particular document is very new to me, your Honor. I hope I can get along without having to stop to look at it. Maybe I won't on every occasion.

By Mr. Stryker:

Q. Was this question asked you and did you give this answer in the receivership:

Page 74.

"Q. After the money was withdrawn in accordance with Giglio's instructions and the money deposited in your bank account, and you made an entry on the books of the particular company from which it was withdrawn, that it was a loan to you, what did you do with the money? A. Yes, we would, and I can show you that checks were withdrawn from my personal check account, either to Mr. Giglio or others, for the benefit of the companies.

"Q. Do you have personal bank records which would show what disposition was made of the $18,000 which is a liability from you to the corporations? A. I have."

Were those questions asked and did you give those answers? A. Yes, sir, but I did not understand that my

(1752)

replies, when you put the previous question, that the money was used for the benefit of the business, because, Mr. Stryker, if you would look at those minutes further on, you will find that Mr. Kohn submitted to the receiver $18,000 worth of checks from my personal account, drawn to the order of Mr. William Giglio, which was deposited by him.

Q. Well, now, in order that my paraphrase that I read to you, in order that we have whether it was correct or not, I read you again your own words, page 74:

> "Yes, we would, and I can show you that checks were withdrawn from the"——

A. Excuse me, will you please read the question so I can get the whole context in my mind?

Q. I did before, but I will be glad to do it again if I have to.

> "Q. After the money was withdrawn in accordance with Giglio's instructions and the money deposited in your bank account, and you made an entry on the books of the particular company from which it was withdrawn, that it was a loan to you, what did you do with the money? A. Yes, we (1753) would, and I can show you that checks were withdrawn from my personal account"—"personal check account"—it says "weither"; I think it means either: it is w-e-i-t-h-e-r instead of e-i-t-h-e-r—"either to Mr. Giglio or others for the benefit of the companies."

Q. Now, then, the paraphrase I read seems to be correct, doesn't it? A. I drew the checks—I testified in the manner in which you read, but I drew all the checks to the order of William Giglio.

Q. Well, in other words, your testimony here is that what I have read to you that you swore to is false; is that it? A. In the same manner as the other questions by prearrangement with the defendants, I testified in that manner.

Q. Regardless—I understand that; suppose we just understand that right through and save time.

All of this was done because of somebody else's fault or instructions to you; is that right, all of your perjury in that case? A. No, I won't put it in the way you put it, Mr. Stryker, because that is the wrong construction of how it was done.

If you will permit me, I will give you the correct construction.

(1754)

Q. I just asked you if that wasn't the fact. If it isn't the fact, why, I will drop it at this point. That is the way I understood it now.

Were any entries made on the books of American Brands for the purposes of deception?

That is my question. I am asking you as a fact, regardless of what you may have testified, what is the fact? A. For the purpose of deception?

Q. D-e-c-e-p-t-i-o-n, deception. A. You mean towards anybody?

Q. Well, just deception. I suppose that would mean anybody, yes. A. There were a great many entries on the books that were fraudulent.

Q. And you made them or caused them to be made, or they were made by your men, under your supervision? A. No, sir.

Q. You didn't make them? A. I had knowledge of them.

Q. All right. A. But the moneys that were fraudulently withdrawn, I had no benefit of or hand in.

Q. Were you asked this question, and did you give this answer:

"Q. Were any entries made in these books of account for the purpose of deception?" And did you

(1755)

answer under oath: A. None whatever"?

A. I answered that way by prearrangement and discussion, the same as the other questions and answers.

Q. Now, were there some answers that you gave in that hearing that were true? A. I do not recall the hearing, but I can tell you the entire purpose and the conspiracy of the testimony in that hearing.

Q. No, I am not asking for that at the moment. I am asking what I at least think is a simple question: Were some of the answers that you gave under oath truthful ones? A. I do not recall.

All my answers were for the purpose of deceiving the receiver.

Q. Well, in the course of doing that, did you not occasionally say something that was true? A. My address, where I lived, and my name, yes, sir.

Q. Every other answer was false? A. I do not recall the answers unless I read the minutes.

Q. Well, from the name and address on, then every single answer that you gave was untrue; have I got that right? If I have, I will pass on. A. True or false, they were for the purpose of deceiving the receiver.

(1756)

Q. That isn't my question. I am asking you——

The Court: I think we have been over it enough now, Mr. Stryker.

Mr. Stryker: Well, your Honor——

The Court: Go ahead. I didn't mean to cut you off.

Mr. Stryker: That is all right. Regardless of the purpose, may I not inquire of the simple fact, whether in this hearing which, according to the minutes here, was——

The Court: He says he can't remember his individual answers, they were all for this purpose of deceiving the receiver.

Now, whether occasionally one was true or false I don't know, but he wasn't there to tell the truth and that is what he has testified here. Now, let's go on to something else.

By Mr. Stryker:

Q. Will you look at them——

The Court: No, let's not take time to do that.

Mr. Stryker: Perhaps I had better state it to you. I have a very definite point that I think in-

(1757)

volves the merits of this case here. I will state it aloud, if you wish, or I will come to the bench.

The Court: Well, come on up here and we will talk it over.

Mr. Wessel: I don't mind counsel stating it aloud if your Honor will permit me to make a comment in response to it.

The Court: I just want to do it the shortest way.

Mr. Stryker: I will do it any way at all. After you hear my position, and once you rule on it, why, of course, I will obey it.

(Discussion at bench as follows:)

The Court: Now, what difference does it make whether they are all wrong or whether one is right? Go ahead.

Mr. Stryker: Let me explain that to you. It makes this difference: It is my submission that this man is a very accomplished perjurer. The most ef-

some discussion about that $50,000 item. Do you know what I am talking about? A. There was discussion about that $50,000 item.

Mr. Stryker: At page 1046, Mr. Wessel.

(1764)

Q. "By Mr. Wessel: Q. Can you state the conversation of Mr. Giglio, please? A. In preparing the tax return, and asking Mr. Giglio whether he has any additional income tax besides that what was indicated on the tax return, he says many of his friends filed tax returns, and they put an arbitrary amount in, in order to cover any possible income that they may have overlooked to include. I think the first year it was $5,000—I am going by memory—in 1944 the miscellaneous income amount was $5000. I think in 1945 it was $15,000. 1946 it was $50,000.

"Q. I ask you, Mr. Roth apart from the $50,000 'Other Income' item in these two returns, were the proceeds or profits from the corn syrup sales put into Mr. Livorsi or Mr. Giglio's tax return, in any place? Do you understand my question? A. No, sir, I don't.

"Q. As I understand your answer it may or may not be that the corn syrup sales are in this $50,000 item; is that correct? A. I can only give you the conversation that existed.

"Q. Is there any other place in these two tax returns where the proceeds of the corn syrup sales might be included? A. I do not know of any."

(1765)

Were those questions asked you and did you give those answers? A. As you read them, yes, sir.

Q. Is there some catch, "As you read them"? I don't quite understand it.

The Court: I don't see any catch, Mr. Stryker. Let us take it as his answer.

Q. In 1945, the figure put in the miscellaneous income was $15,000, is that right? A. If that is what I testified to——

Q. Well, I have just read it to you. A. Well, I will have to look at the 1945 tax return to answer you exactly. I said in my testimony I think it was $15,000 in 1945. You are asking me now for an exact amount for 1945.

Q. I am only asking you, Mr. Roth, whether in this court, under oath, you swore to the answers that I have read you in response to the questions that I have read; that is all I asked you. A. My answer to that, sir, is yes.

Q. All right. Now, as you understood it, Mr. Lubben and his group was the owner of half of the corn box deal, and Mr. Giglio and his group was the owner of the other half, is that right? A. As I understood it that they were fifty per cent partners.

(1766)

Q. All right. A. In everything of Eatsum Food Products.

Q. All right. Now let's see. Half of the $140,000 would be $70,000, wouldn't it? A. Arithmetically, yes.

Q. That is all I am asking you at the moment. And half of $70,000 is $35,000, isn't it? A. Arithmetically, yes.

Q. And this income item, miscellaneous income, happens to be or is a figure of $50,000 which is exactly $35,000 over the $15,000 item in miscellaneous income for the year before, is that right? A. Arithmetically, yes.

Q. Now is it not a fact that Mr. Loperfido left the partnership because of a dispute with Mr. Giglio because he

learned that the cash earnings from the corn deal was a separate business venture between Lubben and Giglio only, or between Giglio and Lubben? A. I don't know what reason why Mr. Loperfido left the partnership.

Q. Is it not a fact that he left because the cash of the corn deal was not an Eatsum venture? A. I do not know what reason why Mr. Loperfido left the partnership.

(1767)

Q. He left because the corn deal was an independent Lubben-Giglio venture? A. I do not know of the reason why Mr. Loperfido left.

Q. All right. A. Mr. Stryker if you please, sir——

Q. That would answer my question unless you want to correct it, because I would like to go on. Have you answered it to your satisfaction? If not, I certainly don't want to interrupt you. A. The cash business——

Q. Well, Mr. Roth— A. I don't want to volunteer but I answered the question to the best of my ability.

Q. That is all I could expect. A. Excuse me, sir.

Q. That is all right. Is it not a fact that the 6½ cents of the sales received in the form of checks in connection with the corn deal were put on the books of Eatsum? A. I can't answer that with the 6½ cents amount in there. I could answer it in this manner.

(1768)

Q. Well, were some part—all right, go ahead. I had better not interrupt you. A. On every car of corn syrup, it was billed at a certain unit price. When the car of corn syrup was billed at a unit price, and an invoice submitted, it was recorded in the sales book. The other part of the income applicable to that invoice was paid in currency, and that went into the corn box.

Q. So it is a fact, isn't it, that the 5½ cents of each cash sale was kept separate and apart from the books of Eatsum?

A. I can't distinguish it at 5½ cents. I can only say a certain—part of the money of the sale in currency went to the corn box. Whether it was 5½, 6½ or 8½ or 1½ I do not know.

Q. Well, wasn't that done because the 5½ cents cash sales—and if that isn't exactly the right cents, you can supply it as best you can—were considered not part of Eastum, but were considered a separate source of earnings belonging only to Lubben on the one hand and to Giglio and Livorsi on the other hand? A. It was not separate earnings because it was audited in the regular, normal course of business at the end of every month.

(1769)

Q. Well, you kept separate books on the cash deals in the corn box, didn't you, a separate record? A. There were no books kept on the cash deal except a record of the currency and out.

Q. Well, I guess my word "books" was wrong. Records were kept? A. Mr. Hausman checked Mr. Loperfido's records of money going into the box, of currency going in and currency going out.

Q. Well, then, there were records to the extent that you have answered? A. If that is the definition of records, yes, sir.

Q. Now, if this, what I have gotten so far, is true, you as an accountant knew, didn't you, that this earning of $140,000 had no proper reason to be reported on the Eatsum information return? A. Mr. Stryker, you will excuse me, I just did not get the full question.

Mr. Stryker: I will be very glad if the recorder will be good enough to read it to you again.

(Question read.)

A. It should have been reported on the Eatsum information return.

Q. Did you report the Burlan earnings in the Eatsum return? A. Burlan was a separate and distinct corporation

(1770)

apart from Eatsum Food Products Company partnership.

Q. And you did not report it on the Eatsum return? A. I wasn't supposed to.

Q. Well, you did not? A. You just don't report the income of a corporation on a partnership return.

Q. Mr. Roth, all my question is, did you report it or not? A. Of course I didn't report the corporation returns on the partnership information return.

Q. This Burlan Corporation, as you have said, was a separate, distinct entity; isn't that right? A. Yes, sir.

Q. I think you have testified, Mr. Roth, that Bercu was the accountant for Eatsum partnership—correct me if I am wrong—from the beginning until the time when it broke up; is that a correct statement? A. If I recall my testimony, it was from its inception up to about one month or so before Mr. Lubben and Mr. Giglio disassociated themselves.

Q. Well, let's see, I am a little confused about the dates. The formal dissolution was, I think, June, 1946, but the actual dissolution was March 8th and 9th, as I remember it;

(1771)

is that right? A. In that area, yes, sir.

Q. Well, now, then, up to then, at least March 9th of 1946, Mr. Bercu was the accountant for Mr. Lubben, wasn't he? A. Not up to March 9th. I would say up to about January 31st.

Q. Well, up to that time. A. Yes, sir.

Q. Now, isn't it the fact that Mr. Bercu did not insert this $140,000 on the Eatsum books because it was not an Eatsum transaction? A. I do not know what was in Mr. Bercu's mind.

Q. Well, if it would be the fact that Mr. Giglio's and Mr. Livorsi's half of their share, that is $35,000 each, was in fact picked up in their individual returns, the Government would not lose by that transaction, would it, if that were the fact? A. Well, I can't answer that yes or no, sir.

Q. Well, I will admit my question—all right.

The Court: Is it all right with everybody to skip the midafternoon recess because we started late?

We will go right through until 4:00 o'clock if it is all right with everybody.

Q. Now, Mr. Roth, will you tell me the arrangement

(1772)

or understanding, whatever is the proper term, between you and Mr. Wessel regarding your being a Government witness here? A. I can't give you an understanding. I could only repeat to you a conversation that took place in Mr. Wessel's office between my attorneys, Mr. Wessel, and about eight or nine Government agents.

Q. Will you do that? A. Present: Mr. Wessel, Mr. Rosenblum, my counsel, Mr. Perry for Mr. Rosenblum's office, Mr. Tilzer, representing the Government.

Q. Tilzer? I didn't get the name. A. T-i-l-s- or z-e-r. Mr. Tilzer representing the Government, Mr. Fraiman, an associate of Mr. Wessel's, Mr. Present, revenue agent; I think Mr. McMahon was there. There were about two or three other revenue agents there.

Those names don't stick in my mind, except Mr. Wessel, Mr. Tilzer, Mr. Rosenblum stick in my mind.

Q. Mr. Roth, I am not interrupting you. I would be glad to have you put anybody there. I would like to know what the arrangement was, but answer in your own way. I won't interrupt you at all. A. Mr. Wessel said to me, at

(1773)

the same time directing his remarks to Mr. Rosenblum, "You have an opportunity to withdraw your plea, and I will not use in court for prosecuting you anything that the Government has learned" or I may have told the Government since the time that I pleaded guilty.

Now, I am talking about a conversation that existed about January 3rd or 4, 1955.

Q. All right, go ahead. A. "If you do become a Government witness, the only thing that I could do for you is, solely, a hundred per cent in my judgment, is at the time of sentence to present to the Court the extent of your cooperation. We are not permitted by law to make a recommendation to a judge. The final determination rests with the judge."

That is the only—if you want to call that an arrangement or an understanding, that is what happened, sir.

We adjourned, my counsel and I, and for about three or four hours' discussion, and about 2, 3 in the afternoon, by appointment that Mr. Rosenblum made with Mr. Wessel, I told him that I chose not to withdraw my plea, but to continue the cooperation that I commenced back in 1952 with Judge Pecora.

(1774)

That is my answer, sir, to your question, what is my arrangement.

Q. Well, did you start giving Mr. Wessel information before the conversation you have just narrated? A. Back in—two or three months before that, after pleading guilty in June or July, 1954, I discussed with, first, Mr. Bauman —I later learned Mr. Wessel was away on vacation—and then about two days or three days with Mr. Wessel and revenue agents. Then everything was dormant until January 4, 1955.

Mr. Wessel told me, incidentally, on January 4, 1955, that the reason that he waited so long because regardless whether I would or would not become a Government witness, he was ready to go ahead with the trial and prosecute me; if I chose at that time to withdraw my plea, he was all ready to go ahead. It was my choice at that time.

Mr. Stryker: Mr. Recorder, would you be good enough to read back my question which I don't think this answer answers.

The Witness: Mr. Stryker, I tried to give you the explanation.

Mr. Stryker: I understand it. I just want to get the question myself. I may not remember it exactly.

(1775)

(Question read.)

A. After pleading guilty in June or July, 1954, I spent about three days, four hours each day, with Mr. Wessel and two revenue agents, discussing my misdeeds.

Q. Now, the plea that you refer to is the plea that you entered to this indictment in this court, is that what you are talking about, or some other plea? A. No, the income tax indictment, this present case.

Q. And that plea was entered when—I have forgotten with all the dates in this case—was it January 4th or something like that? A. I think it was in the middle of July, sir.

Q. Oh, I think you are right, July of last year.

All right. Now, before you discussed your misdeeds with Mr. Wessel, didn't you have any talk about what the Government would do for you if you did discuss them? A. I had no discussion with Mr. Wessel about that, only what Mr. Bauman told me.

Q. Well, he told you that if you talked something good might happen to you, or what did he say, I don't know? A. No, sir, he did not say that and you are misquoting a conversation you don't know about.

(1776)

Q. I am not, because I am just asking for it. A. Well, you just made a statement, if you please, sir.

Q. I did not make a statement. I asked you a question. If Mr. Bauman said anything about that, I want to hear what it was. A. In Mr. Bauman's office there was Mr. Rosenblum, Mr. Bauman, Mr. Tilzer, Mr. Mahon, Mr. Twohig.

Q. All right. Now, what was said? A. Mr. Bauman said to me, if the Government accepts my cooperation, the only thing I can hope for is at the time of sentence a presentation of the facts of cooperation and to what extent I cooperated will be presented to the judge. They are not empowered to make a recommendation.

That is the extent of the conversation in regard to what Mr. Bauman told me.

Q. All right. Now, the fact remains, does it not, Mr. Roth, that you understand that your future, in so far as the assistant has anything to do with it, depends solely upon the recommendation, I take it now, of Mr. Wessel; is that right? A. That is wrong.

Q. Where is it wrong? A. You used the word "recommendation," and I specifically told you twice, sir, that

(1777)

both Mr. Wessel and Mr. Bauman told me that they have no power to make a recommendation.

Q. All right. It depends upon what action they take after you have done your work as a Government witness, is that right? A. That is wrong, sir.

Q. Let me have the minutes, then, and see if I can't get it right. A. It depends entirely upon the judge, regardless of what they say.

Q. Well, is this it, page 1300, your answer:

"After consultation with my attorneys, I decided not to withdraw my plea, but to continue the cooperation of the Government, dating back to the middle of 1952; and you ("you" is Mr. Wessel obviously) said to me (Roth: I am interposing those two words) that the only thing that you could do ("you," Mr. Wessel, "could do") is resting solely a hundred per cent in your (meaning Mr. Wessel's) judgment at the time of sentence you (Mr. Wessel) would call the Court's attention to the extent of my (meaning your) cooperation and you (Mr. Wessel) can't do anything further for me, or could I hope for anything further except the true recommendation—except the recommendation of your true feelings ("your" again meaning, of course, Mr. Wessel)

(1778)

to the extent of my (meaning your) cooperation."

Now, that is what was said, wasn't it? A. Well, if the record says so, I testified——

Q. Have I got that right now? A. If the record says so, I testified that way. I didn't read it with you, Mr. Stryker.

Q. Do you doubt that I read it correctly?

The Court: Nobody's challenging that, Mr. Stryker.

Mr. Stryker: What is that?

The Court: In the absence of any challenging we will take it as read correctly.

Mr. Stryker: I should hope so.

The Court: And he says he so testified. Now let's go on.

By Mr. Stryker:

Q. Well, then, you understand that your future may very well depend upon the recommendation—using that word from your answer—that Mr. Wessel may make to the judge who sentences you; you understand that? A. I don't understand it that way, regardless of what Mr. Wessel may make, recommend, a hundred per cent of the decision still rests on the judge.

(1779)

Q. Well, don't you regard his recommendation—I am not using the word, it is your answer—as an important factor in your future? A. Recommendation of cooperation, sir, and not recommendation of sentence.

Q. Well, regardless of what recommendation, don't you—— A. Let's put the word "recommendation" in the proper place so we don't misunderstand.

Q. Well, I will put it in the place where you put it in your answer.

Well, recommendation as to cooperation, or with regard to your cooperation, without cavilling about words, don't you feel, although the judge, of course, is the person that does it, that what Mr. Wessel may recommend to the judge is of great importance to you? A. If Mr. Wessel will explain to the judge to the extent of my cooperation as a human being standing before a judge, I expect the judge will take into consideration what Mr. Wessel has to say to the extent of my cooperation. If that is what you want, that is within my brain, with hope.

Q. And my question was, then, do you not recognize that whatever report or recommendation—I don't care about

the word—Mr. Wessel may choose to make at the proper
(1780)
time to the judge, whether a favorable or unfavorable recommendation, is of great importance to you? A. I could only answer the question to you, sir, as I answered it before.

Q. Well, is it or is it not important to you, that you get, if you can, a—— A. Mr. Stryker, you walked away from me with your back towards me and I didn't get all the words of your question.

Mr. Stryker: I'm sorry. I did do that.
Would you read my question as far as I went?

(Question read.)

By Mr. Stryker:

Q. —a favorable recommendation to the judge by Mr. Wessel? A. I hope that Mr. Wessel will enumerate to the judge to the extent of my cooperation and it will be taken into consideration by the judge in imposing sentence.

Q. And so it is your desire, is it not, to do everything in this trial that you think would be cooperation with the Government? A. That is incorrect, only to enumerate the facts, based on my instructions, the instruction from Mr.
(1781)
Rosenblum, to tell the truth, whether it hurts the Government or helps the Government, whether it hurts the defendants or helps the defendants.

Q. Just the truth? A. And the accurate—the truth and the accurate facts. It is not for me to decide whether it is advantageous or disadvantageous to Mr. Wessel.

Q. But it is for you to decide what you will say there under oath on the witness stand, isn't it? A. I am stating to you the accurate facts and the truth to the best of my ability.

Q. Well, aren't you aware of what would help or hurt the defendants? Aren't you aware from your vast knowledge of this case what you think would help them or hurt them; you must know that? A. I can only state the facts as they exist and the circumstances as they exist.

(1782)

Q. And you wouldn't be aware as to what facts would be hurtful or harmful? A. I can only state the facts as they exist and the circumstances as they exist.

Q. And as you state them, you wouldn't be aware of which they meant or which way they tend, would you? A. I could only state the facts as they exist and the circumstances as they exist.

Q. Now let's see. You are awaiting sentence on your plea in this case; that is right, isn't it? A. Yes, sir.

Q. And you are awaiting sentence on your plea to one count of the indictment in the RFC matter; that is right, isn't it? A. Yes, sir.

Q. And you are awaiting the disposition of the five other RFC indictments; that is right, isn't it? A. What do you mean by disposition, sir?

Q. Well, trial or dismissal, any disposition by the court. A. Well——

Q. I mean, they haven't been disposed of, have they? A. We haven't reached a point even to discuss the others, whether the indictments are correct or not. So I do not understand what you mean by disposition. You are trying to infer that I am looking for a benefit in the other five

(1783)

indictments, and I am trying to explain to you that it was never decided whether they are correct indictments.

Q. The indictments are filed by the grand jury and have been in the files of this court since 1952, haven't they? A. Yes, sir.

Q. And they are not dismissed yet. A. Up to this moment nothing has been done about those indictments.

Q. Have you any understanding about those five indictments that are still pending against you? A. None whatsoever.

Q. Have you hopes about Mr. Wessel's recommendation regarding those five undisposed of indictments? A. Those five indictments were never discussed with Mr. Wessel, and Judge Pecora, who is in charge of those matters, has never had any discussion with Mr. Wessel about them.

Q. I asked you if you had hopes about the disposition of those indictments? A. Hopes? I didn't give anything—no thoughts came to my mind about those indictments whatsoever.

Q. In other words, you are sitting with five Federal indictments against you and what might happen to them

(1784)

just did not enter your mind is that right? A. I told you before, Mr. Stryker, that no discussion was had as to whether those indictments are correct.

Q. Well, my question is not discussion now, it is a question of your mind: have you hopes for a dismissal of those five indictments without trial? A. I have hopes that Judge Pecora will be able to indicate to the District Attorney that those indictments are incorrect and should have never been filed.

Q. But you pleaded guilty to one of them, didn't you? A. On that one I was guilty, sir.

Q. I see. At all events, Judge Pecora as yet has not been able to persuade the court or the assistants that those indictments are incorrect? A. Just a moment, sir, not the way you are putting the question to me. Judge Pecora had no conferences whatsoever since 1952 with the District Attorney's office regarding those indictments, though all his papers are ready.

Q. Well, can I get a plain answer to what I hope was a plain question? A. Well, you are carrying an inference to some of your questions, Mr. Stryker, which is very unfair.

(1785)

Q. I mean to ask you a plain simple question. A. Please make it plain and simple.

Q. Do you hope that those indictments will be dismissed? A. I have hopes that Judge Pecora will be able to show the District Attorney that those indictments were not correct, correctly filed, and should not have been—there should not have been an indictment.

Q. And do you not think that if you were to receive a favorable recommendation from Mr. Wessel for your work here, that Judge Pecora would have a slightly better chance of persuading the authorities that those indictments should be dismissed? A. I do not know what is in Judge Pecora's mind, and the arithmetical accuracy of that—I do not think that I need that assistance from the United States Attorney on those RFC matters.

Q. You have admitted that you committed perjury before the 1952 grand jury with respect to your own personal income tax returns, not where somebody else had something to do with it—you have admitted that, haven't you? A. Yes, sir.

Q. Have you hopes that you won't be prosecuted for perjury with respect to that matter? A. That discussion never came up, sir.

(1786)

Q. Well, my question is, have you hopes? A. The thought never came into my mind.

Q. Let me see if I understand that and then I will stop. Are you telling this Court and jury that the thought of these undisposed of five indictments and the admitted

perjury that you gave before the grand jury, that what might happen to you because of that, never entered your mind; is that your answer? A. I did not say that, sir.

Q. Well, do you say so now? A. You are misquoting me, Mr. Stryker.

Q. Do you say so now? A. Please ask me the question again and please don't misquote what I said.

The Court: Read the question.

Mr. Stryker: I will start again.

Q. Are you telling me that you thought of what might be the consequences of your perjury before the grand jury with respect to your own personal tax returns, never entered your mind? A. Perjury never entered my mind.

Q. Well, that is an answer, if that is all you want to say. A. Well,——

Q. If you want to go on, I won't interrupt you. A. You did interrupt me, and if you want to interrupt me so that I

(1787)

can lose my thought, it is very unfair.

Q. I want to go back then—— A. I have a lot of respect for you, Mr. Stryker, but don't distract me in interrupting my thoughts.

Q. I will have the question read over again and I will sit down until you finish and say anything you want to say. If I have interrupted you, I am sorry. A. The damage has been done but it doesn't make any difference.

The Court: Did you give any thought as to the possibility of your prosecution for perjury for the false statement you gave before the grand jury?

The Witness: I never gave perjury any thought, sir, ever being indicted for perjury, nor having—nor was there any discussion with Mr. Wessel or Mr. Leone or Judge Pecora or anybody else, and

this is the first time that perjury came up regarding the grand jury.

Mr. Stryker: That is all.

Mr. Wessel: Thank you, Mr. Roth. I have no questions.

The Court: Mr. Roth, do you think that Mr. Wessel's recital to the Court on sentence would be more favorable if he ever finds out that you lied to hurt any of these defendants?

(1788)

The Witness: On the opposite, I think it would be—I would incur his enmity, if one could use it.

The Court: Do you think that the Court's sentence would be more favorable if the Court ever finds out?

The Witness: That I lied?

The Court: Yes.

The Witness: I think it would be double or triple what may have been in the Court's mind.

The Court: Thinking back with that in mind, is there any of your testimony whatsoever that you want to change?

The Witness: None whatsoever except possibly dates, you know, recollection of dates.

The Court: All right.

The Witness: But as far as facts and circumstances, none.

The Court: All right. We will start with the next witness at ten-fifteen tomorrow morning. Don't discuss the case.

(Adjourned until Thursday, February 3, 1955, at 10:15 o'clock a. m.)

(1789)

New York, February 3, 1955,
10.30 o'clock a. m.

Trial resumed.

(Jury present.)

Mr. Wessel: Government's next witness is William Gordon.

WILLIAM GORDON, called as a witness by the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Wessel:

Q. Mr. Gordon, have you ever been know by any other names? A. Yes, sir.

Q. What names, sir? A. Goldenberg, William Goldenberg.

Q. Any other names? A. I don't believe so.

Q. Were you Gerson, G-e-r-s-o-n? A. Yes, I was.

Q. Have you ever been convicted of a crime, Mr. (1790)
Gordon? A. Yes, sir.

Q. When and where, sir? What crime and when? A. For——

Mr. Stryker: One moment. I object to it, incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Stryker: Exception.

A. Alcohol tax.

Q. On how many occasions, sir? A. Two.

Q. Could you give the years, please? A. I believe one was in 1935, and the other one was in 1939.

Q. Can you identify in this courtroom, Mr. Gordon, the defendants, William Giglio, Howard Lawn and Frank Livorsi? Will you point them out, please, for the record? A. Yes, sir. Mr. Giglio (indicating) to the left of me, Mr. Lawn, and Mr. Livorsi in the rear.

Mr. Wessel: Let the record show that the witness has identified the three defendants.

Q. Now, Mr. Gordon, were you at some time employed by Mr. Giglio or by companies with which he was associated? A. Yes, sir.

Q. Would you state when and what companies, if you (1791)
know the companies? A. I was employed by Mr. Giglio, and I believe the company was the Tavern Fruit Juice Company.

Q. Now, at what time, sir, were you employed by Tavern Fruit Juice Company? A. In 1945.

Q. Any other time? A. And '6.

Q. Were you ever? A. A part of '6.

Q. Excuse me? A. A part of '46.

Q. Can you state your best recollection of the months, days or whatever period you can fix that you worked for Tavern Fruit Juice Company? A. I would say the first part of 1945.

Q. When you say the first part, you are referring to, let's say—I am trying to fix it as accurately as possible—from January through June? A. No, sir. I would say from about April or May of 1945.

Q. Until when, sir? A. About March of 1946.

Q. Do you recall, sir, having testified before a grand jury in this district in 1952? A. Yes, sir.

Q. I am going to read you some questions and answers, sir, which appear at pages 399 and 400, and see if they re-

fresh your recollection in any way as to the date when you
(1792)
first commenced working for Tavern Fruit Juice Company?

Mr. Stryker: I object.

Mr. Wessel: I will be very happy to show this to counsel after I have concluded my direct examination.

Mr. Stryker: I object on the ground it does not appear that the witness needs to have his recollection refreshed. I don't know whether he does or not, but the record doesn't state that, if I have heard correctly.

Mr. Wessel: I will ask another question.

By Mr. Wessel:

Q. Are you sure, Mr. Gordon, that you commenced working for Tavern Fruit Juice Company in about April or May of 1945? A. I wouldn't be too sure. It is a long way back. As far as I can remember right now, I believe it was around that time.

Q. Now, if I were to read you from your grand jury testimony that it was a different time, would that perhaps refresh your memory? A. I wouldn't know, sir.

Q. You wouldn't know? A. I wouldn't know whether it will or not.

(1793)

Q. Well, then, supposing I read to you from pages 399 and 400 of your grand jury testimony in this district, given in October of 1952: I am leaving out some of the preliminary matters.

"What company? A. The—let's see, the name of it—the Tavern Fruit Juice Company, I believe that was the name of it.

"Q. And how did it come to pass that they employed you? A. Well, I knew William Giglio who gave me an opportunity to go to work there.

"Q. And did he hire you? A. Yes, sir.

"Q. And for how long—what did he have you do when he hired you? A. Well, originally——

"Q. By 'originally' you mean when you started? A. That's right.

"Q. Which was when? A. It was sometime in 1945.

"Q. The end of 1945 or the early part of 1945? A. I would say it would be the latter part of 1945."

Does that refresh your memory in any way, sir? A. Yes, sir.

(1794)

Would you say it was the latter part of '45? A. I can explain that, sir.

Q. I wish you would, please. A. When I originally went to work for Mr. Giglio, it was in the early part of '45, and I wasn't on the payroll. I took a contract to do some work for them, and perhaps when I answered that question in the jury room I had in mind that later on I was put on a regular payroll.

Q. And am I correct that contract you are referring to was one to do some work at the Tavern plant and keep it under a certain price? A. That's right.

Q. That is the contract you are now referring to? A. That's right.

Q. Do you recall what the figure was in that contract? A. The figures?

Q. Yes, sir. A. It was between 25 and $30,000.

Q. Supposing I read you some further testimony of the grand jury, pages 402 and '3, and see if this refreshes your recollection any further:

"Q. Were you employed by Tavern? A. By Tavern Fruit Juice, yes.

"Q. How much were they paying? A. At that time they weren't paying me anything. Originally, when I came in there they had this project of making

(1795)

these changes, and I undertook to put my time to supervising the changes, and if it came to—the total cost came to certain figures, they were to give me a lump amount.

"Q. What was the figure that the revamping job was to be? A. It was not to be over $20,000, around that figure.

"Q. In other words, if you were to keep it within the figure of $20,000, you would be paid a bonus; is that correct? A. That is correct.

"Q. What was the amount of the bonus you were to get to be? A. If it stayed within the $20,000 mark, I was to get $3,000."

Does that refresh your recollection that you had that contract very much in mind when you testified before the grand jury? A. Well, I wasn't——

It wasn't very clear. I didn't know what questions they were going to ask me in the grand jury room, and I may have said that, or if you read it correctly, that is what I said.

Q. Does that refresh your recollection as to when you went to work for Tavern? A. Well, do you mean by going to work, including this contract, or when I was put on the

(1796)

payroll.

Q. When you first went to work for Tavern, whether you were paid or not? A. It still was the first part of 1945.

Q. Do you recall having given a statement to the Treasury Department back in October 31, 1950? Do you recall, sir? A. I recall making some sort of a statement.

Q. Do you recall Mr. Twohig, Special Agent Twohig, was not present during that statement? A. I didn't know who was not present.

Q. I am going to read you some questions and answers from the statement, sir, and see if that refreshes your recollection as to when you went to work for the Tavern Company:

"Q. What were you doing as an engineer in Mr. Giglio's employ, in brief? A. Well, I worked for Mr. Giglio for less than a year, and I would say most of my time was spent in experimental work on a method of purifying molasses into sugar.

"Q. And what was the name of the company for which you worked? A. I believe it was the Tavern Fruit Juice. I am not quite sure whether the name I

(1797)

gave you was exactly so, but it is——

"Q. And that was located in Brooklyn? A. Yes, sir.

"Q. Do you remember the approximate months that you were employed there? A. Well, I would say it was close to the last half of 1945, to the very beginning of 1946. I am not quite sure about those dates."

Does that refresh your recollection in any way as to when you went to work for Tavern? A. I probably said that at that time.

Q. No, I am not asking you whether you said it or not, sir. I am asking whether it refreshes your memory in any way as to when you went to work for Tavern, bearing in mind that statement was given five years ago, in 1950? A. Well, it doesn't help me now to recall. At the time I was asked this question—if I can explain this?

Q. Go right ahead, sir. A. I had no idea as to what questions were going to be asked, and I didn't have a chance to associate them with my personal life.

Q. Do you have some idea what questions you are going to be asked here today? A. No, sir.

Q. Have you seen Mr. Stryker before you came here

(1798)

today? A. No, sir.

Q. Mr. Wolfram? A. No, sir.

Q. Not at all? A. No, sir.

Q. Have you been in their office? A. Yes, sir.

Q. Do you recall what the total amount of your income——

Mr. Wessel: Strike that.

Q. Do you recall the total amount of salary payments you received from Tavern Fruit Juice Company? A. The total amount?

Q. Yes, sir. A. I don't recall it now, but whatever I did get I reported to the Internal Revenue Department.

Q. I see. Have you seen your tax returns recently? A. The old ones?

Q. I am referring to your tax returns that relate to the Tavern Fruit Juice Company income? A. No, sir.

Q. But you are sure that whatever will be shown on those tax returns will be the exact amount that you did receive? A. Yes, sir.

Q. You have no recollection of how much that was? A. No, I don't.

Q. At the present time? A. I don't.

(1799)

Q. Is there any way that you can refresh your memory? A. I don't know of any way.

Q. Do you know what your weekly salary was at Tavern? A. Yes, sir.

Q. How much? A. $500 a week less deductions, which would—I think the deductions at that time were $111 and change.

Q. Incidentally, you are quite sure that it was the Tavern Fruit Juice Company that you worked for? Am I correct, sir? A. I was paid by Mr. Giglio and I understood I was working for the Tavern Fruit Juice Company.

Q. From whom did you receive that understanding? A. From Mr. Giglio.

Q. And that was when? A. Well, when I was put on the payroll.

Q. In other words, at the time it was your understanding that you were working for Tavern; am I correct? A. That's right.

Q. Did you ever have any understanding that you were working for anybody else? A. Well, the only understanding I had was that I was working for Giglio, and the only one that I had to answer to was Giglio.

Q. Well, now, I am referring to the company for which (1800) you worked, Mr. Gordon. As I understand your testimony, you said that it was your understanding that you were working for the Tavern Fruit Juice Company, and I now ask of you whether you have any recollection of having worked for any other Giglio company in either 1945 or 1946? A. I wouldn't know that, sir.

Q. I show you, Mr. Gordon, Exhibit 59-B for identification, and ask you if that will refresh your recollection in any way as to whether or not you did not work for some other company? Does it refresh your memory in any way, sir? A. It doesn't refresh us as to who I got the money from. You see—if I can explain that?

Q. Go ahead. A. My money was always paid to me, or most of the time it was paid to me by—in cash, in an envelope in which the deductions were made. Now, whether it was—whether it came from American Brands or Tavern Fruit Juice, I have no positive knowledge of that.

Q. Do you recall whether or not there was a W2 form attached to the envelope? A. Yes, there was.

Q. And you didn't look to see which company it was? A. I didn't pay any attention to it.

Q. In other words, that doesn't refresh your memory? (1801)

A. It doesn't, Mr. Wessel.

Mr. Wessel: Well, I offer it in evidence under the rules, a certified copy of a Social Security return.

Mr. Stryker: Of course, there is no possible foundation for this document. I haven't even had a chance to read it. It was some paper shown the witness. He was asked if it refreshed his recollection

Mr. Wessel: Well, it doesn't.

Mr. Stryker: I understood him to say it does not. It has no independent basis in this case at all. I object to it. No foundation shown.

The Court: May I see it?

Mr. Wessel: May I hand it to your Honor? I offer it not for this witness at all, but as a certified document.

The Court: (After looking) I will receive it.

Mr. Stryker: Exception.

(Government's Exhibit 59-B for identification received in evidence.)

Mr. Wessel: (To jury) Ladies and gentlemen, Exhibit 59-B is a certified copy of a social security

return filed with the Government, and the portion we
(1802)
are concerned with at the moment is that it is dated for the quarter ending March 31, 1946. It is headed, "American Brands Corporation," and under the heading, "B. Goldenberg," is the amount of taxable wages paid, $1,180.

(1802a)

Q. Mr. Goldenberg, what is your social security number? A. I could tell you that. I have it in my pocket.

Q. Would you do so, please? A. William Gordon is my legal name, Mr. Wessel, and it is 9-20-5449.

Q. At the time, in 1945 and 1946, your legal name was Goldenberg, am I correct? A. That's right. Now my legal name is Gordon. The number on this social security return is 289-20-542.

All social security numbers on this return have four last numbers, and that appears to be an error.

Q. May I ask you, Mr. Gordon, to examine——

Mr. Wessel: Well, strike it.

Q. Now, during the period that you worked for Tavern Fruit Juice Company, where did you live, Mr. Gordon?

Mr. Stryker: Object to it as immaterial.
The Court: Overruled.
Mr. Stryker: Exception.

A. I lived at Mr. Giglio's home.

Q. And you received your room and board there without paying for it, am I correct? A. Yes, sir.

(1803)

Q. Where was his home at that time? A. Well, it was in Elmhurst I believe it was Butler Street at the time.

Q. Do you recall the total amount of weeks that you worked at the Tavern Fruit Juice Company for which you were paid $500 a week? A. I don't at this time.

Q. Well, would it be in excess of, let's say, $20,000? A. No, sir.

Q. Would you give us your best recollection of the amount of money you earned in Tavern Fruit Juice Company during the entire period that you worked there? A. Whatever figure I give you, Mr. Wessel, would be a rough guess.

Q. Well, suppose you give a rough guess. A. I would say it was between 12 and $15,000.

Q. And that was during the entire period that you worked there? A. That's right.

Q. As I recall, you said you commenced about April of 1945, and you continued until some time in 19'6. A. Well, at April, that was during the time of the contract, but I believe I went on the regular payroll either in August or September or it might have been a little one way or the other.

(1804)

Q. Of 1945, and how late did it continue in 1946? A. I would say until March.

Q. Of 1946? A. That's right.

Q. So that would it be fair that you were paid $500 weekly from about August of 1945 until about March of 1946? A. Well, actually, I wasn't paid $500 all the way through. I believe that my salary became $250 a week, after the first of the year; that is, after——

Q. After January 1, 1946? A. 1946. Now, just how close to the first of the year I don't recall.

Q. Now, sir—incidentally, you are an engineer, Mr. Gordon? A. Yes, sir.

Q. What kind of an engineer? A. A practical engineer.

Q. And how long have you been a practical engineer? A. I would say going back 20 years or more.

Q. Isn't it the fact that it is no more than 13 years? A. No, sir.

Q. Have you had any college education? A. No, sir.

Q. Now, would you described, Mr. Gordon, the work

(1805)

that you did for the Tavern Company, where it was done, during what time, and in general what kind of work? I don't want too much detail at this time unless you feel you have to give it to answer the question. A. Well, do you mean during the period that—of this reconstruction, and so forth?

Q. Well, you might described the reconstruction. A. I will describe it in the best way I know how. The plant, at the time I was called in to check whether the production couldn't be increased and more efficiently put into the plant, I would say, had a capacity of about——

Q. I don't want to interrupt. Will you describe what plant you are talking about? A. I am talking about the Tavern Fruit Juice Company, the one that was in Brooklyn, New York.

Q. All right, go ahead.

Mr. Stryker: Could I ask the witness to keep his voice up? He drops it sometimes.

By Mr. Wessel:

Q. Will you do that, please? A. What's that?

Q. Keep your voice up if you can, Mr. Gordon. A. Yes, I will try to.

(1806)

It had a capacity of approximately about 50 to 70 barrels of jelly a day, and, as the problem was presented to me, they wanted a production of about 250 or 300 barrels a day.

I found that all the equipment, most of the equipment in the plant was inefficient. The boiler, it didn't have enough capacity; it was out of order; it needed a lot of repairing. The tanks used in connection with this production of jelly weren't the right ones. They had jacketed tanks—I am talking about these tanks that I am describing now—that were low pressure, used with a high pressure boiler, which was very dangerous. In other words, the whole operation was inefficient.

Now, what I did was, first of all, the oil tank, they had an oil tank that had a capacity of about 400 or 500 gallons. That meant that while they were on production——

Q. I don't want to interrupt. If you feel you have to answer my question in detail, it is all right.

Mr. Stryker: I submit the question has been asked, and it is only fair——

Mr. Wessel: I don't mind.

Mr. Stryker: —to permit the witness to answer it.

(1807)

By Mr. Wessel:

Q. Go ahead, Mr. Gordon. A. Mr. Wessel, if you don't mind, I will just go down the line the way I actually put in this equipment, starting from where the operation would start.

Q. Bear in mind we have at all times been talking about the Tavern Fruit Juice plant in Brooklyn. A. Yes, sir, yes, sir, I understand that.

I bought a 5,000 gallon tank to hold the oil.

Mr. Stryker: Let's talk up against the competition, the bell.

A. I said, I bought a 5,000 gallon tank for the oil, built safety walls around the tank, which was a requirement, a city safety requirement. I bought a used boiler in—shall I want until that is——

Mr. Wessel: Mr. Stryker would like you to speak louder if you can.

Mr. Stryker: It is hard with the bell for all of us to hear you. If you don't mind, speak up.

A. I bought a boiler in New Jersey, I believe it was Belleville, New Jersey, a used one, and had it moved into the plant. I built walls around the boiler—by the way, the

(1808)

boiler was about 150 horsepower; it weighed about 18 or 20 tons. Put up a high smokestack, installed oil burner, fully automatic, installed a return line to the boiler, where the hot water that had been used would be returned to the boiler. The boiler itself had to be relined with firebrick.

Now, this part of the boiler was done—there was a blueprint made of it and it was submitted to the—in Brooklyn, to the Safety Department, and there was a permit issued and it was inspected by the city.

Now, from the boiler itself we installed a four-inch steam line, which extended from the boiler about 180 feet. That takes care of the boiler room.

Now, I bought a 10,000-gallon storage tank which was about 10 foot in diameter, by about 10 or 11 foot long, for storage of liquid sugar. On that tank we put a series of strainers, to strain some of the foreign matter from the syrup as they got it. This involved two or three strainers, with a series of valves in which, while liquid was taken out

of the tank, if the screens would clog up, you could close off one set, and open up the other, without stopping the operation.

(1809)

From there I put a heat exchanger—as a matter of fact, there were two; I will come to that one later—a heat exchanger which would raise the temperature of the liquid syrup to from 50 or 60 degrees, or room temperature, to 180 degrees.

This heat exchanger, and the one which I will come to later, was bought by—from P. J. Delehanty Company in Edgewater, New Jersey.

Now, the heat exchanger had automatic controls. The controls—the controls were controlled on a platform which was about 30 or 40 feet away from this heat exchanger, by the operator of that department, and it had a recording, it was a recording instrument, and very accurate. In other words, if more syrup would pass through, it would automatically open the amount of steam that went through there to balance, to maintain a certain temperature.

Now, this boiler had a pressure, or the pressure that the city allowed us on that was 125 pounds of pressure, and in the equipment that they had there, when I came there—it was there and I used it—I took the—I don't remember whether it was two tanks or three tanks, the low-pressure tanks, and put a reduction valve on there to reduce the pressure of the steam from 125 pounds down to 10 or 15

(1810)

pounds, whatever the underwriters had on the tanks themselves; and I put safety valves on those tanks, and, of course, we had a pipe, the syrup going through a pump, which had quite a high capacity; I believe it was, I believe it was a three-inch pump, I am not positive about that——

Q. Would you like to refresh your recollection? A. I don't remember whether it was a two or three-inch pump.

Q. I wondered if there is any way I can refresh your recollection on the size of that pump? A. Unless you have some of the bills there that I submitted.

Q. Go ahead. A. Now, the pump would take the liquid out of the storage tank, this 10,000-gallon storage tank, pump it through the heat exchanger, and then it was piped on a platform, which I had to build; the platform was about seven feet off the ground, and it was built out of wood, and it was so placed so that the operato of this whole operation could stand above those tanks and operate all the valves, and his controls, both electrical and otherwise, from that platform, and there was a series of valves that went into

(1811)

the four or five tanks that eventually were put on there; so that if the operator wanted to fill No. 1 tank all he would have to do is open up the valve on No. 1, and the material would go in there at a certain temperature, and, of course, all the way down the line.

Now, whether there were two or three of these low pressure tanks there I don't know. I know there were two there for sure, and I can't recall whether there was three.

Q. Is there any way I could refresh your recollection on that? A. Unless there is some pictures or——

Q. All right. A. —or something associated with that, that I might be able to recall that.

Q. If I read to you from the grand jury testimony, would it refresh your memory? A. I don't know. I can't remember what I was asked there.

Mr. Stryker: Just a minute. The witness was asked to describe what was done. He is doing it. If h wants to——

Mr. Wessel: Extremely well, Mr. Stryker.

Mr. Stryker: If he wants to refresh him or (1812)
ask him later on, then your Honor will pass on that. At the moment I think the fair thing, having asked the question, is to get the witness' answer.

Mr. Wessel: Go ahead.

Mr. Stryker: Without interruption.

A. I do know, however, that where these low pressure tanks were metal and glass lined; there were three more tanks brought in there—now, I don't remember whether I bought those tanks or they had them available at the time, but I do know that I had to order some copper coils, made up, which I believe I bought from the Brown Rigg Company in——

Q. What is the name of that company, sir? A. Brown, B-r-o-w-n, Rigg, R-i-g-g Company in Jersey City, New Jersey.

Q. Incidentally, how much did you pay this P. J. Delehanty Manufacturing Company? A. It was over $2,000. I believe it was $2,200.

Q. See if I can refresh your memory at all.

Mr. Wessel: Would you mark that for identification, please.

(Marked Government's Exhibit 112 for identification.)

Q. Incidentally, I won't interrupt you, Mr. Gordon. (1813)
You continue, and remember that we are now talking about the Tavern plant in Brooklyn, and I don't want to interrupt any more. Go ahead. A. We are talking about the Tavern plant in Brooklyn.

Q. Brooklyn? A. That is correct.

Now, I ordered some coils, these copper coils, to put inside these wooden tanks, in order to process the material, to bring the temperature up, or to maintain the temperature.

Now, the two or three tanks, the tanks that were there before, had agitators in them, and the other two or three that I put in there needed agitators.

Now, on the platform I bought four or five high-pressure kettles, and, sir, I can't remember the exact capacity of those, but I would judge that a couple of them were 80 or 90-gallon capacity, and three, three of them were of about 150-gallon capacity. They were placed on top of the platform, and the purpose of them was for a premixing of the thickening agent and the artificial flavoring that they used in connection with making this jelly.

They were high pressure tanks, and I think I bought them from the same company, Brown Rigg. I believe they

(1814)

obtained them from the Navy Department, or it was a reject from the Navy Department, but they were high-pressure, stainless kettles.

Now, I bought agitators for those five kettles, and also bought two large agitators for the wooden tanks that I put in later on.

Now, of course, in connection with all this there was some electrical installation: magnetic switches and controls, and so forth.

(1815)

On the platform, because of the five tanks, there was a lot of steam there, and I cut through the roof and put those ventilators on there. There must have been five or six of them, ventilators.

Now, the other heat exchanger did the opposite of what the first heat exchanger had to do. I will have to explain

that a little bit. For the reason of putting in this other heat exchanger it was a cooling exchanger, and in the process prior to making all these changes in these experiments, the jelly was filled in barrels, wooden barrels. These barrels were lined with wax, and if they took the finished product and put it into those barrels while the product was hot, it would melt the wax off and as a result, first of all they wouldn't get the protection which they were originally put in there for, and we got a lot of leakers.

Now, in order to cool this jelly, there was a critical point at which the jelly itself would jell up. Then, therefore, it had to be a very closely controlled temperature. The cooling was done by water through a heat exchanger, but the controls had to be very close. I believe that the melting point of this wax is about 105 degrees, and the jelling point of the jelly that they made at that time was very close to it, and I remember there was a very close tolerance

(1816)

as to it.

Now the trouble was, if you cooled it too much it would freeze in the heat exchanger. Therefore, provisions had to be made in the heat exchanger, should the automatic controls not work, function properly, that steam had to be thrown into the heat exchanger to thaw the jelly out and start the operation again.

Now this involved a lot of valving and piping to it, because the steam itself, going into the evap-dehydrator—excuse me. The heat exchanger, everything had to be double-valved so as if you shut the steam off you wouldn't get any addition—there wouldn't be a chance of any steam escaping into the heat exchanger.

Now, from there—well, prior to going into this heat exchanger there was a pump which was connected to all the tanks that was close to this platform. This pump was

about a three-inch pump—I am fairly sure of that—and it was on the ground, and whichever tank was ready to be emptied, you would open the valve corresponding to that tank; the pump would pick it up from these tanks when the processed jelly was ready and push it through the heat exchanger into a tank that formerly was used for storaging the raw liquid sugar.

(1817)

Now, on that tank, around that tank, there were three, three or four openings, in which it wasn't connected in solid type; it was connected with hose. I believe it was an inch and a half hose, with a quick action valve on the end of each hose, in order to fill the barrels.

I installed—I bought a secondhand scale, that is, a scale that is built into the ground. I bought a secondhand scale, one that was rebuilt. I believe it had a 2000 pounds capacity. And I installed it in the proper place. It was in between two rooms, where an empty barrel could be weighed on it, taking it to be filled, and the full barrel could be weighed coming back. They wheighed the barrels and marked the tare on there.

The amount of water that was coming in through the City water main at the time I came there wasn't enough or sufficient to take care of this whole operation. I believe they had a normal three-quarter-inch line, which is really five-eighths, and I installed a two-inch line from the street into the building, and as soon as I came into the building I increased that size with three-inch pipe. Now part of that was piped over to the heat exchanger; part of it was piped

(1818)

over to the boiler room; and of course part of it was piped off in various places for the different uses.

Now the floors, in that building, some of them had wooden sections on the floor, which was not a very sani-

tary condition. I ripped out all those floors and put in proper sewer basins for each, with the right slopes. I also installed an inch and a half pump for the purpose of emptying barrels of syrup.

I might have to explain that because most of the time that they got their liquid syrup, it came in tank trunks, but there were times when the sugar companies, or whoever delivered it as the material to them, delivered it in barrels, which meant that a pump would have to pump it out of the barrels into this 10,000 gallon tank.

Now I would say, roughly, that is about the rough of this whole plant, except that there is a lot of incidental things that went with it. For instance, lights—all the incidental things that go with this operation. And that just about covers the extent of the remodeling.

Mr. Wessel: You have got an excellent memory.

Q. May I ask you this, Mr. Gordon: do you recall when (1819)
you completed that? A. I believe it was at the end of June. I wouldn't be too sure about that.

Q. What year, '45? A. That's right.

Q. And were you paid for it? A. No.

Q. That was the one you didn't receive any money for? A. I didn't receive any money for that.

Q. After that, for a period of time, you continued to work for Tavern, or if you don't remember the name of the company, it was in Brooklyn; is that correct? A. Actually, I felt I was working for Bill Giglio.

Q. Let's disregard the name of the company. Where did you physically work after you finished this job you just talked about? A. Well, there were a lot of projects, sir. I will have to recall——

Q. If you can. Bear in mind that I am talking about geographical location of where you were performing your duties, where they were. A. Well, they varied. I did some work in Jersey City.

Q. How long after you finished this work that you have just described did you go to Jersey City? A. It was right after that.

(1820)

Q. Right after that? A. That's right. In fact, some of the work that I had undertaken to do in Tavern, or in that location in Brooklyn, I wasn't quite finished, and I had to come back.

Q. I see. In other words, if I understand you correctly, you started—and I am not going to pin you down to an exact time—but you started sometime about April of '45, you worked at the Tavern plant in Brooklyn until about June of '45? A. It might have been a little bit later.

Q. Let's say July or even August of '45; correct? A. It could be.

Q. And then almost immediately, or shortly thereafter, you went to the Jersey City plant? A. Well, there were some other things there now. I will have to recall.

Q. I wish you would. A. First of all, I will name the places that I did work, or where I did do some of my duties or performed my duties.

Q. Did you ever go to the home office of the company? A. Several times.

Q. Where was that? A. I believe it was at the—in Rector Street.

Q. Rector Street? A. I believe so.

(1821)

Q. Didn't you ever go any place else? A. I can't recall, sir.

Q. Well, is there any way I can refresh your memory, Mr. Gordon? I think it is quite important that we deter-

mine where the home office of this operation was. A. Well, I didn't know—as I said, I went up to Rector Street and met Mr. Giglio there. Now whether that was officially the home office of Tavern Fruit Juice, I don't know.

Q. Well, when you first came from—is your home in Cleveland? A. It was, yes.

Q. When you first came from Cleveland to New York, how soon after that did you first start working for Mr. Giglio? A. Well, it was quite a while. I was here for quite a while.

Q. Had you been friendly with Mr. Giglio before that time? A. Oh, yes, sir.

Q. Where did he live? Where was his home, before you went to work for Tavern? A. On Butler Street.

Q. Did you ever visit him in his office before you went to work for Tavern? A. I can't recall, sir.

Q. Well, the only office, I take it, you seem to recall is 19 Rector Street? A. I believe so.

Q. Incidentally, when did you last stop working for

(1822)

one of Mr. Giglio's or Mr. Lawn's companies? A. That was in—tl. ' was in March, and then I believe that some years later I put in a couple of weeks in one company.

Q. Which company was that? A. I don't know. It was a tank company, some tank cleaning company.

Q. Didn't you work for one of Mr. Lawn's companies last year? A. Last year? No, sir, I wasn't working for him at all.

Q. Paint Stripper Company didn't mean anything to you? A. It means something to me, but I don't work for him, nor did I ever work for him.

Q. Do you know whether or not Mr. Lawn owns 50 per cent of the stock of the Paint Stripper Company? A. I wouldn't know that.

Q. Do you know whether Mr. Giglio has any stock in the Paint Stripper Company? A. I wouldn't know that, sir.

Q. Did you make a telephone call to the Paint Stripper Company in October 1954, specifically to Mr. Giglio, in Battery Place, or 17 Battery Place? A. It is possible that I did.

Q. I see. And you left Cleveland for Florida a few days after that? A. In October?

(1823)

Q. Yes, sir; October or November of 1954. Did you leave Cleveland for Florida? A. Well, in Florida, I have spent since last June, I have spent most of my time down there, but I did spend some time going back and forth to Cleveland, and it might have been one of my trips back and forth.

Q. What does the number Yellowstone 2-8660 mean to you? A. That is my former telephone number, in Cleveland.

Q. At home in Cleveland? A. That's right.

Q. When was that discontinued? Would the date, October 29, 1954, mean anything to you? A. Yes, it is around that time.

Q. What does the number, Broadway 1-2077 mean to you? A. That is the number of my—our company, the Helper Paint Remover Service.

Q. Helper Remover Service, Inc., of which you are 50 per cent stockholder with your wife? A. That's right; I am vice president of that company.

Q. What does the number, Bowling Green 9-8931 mean to you? A. I can't remember that number. It is a familiar number but——

Q. Do you remember telephoning there on October 27, 1954? A. Well, is it——

Q. I am asking you for your recollection, Mr. Gordon,
(1824)
nothing else. A. The number itself doesn't mean anything to me right now, sir.

Mr. Stryker: One moment. Just a minute. I have listened, I hope patiently, to this, and I can't see the faintest possible relevance of any of these matters now being sought to be adduced to any issues in this case. If I understand the issues correctly, the only relevance of this gentleman's testimony is in relation to one of the counts of the bill of particulars.

Mr. Wessel: I will drop the question.

Mr. Stryker: All right.

Q. Were you an officer of the American Syrup Company? A. Yes, sir.

Mr. Stryker: I object to that as immaterial.

The Court: Overruled.

Mr. Stryker: Exception.

Q. Who was president? A. Well,——

Q. Frank Loperfido? A. Yes.

Q. Who was Frank Loperfido, Mr. Giglio's blood cousin? A. I believe he is, yes.

Q. Now, Mr. Gordon, there came a time, I take it, when you finished up your work at Tavern, that you have described, and you then went to work in Jersey City. Between those two times, did you do any work for Tavern in
(1825)
Brooklyn? A. Yes.

Q. Did you get paid for that work? A. Well, as soon as I was put on the payroll, that meant I was getting paid for the work.

Q. Do you recall when you were put on the payroll? A. I can't recall it at this time.

Q. Whenever it was, that was the time; am I correct? A. That is correct.

Q. After you finished your work in Tavern, you then went to Jersey? A. No, excuse me.

Q. You did work at both? A. No, here is what I meant. I did some work at Jersey City. As to whether to place that immediately after my work at Tavern, I couldn't, I can't recall it right now, unless my memory is refreshed, but I can give you a list of the projects I was working on, including the Jersey.

Q. Well, supposing you tell me if you can the projects you were working on? A. Well, in Jersey City there was experimental work with the reclaiming of sugars from molasses particularly. Then I spent some time in California, in Sacramento, California, where we did some work on trying to reclaim sugar from grapes.

Q. Wasn't that in Florida? A. That was in Sacramento, California.

(1826)

Q. Excuse me. A. I will just mention the ones——

Q. Go ahead. A. I am not putting them in their order. I will have to recall that. Then I made a trip down to Florida, in which we did some work on reclaiming sugar from citrus waste, and incidentally, while I was down there we did some work on agar. That is the seaweed that is used in chemical plants. Then I made a trip to Louisiana, to a sugar plant. I can't quite recall the name of that company or the plant, in which we did some work on reclaiming sugar from molasses.

Q. Is that blackstrap molasses? A. That is what we were aiming for.

Q. What process did you use? Do you recall ion exchange? A. Ion exchange was the main thing that the whole thing was built around, but there was a lot of sides.

Q. Did you help in the development of that process? A. Yes, sir.

Q. Who else did, Mr. Giglio? A. Mr. Giglio spent a great deal of time with it.

Q. Mr. Lawn? A. No.

Q. Not Mr. Lawn? A. No.

Q. Mr. Livorsi? A. Not on these experiments.

Q. What projects did he work on? A. Who?

(1827)

Q. Mr. Livorsi? A. Well, as far as I knew, he had charge of production over at Tavern.

Q. I see. Go ahead. A. His was a production job. This was—I now recall it was Ruth Sugars in Louisiana. It was sixty or seventy miles outside of New Orleans.

Later on I went back to—you asked me who else worked on it. I think there was a Dr. Van Dyk. Later on Dr. Van Dyk and myself, and I believe I took my wife along with me at that time, we went down to further experiment on this citrus waste in Haines City, Florida.

Q. Did you have an expense account at that time? A. Yes, sir.

Q. How much did you have? A. I can't recall.

Q. Well, I mean, was it over $10,000? A. The expense account?

Q. Well, the amount of money that you spent there, over $10,000? A. No, no.

Q. Go ahead. A. There might have been—we took a trailer down there, with all the laboratory equipment with us. Now, whether—when you ask me ten thousand, I didn't pay for that equipment

Q. Incidentally, those operations at the Tavern plant sound as though they were quite expensive. Did you pay (1828)
for those or did you help take care of the disbursements? A. I think I paid for most of it.

Q. Did you get cash from Mr. Giglio and pay it out? A. That's right.

Q. Was it primarily in cash or some in check? A. There might have been a few of them in checks, but I say, primarily I would say most of it, ninety per cent of it, was paid out in cash.

Q. Would you know how that was charged on the books of the Tavern Company? A. I wouldn't know, sir.

Q. You didn't have anything to do with the books? A. No, all that I did was account for the money that was given to me and accounted for what I did with it.

Q. Now, when you got over to Jersey City—I am going to refer only to that operation for a few moments—incidentally, can you fix—

Mr. Wessel: Strike that.

Q. You did some work at the Jersey City plant; correct? A. Yes, sir.

Q. That was 101 Fairmont Avenue? A. That is right.

Q. Would you describe it as the same kind of work you did at Tavern, or was it different? A. No, it was entirely (1829)
different.

Q. But didn't you do any revamping there? A. I don't believe so.

Q. Did you make purchases from Delehanty there, or things like that? A. What is that?

Q. Didn't you make purchases from Delehanty and different companies you mentioned? A. That was for a different purpose.

Q. I want to know the purpose, if I may, over at the Jersey City plant? A. In the Brooklyn plant I had a specific problem, a production problem, whereas in Jersey City it was strictly a research problem.

(1830)

Q. Well, I don't mean to, I don't want to interrupt you, if there is something I am not understanding, but you mentioned the names of a number of companies—I only picked up a few—from whom you made purchases over at Tavern to do certain things, to revamp the equipment, I suppose is one way of putting it.

Didn't you do the same kind of thing over at the Jersey City plant? A. If I did, it was very, very little of that. Very little of—the nature of my work there was strictly for research and to develop this process of getting sugar from molasses, particularly black——

Q. My memory is not too good on your answer and you can correct me.

As I recall your testimony, at one point you referred to having made a number of purchases from various companies in rather large amounts, and then later on I asked you, you said you paid for those, generally in cash, sometimes by check that you received from Mr. Giglio.

Did you do the same kind of thing at the Jersey City plant? A. No, sir.

Q. Not at all? A. I don't think so.

Q. Well, now, let me ask you this, Mr. Gordon: When

(1831)

did Tavern stop business, do you know? A. No, I don't, I don't——

Q. Would the date November 23, 1945, refresh your memory in any way? A. I wouldn't know that, sir.

Q. Well, let me ask you this question: While you were doing the work at Tavern, whatever period, am I correct that their production was still continuing, they were using their plant to manufacture jelly, and that was the purpose of the changes; correct? A. That is correct.

Q. So, in other words, it couldn't have been after whatever the date was that Tavern stopped business, could it? It would have had to be before that time? A. Mr. Wessel, I am sorry. I am not getting what you are saying.

Q. I am not being very clear. You did a good deal of work revamping the Tavern plant in Brooklyn, am I correct, sir? A. That is right, sir.

Q. And you did that for the purpose of expanding and increasing production of jelly? A. That is correct.

Q. And you did that in order that Tavern would be able to make and sell more jelly? A. That is correct.

(1832)

Q. And you did that in order that Tavern would be able to make and sell more jelly? A. Well, I don't know what the purpose was but it could be.

Q. Well, while you were there, was work going on at the Tavern plant? A. There was work——

Q. Yes, manufacturing jelly? A. That's right, and, of course, there was some other work going on there, too.

Q. And Mr. Livorsi was there as production manager, handling production? A. That's right. There was also some other work going on there at the time, too.

Q. I show you Exhibit 112 for identification and ask you if it isn't the fact that every bit of work you talked about was at the Jersey City plant. Tell me whether your recollection is refreshed in any way. A. What is your question, sir?

Mr. Wessel: Read the question, please.

(Question read.)

A. My recollection does not need to be refreshed on this matter. I absolutely deny that. What I told you before, that this money was spent, it was absolutely spent for the plant in Brooklyn, the Tavern Fruit Juice. This is an

(1833)

entirely different proposition, and that, Mr. Wessel, is what I was trying to explain to you.

Q. That is work for the Jersey City plant? A. This was for this experimental work subsequently, and I think, I think I can recall just exctly what was done for that.

Q. I wish you would. Go right ahead. A. I don't quite recall just what this check was made for. I probably could associate it if you show me some other bills or——

Q. I will. A. But we had done a lot of experimental work on ion exchange, and it was decided to put up a pilot plant, an ion exchange pilot plant.

Now, in connection with that, we decided to build—there were six tanks, I wouldn't be able to tell you the exact dimensions, but there were six tanks that had to be built a special way, because—I can explain that in a better way.

Q. Go ahead. A. The material used in connection with ion exchange is a resin, and it is used over and over again; it is recharged, and the same material is used over again, and there is a chance that this resin, which is a very expensive chemical, can be spoiled, and the tanks that are required to hold these resins had to be lined in the inside with

(1834)

a special coating to prevent corrosion and prevent the spoiling of these resins.

Now, I believe that this money was a part of this venture.

Q. You are referring to $2,000 paid to P. J. Delehanty in January, 1946, am I correct?

Well, do you need to look at that to find out? I thought you were testifying from your own recollection, Mr. Gordon? A. I didn't know when this money was paid, sir.

Q. I see. A. You see, at that time I had nothing to do with the finances. All I did was go out and order the stuff.

Q. Oh, I see. Didn't you have a joint bank account with Mr. Raymond Giglio? A. No, sir.

Q. You did not have a joint bank account? A. I don't believe so.

Q. Are you just as sure of that as what you testified to before? A. No, I am not positive of that.

Q. You are not positive? You might have had a joint bank account with Mr. Raymond Giglio? A. I don't recall that now, sir.

(1835)

Q. You don't recall, but you might have?

Before I mark this paper, might you or not, Mr. Gordon? A. I am trying to recall, Mr. Wessel.

Q. Go ahead. A. It might be.

Mr. Wessel: I thought so.

By Mr. Wessel:

Q. Now, Mr. Gordon——

Mr. Stryker: One moment. I am sure it is not intentional, the elecutionary interjection of counsel —I don't believe your Honor heard it—"I thought so."

I mean, that is not part of the evidence, and I don't think it is a fair comment.

Mr. Wessel: I will withdraw the comment, and I apologize.

The Court: Strike it out.

As a matter of fact, I think we will take our mid-morning recess now.

Mr. Wessel: May I request your Honor to direct the witness not to confer with anyone during the recess?

The Court: All right, don't discuss the case with anyone.

(1836)

Mr. Stryker: That includes the Government, too, I suppose.

The Court: Anyone.

Mr. Wessel: It certainly does.

The Court: And the jury, don't discuss the case among yourselves or anyone else.

(Jury out.)

(Short recess.)

(Jury present.)

By Mr. Wessel:

Q. You did not talk to anyone during the recess, did you, Mr. Gordon, about this case? A. No, sir.

Q. Who did you see when you were in Mr. Stryker's office last? A. Mr. Giglio.

Q. And anybody else? A. On my way out I just said hello to Mr. Lawn.

Q. When was that? A. This morning.

Q. Did you do any work at the Loraine pilot plant? A. At Loraine?

Q. Yes, sir. You know what Loraine Food Corporation was? A. Yes, in New Jersey, in Jersey City.

Q. Did you do any work there? A. I did some work in that building.

Q. When was that? A. In 1945.

(1837)

Q. That is while—the same time you were working for Tavern or after or before, or when? A. I don't know what you mean by while I—I understood I was working for Tavern all the way through.

Q. I am not talking about by whom you were employed. I am talking about whether you worked at the Loraine pilot plant, without regard to who paid you. A. I worked on the pilot plant, yes, sir.

Q. That is the Loraine pilot plant we are talking about, am I correct? A. Well, in that building. I don't know——

Q. Which building are you referring to? A. In Jersey City.

Q. 101 Fairmont Avenue? A. That's right.

Q. Now, do you recall when that was? You said in 1945. When in 1945? A. I can't quite recall.

Q. How much sugar did you produce at that plant? A. From the pilot plant?

Q. Yes, sir. A. Well, while I was there, it was all experimental, there was no, it was a negligible amount of sugar.

Q. Negligible, did you say? A. As far as I was concerned on this experimental work.

(1838)

Q. Wasn't a good bit of sugar produced at the Loraine pilot plant and turned over to Tavern? A. I, I don't know what you mean by a pilot plant, producing sugar. I did some experimental work.

Q. Yes, sir. A. Now, the experimental plant did not produce any sugar while I was there. I left the company at——

Q. You left when? A. I left when, I would say, it was about 70 per cent finished.

Q. When was that? 1946 was that? A. In 1946.

Q. After Tavern had finished its business? A. Well, I don't know whether Tavern did finish its business or not. I am not familiar with that.

Q. Well, now, let me ask you this, Mr. Gordon, see if it refreshes your recollection in any way as to when you started to work for the Tavern Company:

"Q. You finished up the job"——

This is at page 404 of the grand jury testimony. First, I will ask you if you recall being asked these questions and giving these answers:

"Q. You finished up the job in Brooklyn and you weren't paid, is that right? A. That is correct. (1839)

"Q. You received no compensation whatever. Were you paying board at Giglio's? A. No.

"Q. You might say the only compensation you received was the fact you were living there? A. That's right.

"Q. How long did that job take you? A. I would say about, as far as I can remember now, about three or four months.

"Q. When did you start over in Jersey City? A. Shortly thereafter.

"Q. Would you say it was in the middle of 1946, the early part of 1946; give us your best memory, that is what we are asking you? A. I would say it close to the first of the year of 1946. It might be a week or two before or a week or two, something like that, after.

"Q. In other words, what happened was that it wasn't until the end of 1945 that you went to work in Tavern. It must have been earlier than that be-

cause you spent three or four months over there. A. It was towards the latter part of 1945.

"Q. By that you mean what? A. I mean past July.

(1840)

"Q. So it was in the last half at any rate, it was probably around September, in the fall of the year? A. It might have been, or somewhere around that time.

"Q. You went to work in Jersey City under what arrangements? A. I was paid a salary of $500 a week"?

Do you recall giving those answers to those questions? A. Substantially.

Q. Were they true when you gave them? A. Except for the dates. This thing happened about ten years ago, or at that time it was about eight years ago.

Q. Yes, sir? A. And except for the dates, it might—I might not get the clear——

Q. Is your recollection better today as to what happened in 1945 and 1946 than it was in 1952? A. My recollection is not better, but I have had time to associate them with things that happened to me personally in those days and I could, on some things I could pinpoint the exact date more so now than I did then.

In the grand jury, I came with no preparation or thought

(1841)

of what I was going to be asked about dates.

As a matter of fact, they asked me what date I was married and I couldn't remember that date at the time. I think you will find that in the minutes there.

Q. Is this what you are referring to, Mr. Gordon:

"A. Juror:

Q. Well, you told us you remembered one of those income tax returns.

"The Witness: I don't believe that we were married in 1945. I believe we were married either in the latter part of 1945 or the following year."

Is that what you were referring to——

A. That is what I had reference to.

Q. —when you said you didn't remember when you were married? A. That's right. Now, if you would ask me that question now, I would recall it.

Q. When you were married? A. Yes.

Q. I am sure you could.

Mr. Wessel: I have no further questions. Does counsel wish to see this?

Mr. Wolfram: Yes, thank you.

(Marked Government's Exhibit 113 for identification.)

(1842)

Mr. Stryker: Pardon me for a moment, your Honor.

The Court: All right.

Cross-Examination By Mr. Stryker:

Q. Mr. Gordon, on direct examination you said that you, if I heard you right, that you didn't get any money for the Tavern plant job.

As I recall it, you were talking about the first job. Now, the question was left there.

Now, I would like to ask you to explain fully the situation when you went there under, I think you said, some kind of a contract. Do you know what I am talking about?

A. Yes, sir.

Q. Now, let's have that all cleared up. Let me hear it from you. Just state it in your own words. Did you enter into some kind of a contract with Mr. Giglio before you went there the first time? A. Yes, I did. Yes, I did.

Mr. Wessel: Counsel has asked a question. I suggest he let the witness answer it.

Why don't you clear it up, Mr. Gordon.

Mr. Stryker: What was that?

Mr. Wessel: I am asking the witness to answer your question, sir.

(1843)

Mr. Stryker: I haven't interposed while you were examining to interject.

Mr. Wessel: On the contrary, counsel did.

The Court: Well, how many questions do we have before us now?

Mr. Stryker: None. I am going to withdraw them.

By Mr. Stryker:

Q. Before you went to work on your first job there at Tavern, did you have some sort of a contract with Mr. Giglio? A. Yes, sir.

Q. What was the nature of that contract? Tell the jury what it was. A. I was to do all this work that I described previously and the understanding was that if the cost, the total cost of this job would be not over a certain amount—and I am not positive of the amount even as of now——

Q. All right, go on. A. —that I would receive 3,000 actually in compensation; that if it went over a certain amount I was to get nothing.

Q. In other words, it was a kind of a speculation—— A. Well——

Q. —or a contingency? A. The only speculation in connection with it was my time. The understanding was

(1844)

that they were to pay for all the materials.

Q. And if you could do it for a certain price, you would get 3,000, but if you couldn't, you wouldn't, and you were gambling your time; is that right? A. Exactly, sir.

Q. Is that correct? A. That is correct.

Q. All right. Now, did the work, which I certainly am not going to ask you to repeat, improve the productivity of the Tavern plant in Brooklyn that you are talking about? Did it increase the amount of jams and jellies that this business could produce? A. It definitely did, sir.

Q. Can you give me about how much it increased the capacity of this business enterprise to produce the product that it was selling, about? I don't care for the exact figures. A. That is a hard question to answer.

Q. Well, give me your best estimate of how much your work increased the capacity of the plant? A. Well, in physical capacity it increased the capacity from about 50 or 60 barrels. I don't recall what it was.

(1845)

Q. Yes? A. And it increased it to 300 barrels.

Q. All right. A. It also increased it from this point of view, that there were less men used to produce those 300 barrels than there was to produce the 50 barrels.

Q. So it would decrease the labor cost? A. It would just be a mathematical question as to how much saving there was.

Q. All right. A. I should judge around 50,000 a year, at least.

Q. Did the cost of the work and the materials exceed the amount fixed in the agreement that you have just mentioned? A. Yes, sir.

Q. So that you were not paid anything personally? A. That is correct.

Q. That is right, is it? A. Yes.

Q. But the cost of the materials and the labor, all these things that you have told us about, were paid by Tavern, or Mr. Giglio, Tavern? A. Mr. Giglio gave me the money.

Q. Well, all right. Can you give me a rough idea of how much all those materials and labor that you used in fixing these boilers and tanks and whatever they are you

(1846)

told us about, about how much was expended in labor and in materials; just give me an approximation? A. Well, it would be between, I think, between 30 and $40,000.

Q. All right. Now, you have been asked about the change of your name. Was your name changed legally from Goldenberg to Gordon? A. Yes, sir.

Q. When did you start to travel back from Cleveland to Florida in June, 1954? Did you travel back and forth from Cleveland to Florida in June, 1954? A. That is correct.

Q. Well, do you now live in Florida? A. Yes, sir.

Q. Well, your traveling to Florida, then, I take it, had nothing to do with whatever this telephone call in October, 1954, to this concern called the Paint Stripper: is that right? A. I don't quite understand the question, Mr. Stryker.

Mr. Stryker: I don't blame you.

Read the question. It is a poor question. Maybe if you read it—would the recorder read it for me, or I guess I will withdraw it. I have characterized it as poor; I had better stand on that.

The Court: All right.

(1847)

By Mr. Stryker:

Q. Did this telephone call, whatever it was, to this Paint Stripper concern in October have anything whatever to do with your trip to Florida? A. It might have.

Q. It might have. All right.

What was it? What did it have to do with it? A. Well, I would have to do a little explaining on that, Mr. Stryker, if it is all right.

Q. All right, go ahead, I have asked you. A. I am presently negotiating a venture in Florida on the disposition of citrus waste for cattle feed, and in the past six or eight months I talked to Mr. Giglio, with reference to that deal, and possibly, most likely it was in connection with that.

Mr. Stryker: Just a minute.

Your Honor, I have here—it has just been handed me a few moments ago; I haven't even glanced at it——testimony apparently of this gentleman before the grand jury, some of which was read. I think there are about, well 75 or 100 pages.

I would like a chance to glance at that, and I might be able to conclude this cross examination very rapidly.

(1848)

The Court: Do you have any other questions besides that?

Mr. Stryker: I am looking around to see if I have.

By Mr. Stryker:

Q. Did you ever, while you were doing this work, see at Tavern, in Brooklyn, see Mr. Roth there? A. Yes, sir.

Q. Often or infrequently? A. Fairly regularly.

Q. Did he come out and see the operations, as you what you were doing? A. He must have seen the operation, and I discussed the operation with him a number of times.

Q. You did discuss it with him? A. Yes, sir.

Mr. Stryker: Your Honor, I am sorry, but I seem to have combed the bottom of my barrel, shall I say, here, and I don't know what else to take up except this.

Mr. Wessel: I turned over those minutes voluntarily, your Honor, not in the expectation that it would delay the trial at all.

If counsel wishes an adjournment or delay of any

(1849)

kind in completing the examination of the witness, I would like the grand jury minutes back.

Mr. Stryker: I resent the suggestion that I am trying to delay this trial.

Mr. Wessel: I did not suggest that.

Mr. Stryker: I think that is in what you have said.

You questioned the witness from this paper. It is definitely the law that when you do that I have a right to see them.

Mr. Wessel: I think I was unable to refresh——

Mr. Stryker: Let me finish. I think that is definitely the law. You did hand them to someone at counsel table. I think it is apparent to everyone I have had no opportunity to look at them since.

I should think my request is a proper and legal request and shouldn't be characterized as an effort on my pa to delay this trial.

The Court: We haven't quite gotten that far.

Mr. Wessel: I did not do that, if your Honor please. I think I turned them over voluntarily be-

cause they did not refresh the witness' recollection, unfortunately.

(1850)

I don't think I was under any obligation to turn them over.

Mr. Stryker: Your view of the law and mine will differ on that. When you interrogate from a paper, I have always understood——

The Court: Let's not broaden the question any further.

Mr. Stryker: What's that, sir?

The Court: I say, let's not broaden the question beyond the point we have reached.

Mr. Stryker: I don't care to pursue this.

I am just pursuing, in my opinion, a perfectly proper and honorable course, to try to defend this case, and I have asked for a chance to look at papers I haven't seen.

The Court: All right, now——

Mr. Stryker: I won't guarantee that there is anything in there I won't ask him about, but I don't know.

The Court: All right, can we complete the cross? Have we completed the cross except for that subject?

Mr. Stryker: I think so, your Honor.

The Court: Would yo want to go into redirect

(1851)

now?

Mr. Wessel: I have one question on redirect.

Mr. Stryker: One moment now, please.

Well, I think so, your Honor, but I don't want to state anything that I am not certain of.

I know your Honor knows, as a lawyer, how difficult it is to get all these things together and be sure you are finished. At least it is for me.

The Court: Even lawyers have to compromise sometimes, and I would like to know where we stand at this point.

Mr. Stryker: I think I am through, your Honor, but I don't want to be held to it as a positive statement. That is my impression.

The Court: No, I think if I am going to ask Mr. Wessel to go into redirect now, I am going to hold you to it, except for that subject, because if the grand jury minutes had not been given to you as to the other subject matter of cross, you would have made your decision now, whether you are through or not.

Mr. Stryker: I probably might have. And this might alter whatever decision I had in mind.

The Court: Well, except for such matter as

(1852)

is concerned in there, then, I conclude your cross examination is finished and I will tell Mr. Wessel to go ahead with redirect.

Mr. Stryker: Don't hold me to that until I take that position. I have said I don't know. What I would request—I hope it is reasonable—I am just told by Mr. Wolfram that we have now out a subpoena—I don't know whether it will be served; and I don't know what will be produced if it is served—and that might affect the cross examination.

Regardless of that, will you not give me time, sufficient time to at least glance at the papers from which Mr. Wessel read, before I conclude?

Colloquy

The Court: I am going to conclude—I mean, so far as I am concerned, your cross examination is now concluded except for such matter as you may wish to use those grand jury minutes for.

Now we will go ahead with Mr. Wessel. This is not a witness who is in any sense a surprise to you; I assume that.

Mr. Stryker: No, that is perfectly true. Not the least bit of a surprise to me at all.

The Court: Go ahead, Mr. Wessel, you start your redirect.

(1853)

Mr. Wessel: I just have one question.

Mr. Stryker: Just before you do that, your Honor, I think I said, when you asked me whether I had concluded, that I thought so but I wasn't sure. Isn't that what I said?

The Court: I will ask you now to come to a conclusion.

Mr. Stryker: Well, then, give me a moment to do that.

The Court: All right.

Mr. Stryker: Well, I am unable to examine these papers in the time you have given me.

Without that, I will not conclude the cross examination.

The Court: Mr. Stryker, you understand that you are to have the grand jury minutes over the lunch hour and if you wish to recall the witness on any subject matter dealing with those minutes you may. I just want to be sure the rest of it is concluded.

Mr. Stryker: Well, your Honor, will you tell me how I could answer that without knowing what

is in the minutes, whether it might involve something else? How can I make that commitment without knowing it? I don't see how I can.

(1854)

The Court: You heard the sections that were read from the minutes, Mr. Stryker.

Mr. Stryker: I did.

The Court: And I would assume that the minutes given you have relevance in so far as you are dealing with them only as to that, but other matters that they may cover is something which I don't know.

Now, if you are through with everything except the matters that relate to those grand jury minutes, I will ask Mr. Wessel to go ahead with redirect, and let's get on to the next witness.

Mr. Stryker: Well, I have tried to make myself plain and I have nothing more to say on that.

The Court: I think you have, Mr. Stryker.

All right.

Redirect Examination by Mr. Wessel:

Q. Now, you have been asked about your change of name from Goldenberg to Gordon.

Was your name changed legally from Gerson to Goldenberg? A. That wasn't a legal name of mine, Gerson.

Mr. Wessel: I have no further questions.

I suggest this be marked for identification.

The Court: All right, Mr. Gordon, you come

(1855)

back at 2:00 o'clock, and don't discuss the case with anyone.

As a matter of fact, I am going to ask you not to communicate or talk with anyone that has any-

thing to do with this case on either side; that includes counsel, parties or anybody else.

All right. But you come back and be available out here at 2:00 o'clock.

The Witness: All right, sir.

(Witness excused.)

(Marked Government's Exhibit 114 for identification.)

The Court: Call your next witness.

Mr. Wessel: May I ask your Honor to permit Mr. Fraiman to examine the next witness?

The Court: Yes.

DANTE LODICO, called as a witness by the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Fraiman:

Q. What is your occupation, Mr. Lodico? A. Assistant traffic manager.

Q. And where are you employed, Mr. Lodico? A. Bayonne Barrel & Drum, Newark.

(1856)

Q. Will you speak up? I didn't hear you. A. Bayonne Barrel & Drum in Newark.

Q. Where are they located? A. In Newark, New Jersey.

Q. And what business are they in? A. They are in the reconditioning business of barrels and drums.

Q. Do they also sell barrels and drums? A. That's right.

Q. Did you bring some records with you, Mr. Lodico? A. Yes, I did.

Q. Do you have them there? A. I have.

Q. May I see them?

(Handed.)

(1857).

Mr. Fraiman: Will you mark these for identification, please.

Mr. Stryker: Your Honor, am I supposed to have these grand jury minutes?

The Court: Yes, sir.

Mr. Stryker: If I get some here, I will glance at them while we go along, to save time.

By Mr. Fraiman:

Q. While we are having those marked, Mr. Lodico, will you tell me what your duties are at Bayonne Barrel & Drum Company? A. Well, generally, a customer either calls in or by mail they send in an order either to buy drums, or their own drums, or barrels; either buy barrels or drums to be reconditioned, and we place the order in our book; and they want a specific date, and we mark it on the book, and the day comes up—the barrels are made up, or the drums are made up, and when the day comes for delivery, they are put on the truck and a receipt is made out and they are delivered. When the receipt comes back signed, the next day invoices are typed up on those receipts for billing purposes, and the invoices are sent to the bookkeeper and she posts them to the ledger sheet.

(Government's Exhibits 115-1 to 115-21, marked for identification.)

(1858)

Q. Mr. Lodico, I show you Government's Exhibits 115-1 through 115-21 for identification, which are part of the records which you handed me; would you identify these

for me, please, without going into specific figures on them? A. Yes.

Q. What are those, Mr. Lodico? A. Those are invoices.

Q. Are they made out by your company? A. That is correct.

Q. Are these invoices kept, in the regular course of business of your company? A. Yes, they are kept in the regular course of business.

Q. And is it the regular course of business of your company to keep such invoices? A. That's right, it is.

Q. And these invoices were taken from the records of your company? A. Yes, they were.

Mr. Fraiman: I offer these in evidence.

Mr. Stryker: No objection.

The Court: They will be received.

(Government's Exhibits 115-1 to 115-21 for identification, received in evidence.)

(Government's Exhibit 116 marked for identification.)

(1859)

Q. Mr. Lodico, I show you Government's Exhibit 116 for identification, which is another one of the records you handed me. Would you identify that for me, please? A. These are records of Bayonne Barrel & Drum Company.

Q. What sort of records are they? A. These are ledger sheets of accounts receivable.

Q. They were taken from the records of the Bayonne Barrel & Drum Company? A. That is correct.

Q. Are these records kept in the regular course of business of the Bayonne Barrel & Drum Company? A. They are, yes.

Q. Is it the regular course of business of the Bayonne, Barrel & Drum Company to keep such records? A. Yes, it is.

Mr. Fraiman: I offer Government's Exhibit 116 for identification in evidence.

Preliminary Questions by Mr. Stryker:

Q. As I understand it, this is a paper kept by your company? A. That is correct.

Q. A book kept by your company? A. That is right.

Q. These two sheets never were transmitted or sent to the Tavern Fruit Company, were they? A. Not that I know of.

(1860)

Q. They are just kept in the office? A. That is correct.

Mr. Stryker: I object to it as not binding on the defendants; no foundation laid. Incompetent, irrelevant and immaterial.

The Court: Let me see them.

Mr. Fraiman: Your Honor, this witness testified that these ledger sheets are kept in the regular course of business of their business. They tie in with the invoices which I already had admitted.

The Court: I just want to see whose account it is.

Mr. Stryker: Your Honor has in mind I did not object to the invoices, but whatever books they had are not binding on us, as I see it.

The Court: These are not being received as any kind of an admission. They are being received as records kept by this witness's company.

I will receive it.

Mr. Stryker: I except.

(Government's Exhibit 116 for identification received in evidence.)

Mr. Fraiman: I have no further questions to ask.

(1861)

The Court: All right. Any cross?

Mr. Stryker: Let me have those invoices, will you, the ones you put in evidence?

Cross Examination by Mr. Stryker:

Q. Do you know whether or not the items, the goods referred to in each of these various invoices, now Government's Exhibits 115-1 to 115-21 in evidence. Can you tell me when the materials mentioned in there were in fact delivered to the vendee? We will start with the first. I don't intend to go through them all. This seems to be 55-gallon hardwood barrels. The date here is December 17th. A. Well, the date is the same date as the receipt, this receipt number here.

Q. What? A. The same date as the receipt, the receipt number.

Q. What is the receipt number? A. 1267. In other words, the invoices are billed directly from the receipt the following day.

Q. I mean, is that the receipt of the vendee? Is that the vendee's receipt, or whose? A. This receipt is the receipt that we send to the person that buys.

Q. To the purchaser? A. That's right. In other words,

(1862)

the invoice is typed direct from the receipt with the same date; the same date as he receives it appears on top. In other words, the receipt date is the same date on the invoice.

Q. How do you run your system there? When you sell goods does an invoice go out right at the time you sell them or does it go out at a later time? A. By the time now—what we are doing now, the invoices, the receipt goes out and the invoices are typed from the receipts.

Q. You said "now"; do you have a different system than what you had before? A. No, the system then and the system now, to my knowledge, is the same.

Q. So you send out the receipt or invoice with the goods? A. Receipt with the goods.

Q. Well, this printed matter, is that what you mean by receipt? A. Yes. In other words, the receipt goes with the delivery, and when the receipt is returned signed, the invoices are made from them.

Q. And when they are signed, are they signed—you keep the records of those? A. We did have them, yes, but I don't think we have them any more.

Q. You haven't them now? A. No.

Q. But as far as your know then, the original receipts,

(1863)

signed by the vendees, you haven't those? A. That is right.

Q. So that all you are testifying to then, if I understand you, is a course of business? A. That is correct.

Q. Not what happened in these particular invoices; am I right? A. I don't quite follow you. Do you mind repeating that?

Q. I mean, you are testifying to a course of business; you are not testifying as to the fact of the date of the receipt of the goods, because you haven't got that before you? A. I am just saying, in the course of the business the procedure was to put the same date as the receipt on the invoice.

Q. I understand it, but your testimony is limited to that isn't it, procedure? A. Well, the invoice—in other words, the invoice and the receipt dates are the same.

Q. Well, you just told me that you haven't the original receipts. A. Well, the system then and the system now, as far as my knowledge is, is the same.

Q. I am quite aware of that, but I am talking about the receipts themselves, the dates of the receipts; you haven't those; you have told me you haven't those, have you not? A. That's right.

(1864)

Q. Were you employed by this concern in 1945? A. No, I wasn't.

Q. So all you have done is go and bring me these invoices, unsigned, so far as the receipts are concerned, and delivered them here, as it was your duty under the subpoena, I suppose; that is right, isn't it? A. That's right.

Q. How long have you been working there? A. Be four years in August.

Q. What? A. Four years in August of this year.

Q. That is about '51? A. '51 of August.

Q. Well, you don't know anything at all of your own knowledge as to the course of business in 1945 there, do you? A. The fellow, the man that did work there, he passed away last year——

Q. I am sorry about that, but I mean, you yourself don't have any personal knowledge of the system as it obtained five or six years before you went to work there; isn't that so? A. Well, I mean, from what I have seen of this, the system seems to be the same as it was then, as it is now.

Q. My question is, you don't know from having worked there at that time and been connected with this particular procedure, you don't know that the system that you say now

(1865)

exists was in fact, from your own knowledge, the one that existed when you worked there—rather, before you worked there, do you?. A. In other words, at that time, as far as '45 is concerned, and as far as I was kept—I am just assuming, rather. I am pretty sure that it is the same.

Q. You just assumed that. A. No, I am pretty sure it was the same. In other words, this fellow did work there, this fellow that passed away last year, he was with the company at that time, and the system then, as far as my knowledge is concerned, is the same now as it was then.

Q. That comes from something this man said to you? A. Not necessarily what he said to me, but as far as how the records were kept.

Mr. Stryker: I move to strike out these exhibits as having no proper foundation, Exhibits 115-1 through 21.

By the Court:

Q. Mr. Lodico, you worked there for nearly four years? A. That is correct, sir.

Q. And you work with the records of that company? A. Yes, sir.

Q. You worked with records before the time you came, as well as records since the time you came? A. I have had

(1866)

to refer to them.

Q. Your examination of the records show the system to be the same in 1945 as well as it is now? A. That's right.

Q. And these invoices were never sent unless a signed receipt was sent first? At least that is the present system? A. That's right, sir.

Q. As far as you know, that is an old system? A. That is correct.

The Court: I will deny your motion.

Mr. Stryker: I except.

The Court: All right. Any redirect?

Mr. Fraiman: No redirect.

The Court: All right. Next witness.

Mr. Stryker: Pardon me a moment, your Honor.

By Mr. Stryker:

Q. Have you any personal, personal, your own, other than what you got from somebody that told you, knowledge of how the records were kept in 1945? A. Will you repeat that again, sir?

Q. Have you any personal knowledge, your own knowledge, of how these records were kept in 1945, at all, any personal, direct knowledge? A. Well, the mere fact that I picked these ledger sheets out, and the invoices, and I

(1867)

have been there for four years now, and I handle all these records, and the procedure seems—is the same now—file anything away, the invoices are filed in a binder for the whole year, the ledger sheets are put away for the whole year, receipts are put away, and that seems to be—it is the same order as it was then.

Q. Do you know anything about the procedure? When I say "know anything" I am talking about your personal knowledge of the procedure as it existed in your company in 1945, with respect to receipts. Is the question clear to you? A. Yes, sir. Well, as far as my knowledge the records, as I said before, I keep the same now as they did before. I mean, I wasn't actually there. I can't say that they are—I can't swear to that they were actually made that way, but as far as the records are concerned, or the way they are kept now, and what I have seen from our stockroom

there, where the records are kept, it seems to be the same procedure.

Q. Where are the signed receipts in 1945, in other words, the copies or the originals, I should say, of the documents that we have in evidence? Where are they?

Mr. Fraiman: Your Honor, I think the witness has already testified to that. He said, I believe twice, that the signed receipts have been destroyed. (1868)

Mr. Stryker: If he did, you are quite right.

Q. If that is what you said? A. I said I couldn't find them, no.

Q. What? A. That's right, I couldn't find them. I looked for them and they probably were destroyed.

Mr. Stryker: All right, that is all.

The Court: All right, step down.

Mr. Fraiman: Thank you.

(Witness excused.)

Mr. Fraiman: Mr. Cody.

The Court: Have you got a short witness?

Mr. Fraiman: Probably take more than five minutes.

The Court: Is this going to be some more records?

Mr. Fraiman: Yes, sir.

The Court: All right, then, let's get started with it.

Joseph E. Cody—By Government—Direct

JOSEPH E. CODY, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Fraiman:

Q. Where are you employed, Mr. Cody? A. National Sugar Refining Company, 100 Wall Street, New York.

(1869)

Q. How long have you been employed with the National Sugar? A. Over thirty-one years.

Q. What are your duties at the National Sugar Company? A. I am supervisor of the contract department.

Mr. Fraiman: Would you mark these for identification.

(Government's Exhibit 117-A through 117-G marked for identification.)

Q. Mr. Cody, I show you Government's Exhibits 117-A through 117-G for identification; will you tell me what these are, if you can, please, sir, without specifically mentioning what is written on them? A. They are certified copies of our invoices. Is that sufficient, or will I go further?

Q. That is sufficient for now. Do you recognize this signature here? A. Well, it is familiar to me. I know Mr. Roth, who signed it. I have seen him sign others. I didn't see him sign this, but it appears to be his signature, and I have had him certify invoices for me in the past.

Q. Are these invoices from the National Sugar Company? A. Yes, sir.

(1870)

Q. Are they kept in the regular course of business of the National Sugar Company? A. Well, these are copies made from the duplicates of original invoices.

Q. I see. Well, is it the regular course of business of the National Sugar Company to make such duplicate copies? A. Upon request, sir.

Q. Were these made in the regular course of business of National Sugar Company? A. As far as I know, they were, yes, sir.

Mr. Fraiman: I offer Government's Exhibits 117-A through 117-G in evidence.

Preliminary Questions by Mr. Stryker:

Q. These aren't your original records at all, are they? A. No, sir; they are made—those are copies taken from the duplicates.

Q. And somebody else who is not here, Mr. Carter, says they are originals, and that is all we know. A. They are copies. The original invoices go to a customer, and these are made from our records.

Mr. Stryker: I will object to them on that basis. No foundation at all.

The Court: Just let me get clear now.

By the Court:

(1871)

Q. These are copies of records you keep in the regular course of business; is that right? A. Yes, sir.

The Court: All right now, I think if there is any objection made to taking the copies, we have got to have the originals.

Mr. Fraiman: Yes, your Honor. May I ask one or two more questions?

The Court: Yes.

By Mr. Fraiman:

Q. Mr. Cody; where are the original copies of these? I understand you to say the originals go to the customers, and you never had the originals? A. The original goes to the customer.

Q. And your firm, in its regular course of business, retains copies of these invoices? A. Carbons we retain, yes, sir.

Q. Have you made attempts to locate carbon copies of these invoices? A. Yes, sir,—not personally. I have talked to the various people——

Mr. Stryker: One moment. I object to the talk.

The Court: Had somebody under your direction made an attempt?

The Witness: Well, I have talked to the controller, who is my immediate superior, and since it

(1872)

is beyond the statute of limitations, we don't have those copies now.

Mr. Stryker: I couldn't hear it, but if it is what any controller said to him not in the presence of the court and jury, I am going to object to it and ask your Honor to strike it out.

The Court: No, I will let it stand. It in no way relates to the issues of this trial. He is telling me something about records and his problems down there, so I will let it stand.

All right, go ahead, tell us how these things are made up.

By Mr. Fraiman:

Q. These copies that I have here are copies of the copies, certified copies of the copies; is that correct, Mr.

Cody? A. They are certified copies of the duplicates from our file.

Q. And were they made directly from the duplicates in your file? A. They were made up by—I assume they were made up by Mr. Roth. He certified that he made them up, and they are copies, true copies, taken from our records.

Q. Do you know when these were made up? A. I believe around 1952.

(1873)

Q. So the copies were in existence in 1952? A. They were at that time, and since have been destroyed.

Mr. Fraiman: I offer these in evidence.

Preliminary Questions by Mr. Stryker:

Q. When were these papers that you are offering, when were they made up, the things you have here in court? Can I take them? When were these papers prepared? A. Well I saw a letter from the controller——

Q. I don't care about that. Just tell me if you know when these papers were prepared? A. 1952.

Q. These particular papers? A. Yes, sir.

Q. And the papers from which they were prepared, you did not see, as I understand it; the controller saw them? A. I may have seen them, because it is part of my duty, but not individually, no, sir, I didn't specifically.

Q. I am not criticizing you, Mr. Cody. A. No, I can't say specifically I saw these.

Q. In other words, you didn't take the originals or the original copies——is that the right word? A. The duplicate of the original.

Q. You didn't take those, and from those sit down, personally, and make up these papers that are now offered in evidence, did you? A. No, sir, not myself. Mr. Roth did.

(1874)

Q. Did Mr. Roth do it, to your knowledge? Did you see him? A. Yes, he has done it in other cases, and certified to it.

Q. But you don't know whether he did this? A. I wasn't present when he did.

The Court: Who is Mr. Roth?

The Witness: He is billing supervisor, sir.

The Court: Does he work under your direction?

The Witness: Well, with me. He is supervisor, the same as myself.

The Court: Is Mr. Roth still there?

The Witness: He was home sick, I believe, but he was over in the New York Refining—most of the offices are over there since we moved into the new building.

Mr. Fraiman: Your Honor, Mr. Cody has identified Mr. Roth's signature.

Mr. Stryker: Well, we will have to argue that. That doesn't make it evidence.

The Court: If we are going to go through this. I think you had better have Mr. Roth come up and tell us how he made these copies.

All right, thank you.

Mr. Fraiman: We are not finished with this

(1875)

witness, your Honor.

The Court: All right. I will have to ask you to come back after lunch.

Then we will recess now. I understand there is some congestion on the elevators. We will make it 2:05. Don't discuss the case.

(Recess until 2:05 p.m.)

(1875a)

AFTERNOON SESSION.

(2:05 p. m.)

(Jury in box.)

JOSEPH E. CODY, resumed the stand.

Direct Examination Continued by Mr. Fraiman:

Q. Mr. Cody, do you have any other records of the National Sugar Company that you brought with you? A. Yes, sir.

Mr. Fraiman: May I see them, please.

Would you mark this for identification, please.

(Marked Government's Exhibit 119 for identification.)

Mr. Cody, will you tell me, without specifically mentioning what the figures in this Government's Exhibit 119 for identification are, what this document is? A. It is the original accounts receivable record for the Tavern Fruit Juice Company, covering from October 1945 through to February 1946—pardon me, the other side—it goes from June '45 to February 6, 1946.

Q. Was that record kept in the regular course of business of the National Sugar Refining Company? A. That is the accounts receivable original of that customer's account, kept in our files.

Q. And is it the regular course of business of your company to keep such accounts? A. Yes, sir.

(1876)

Mr. Fraiman: I offer Government's Exhibit 119 for identification in evidence.

Mr. Stryker: Are you offering this?

Mr. Fraiman: Yes, sir.

Preliminary Questions by Mr. Stryker:

Q. Were you with the company in 1945? A. Yes.

Mr. Stryker: I object to it on the ground that the document appears to be, I would say, a transcript of one of the books of this sugar refining company. It is not binding on the defendants. There is no suggestion that they were ever shown it or that they ever saw it. On those grounds I object.

The Court: All right, I will overrule the objection and receive it.

Mr. Stryker: Exception.

(Government's Exhibit 119 for identification received in evidence.)

Q. Mr. Cody, I show you Government's Exhibit 119 in evidence and ask you if that reflects sales to the Tavern Fruit Juice Company in December and January—December, 1945 and January 1946? A. Yes, sir; it does. These are the debits, invoice numbers, dates of delivery, the amount of money billed to them. On this side here is the cash credits and——

(1877)

Q. Were those sales that were made between December and January actually delivered to the Tavern Fruit Juice Company? A. I don't know whether they were delivered or picked up by them. I can't tell just from this which is which unless I saw the invoices and matched them with it. The invoices will disclose that, whether they were delivered to them or picked up by them.

Q. How can you tell that the sales were actually picked or delivered? A. Well, there are copies that the gentleman objected to, they would match in with these.

Mr. Stryker: I can't hear you. Will you raise your voice?

A. The copies of those invoices should match with those debits on here, and would indicate whether they delivered them.

Q. Would any entry be made on there if the item had been billed and was not actually delivered? A. Those are entered after the sugars are delivered or picked up.

Q. Do you understand what my question was? That is, if the sugar was not delivered—— A. It wouldn't appear on here.

Q. It would not appear on there? A. They wouldn't be charged for sugar they didn't receive.

(1878)

Q. So that each entry there reflects a sale that was actually delivered or picked up? A. Either that or cash refund. There is a cash item here where the difference between their moneys credited to their account and the sugars delivered, was refunded. The "cs" represents cash, means check. That is debit; here is credit, credit of cash to their account.

Mr. Fraiman: I have no further questions to ask.

Cross Examination By Mr. Stryker:

Q. Does this record that you are speaking from, does this record itself show when the sugar was delivered? A. Yes, sir; the date of the invoice indicates the date of delivery.

Q. But the invoices aren't here, are they? A. The date is on there against a specific charge. That is the date of delivery, sir.

Q. But have you produced the invoices from which this record was made? A. No, sir: we had certified copies of certain of the deliveries on there that I testified to before, that Mr. Roth certified.

Q. Certified by one of your people in your company? A. Yes, sir; by the billing supervisor.

(1879)

Q. But have you the invoices themselves with the receipts and the dates of the receipts, signed by the defendants or any of them here in court? A. I do not have the original invoices; no, sir; they have been destroyed. I may possibly have one of the receipts. The receipts are usually destroyed after four years. Now if I could look at those copies of the invoices that the gentleman has there, I think I have one of the receipts that I have found.

Q. Maybe you would like to do that? A. I would like to do that, sir.

Mr. Stryker: Have you got that?

Q. I am handed 117-A, Government, to G, for identification. They are not in evidence, but look at them and see if it helps you to do what you thought you might do. A. Thank you, sir. (After looking) Yes, sir, I have one of the signed receipts that matches with the K 618 that appears right on here. That is the crystal clear number, and that is a signed delivery receipt. That is the only one I believe that is available. I believe all the others were destroyed.

Q. That you have produced now? A. Yes, sir. Four years is the limit that we keep the receipts.

Q. I am not criticizing you. A. No, sir.

(1880)

Mr. Fraiman: May we have that marked for identification.

Mr. Stryker: That is just what I was about to do.

(Marked Defendants' Exhibit DDD for identification.)

Q. Now will you show me—I am not a bit familiar with this—where DDD for identification matches up on Exhibit 119? A. I will have to match it with this. Here is N 201A of January 3rd. January 3rd, there is 201,1109.12. Here is an amount of the invoice, which represents the sugar, plus the cartage. Here is the 1109.12 here, sir, and the date which matches with the date of the invoice.

(1881)

Q. This is signed by—is it Mr. Roth, is it? A. No, sir, that is signed by whoever received the sugar. It has a rubber stamp, the Tavern Fruit Juice.

Q. I see that, I am trying to get the signature. A. I could not—I would have no knowledge of that at all.

Q. I wouldn't expect you to. A. Receiving clerk, truck driver, whoever, I don't know.

Q. Just let me look at this a minute. A. Yes, sir.

(Marked Government's Exhibit 118-1 to 118-54 for identification.)

Mr. Stryker: Pardon me a moment, your Honor. This is a little confusing.

I will offer DDD, defendants', for identification in evidence.

Mr. Fraiman: Government has no objection.

The Court: Received.

(Defendants' Exhibit DDD for identification received in evidence.)

Mr. Fraiman: May I assume, Mr. Stryker, that you have no objection, then, to the invoice that goes with that receipt?

(1882)

Mr. Stryker: Which is the invoice?

Mr. Fraiman: The one that Mr. Cody has.

The Witness: I think that is the one you have there, sir.

By Mr. Stryker:

Q. Show it to me. A. 110912, that is the one, K6-18. It matches with the number on the receipt.

Mr. Stryker: I shouldn't think I would. Just let me look at it.

Well, on reflection, I will stand on my objection that I made before to Government's 117 for identification.

The Court: All right.

By Mr. Stryker:

Q. Now, is this, then, am I right, the only receipt that you have in the transactions mentioned in your Exhibit 119? A. Yes, sir. It was just by accident I found that one. The rest have been destroyed.

Q. They are all destroyed, all right. A. Yes, sir.

Mr. Stryker: Now let's see if I am giving you back everything (handed).

I have no other questions.

The Court: All right.

(1882a)

(Witness excused.)

The Court: Do you want to recall Mr. Gordon?

Mr. Stryker: I will answer your Honor this way, that I have looked at the grand jury minutes and I have no questions regarding them.

Did you hand them back?

Mr. Wolfram: Yes.

The Court: All right.

Mr. Stryker: Now, I am not able to answer the balance of your Honor's question without certain other information which I am trying to obtain, and may not have.

I would like to have you reserve it for that. I can't do it at this moment.

The Court: Well, you can recall him as your own witness if you see fit at some other time, but as of the moment, now, I am going to tell Mr. Gordon that, at least as far as I am concerned, his testimony is complete. If sometime you wish to supplement it, why, that is a problem we will cross at the time.

Mr. Stryker: I respectfully except.

The Court: If Mr. Gordon is waiting here, I will tell Mr. Dilberian to tell him he is through, and we will get the next witness.

(1883)

Mr. Fraiman: Edgar R. Roth.

EDGAR R. ROTH, called as a witness by the Government, being first duly sworn, testified as follows:

Mr. Wessel: While we are waiting, if your Honor please, I handed a memorandum up a few minutes ago, and I would like, if possible, to consider that with your Honor in chambers sometime later in the day.

The Court: Four o'clock.

Direct Examination by Mr. Fraiman:

Q. Mr. Roth, what is your occupation, please? A. Department head, billing department, sugar, National Sugar.

Q. Was that the National Sugar Company? A. National Sugar Company.

Q. How long have you been employed by the National Sugar Company? A. About 30 years.

Q. Mr. Roth, I show you Government's Exhibit 117A through 117G for identification. Could you tell me, first, if you can identify that and if that is your signature appearing below there on each of those? A. Yes, they are.

Q. What are these documents that I have just shown

(1884)

you, Mr. Roth? A. They are duplicates of records in our accounts receivable and invoices that have been issued.

Q. And did you prepare these yourself? A. I did.

Q. Are they certified copies of the actual invoices, copies of the invoices, which were in your files? A. That's right, yes.

Q. Do you know where those invoices are now which you made these from? A. They are at our Long Island City refinery.

Mr. Stryker: Pardon me, could I ask the witness to keep his voice up.

The Court: Speak so Mr. Stryker can hear you back at the second table.

By Mr. Fraiman:

Q. Have you checked recently to see if those records are still in existence? A. No, I have not.

Mr. Fraiman: I offer Government's Exhibits 117A through 117G in evidence.

The Court: Mr. Roth, the invoices of which those are copies, were they records kept in the regular course of business?

The Witness: Yes.

(1885)

The Court: And it was the regular course of business to keep those invoices?

The Witness: That is true.

The Court: And you are in a position to say that those are accurate copies of those invoices which were kept in the regular course of business?

The Witness: Yes, sir.

Preliminary Examination by Mr. Stryker:

Q. These copies that you have spoken of, 117A to G for identification, Government's, can you give me the approximate date when they were made?

If the papers would help you at all to answer it, I would be glad to have you use them. A. No, I don't think I dated those.

Q. If you can tell me the approximate date when those papers were made up? Take your time. A. Must be more than a year ago, the fall of a year ago. I think it may have been the fall of a year ago. That would be possibly September, October, I would say around September, October.

Q. I am just trying to get your—I am not testing your memory or anything else, I just want to get the date. A. I see.

Q. You would place it, to your best recollection, the

(1886)

making of those documents, in September, a year ago, which would be September, 1953, wouldn't it? A. About that.

Q. About that time. All right. Now, what was the occasion of your making up these copies? Did you have a subpoena from the Government, the grand jury? A. No, it wasn't any subpoena. It is just there was a request for copies of invoices of shipments that had been made and invoiced.

Q. When was that request made, to your best memory? A. I would say the same time that the action took place in making those out.

Q. About in September of 1953? A. About.

Q. Now, then, in order to make up these papers, it would follow, I should think, from what you said, that you had to have the originals before you to make these papers up? A. The originals? Not the original invoices. They'd be mailed out, but copies, our copies are made simultaneously.

Q. Your copies, signed by the vendee, by the receiver or his agent? A. That is true. That is quite right.

Q. Now, let me see if I have that definite. Those in-

(1887)

voices signed by one of the defendants or one of his agents were definitely in existence, then, on or about September, 1953, would that be correct? A. I would say so.

Q. What? A. Yes.

Q. Well, when the Government called for those invoices, didn't they ask for the originals, the ones from which these papers were made up? A. I think counsellor misunderstands. What I mean by "copies," when we make an invoice, it is made in five or seven copies simultaneously, so that those invoices would be prepared from something that had been done at the same time.

Q. Well, I think you are not at all to blame for not understanding my question. Were the signed copies of the invoices, from which you made up these documents, in existence when you delivered the, what you call the certified copies to the Government? Do I make that clear? A. Were they in existence? Were the signed copies in existence?

Q. That's right. A. Well, invoices are not signed.

Q. Well, I thought— A. A receipt is signed, a receipt of shipment.

(1888)

Q. Well, the invoice with the receipt on it, isn't that the way they are worked out? A. Well, the invoicing follows a signed receipt.

Q. Well, the receipt is part of the same document or am I wrong? A. Oh, no, they are two different documents.

Q. Two different documents? A. Yes.

Q. Well, now, what I am asking for, then, is the receipts. So that we are not talking at cross purposes, I mean the copies of the invoices that had a receipt place on it, and which were signed by the defendants' agent. Am I clear now? A. That is true, all right. Both, then, were in existence at that time.

Q. In September, 1953? A. A signed receipt, that is true.

Q. Now, going back, so I think my question may be clear: When the Government asked for these papers, and you had those in your possession, is it a fact that you did not deliver those to the Government, but delivered to the Government the papers 117A to G for identification? Is my question clear? A. Copies of the invoice, that's right, sir.

Q. In other words, you delivered the very papers that

(1889)

we are looking at now? A. That's right. No receipt, no signed receipt, that I know of.

Q. I understand that. But in response to whatever the Government's request was, those papers that I show you were the ones—— A. Prepared——

Q. —that were prepared? A. Quite right.

Q. From documents that were in existence but which have now been destroyed, with the exception of the one that you showed me; is that right? A. That's right.

Q. Then the fact is, isn't it, that the signed receipts were destroyed after the Government asked you for the documents? A. Quite possibly, yes.

Q. Well, that would be my deduction from what you have said If I am wrong, I want you to correct it. You think that is right, don't you? A. Well——

Q. What? A. What was the date of that, those invoices, 1945?

Q. Well, you had better tell me. I think you are more familiar with it. It looks like '45. Look at them all and see if that is right. A. Yes, I would say they were destroyed, yes.

Q. In other words, the answer to my question is yes?

(1890)

A. Yes.

Mr. Stryker: Nothing further, I think. Just a minute, may I have.

By Mr. Stryker:

Q. Did the Government ask you for any papers before September of 1953? A. I can't recall that, counsellor.

The Court: Well, is this anything on the voir dire of these documents, Mr. Stryker?

Mr. Stryker: No, your Honor. He is turned over for cross examination, as I understood it.

Am I right?

Mr. Fraiman: No, I offered those documents in evidence, Mr. Stryker.

Mr. Stryker: Oh, we are on that. Then you are quite right. I will be a minute or two more.

By Mr. Stryker:

Q. Can you just tell me this: Can you remember the name of the assistant that requested the papers that we

are talking about? Would the name Leone mean anything to you? A. Beg your pardon?

Q. Leone, would that mean anything to you? A. Leone, no, sir.

Q. Doesn't mean anything? A. No, sir.

(1891)

Q. Then you can't help me on that? A. No, I am afraid not. I thought I could.

Q. That is all right.

Mr. Stryker: My objection to the documents still stands.

The Court: All right. I will overrule it and receive them.

Mr. Stryker: Exception.

(Government's Exhibits 117A through 117G for identification received in evidence.)

(Government's Exhibits 120A through 120L marked for identification.)

(Marked Government's Exhibit 121 for identification.)

(Marked Government's Exhibit 122 for identification.)

By Mr. Fraiman:

Q. Mr. Roth, I show you Government's Exhibits 121 and 122 for identification and ask you if these refresh your recollection as to when the Government requested you to send us the documents which were sent? A. Yes, sir, it was in 1952.

Q. What was your answer, Mr. Roth? A. I could be in error about that 1953, then.

(1892)

Mr. Stryker: Mr. Roth, when you are talking up there, it doesn't always come here. Will you keep your voice up?

(1892a)

The Witness: What was the question?

Q. Do these refresh your recollection as to when the Government requested these documents? A. Yes.

Q. What was the date, approximately, when they were requested? A. August to September of 1952, September—September 1952.

Q. Would you also look—— A. At the time a request came in the documents were then prepared. So if that is dated September 1952 it must have been then, and my memory isn't quite clear——

Q. The request must have come in before this date? A. That is true.

Q. Which would be what date? A. That is September 9, 1952.

Q. Mr. Roth, would you look at next to the last paragraph of Government's Exhibit 121 for identification; does that refresh your recollection as to whether the delivery receipts were destroyed before or after the Government requested them to be furnished? A. Oh, no, that had been destroyed before, because at the time the request for the receipts and the invoices, we could not comply with the request for the receipts, but we did for the invoices. There are so many of those we couldn't possibly keep them.

(1893)

Mr. Fraiman: I have no further questions to ask.

Mr. Stryker: May I see those papers, please.

Cross Examination by Mr. Stryker:

Q. Merely on the question of date, refreshing your recollection now from these documents, as you have, can

you now tell us the date when these receipts were destroyed? A. The date when the receipts were destroyed?

Q. That is right, the ones we have been talking about a few moments back. A. I have no idea when the receipts were destroyed.

Q. Well, you remember—I thought we fixed your approximate date before, and then quite properly you were shown these documents to refresh your recollection. Now, it being refreshed, can you now tell me the dates when they were destroyed? A. No, I cannot.

Q. What? A. I cannot.

Mr. Stryker: No further questions.

The Court: All right. Any further questions from Mr. Fraiman?

Mr. Fraiman: No.

The Court: Thank you, Mr. Roth.

(Witness excused.)

(1894)

Mr. Fraiman: Oscar Spiegelhalder.

OSCAR SPIEGELHALDER, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Fraiman:

Q. What is your occupation, Mr. Spiegelhalder? A. I am the president of the Holloway Corporation, and also its subsidiary, Sun Hill Products.

Q. Where are those companies located, Mr. Spiegelhalder? A. 57-02 48th Street, Maspeth 78, New York.

Have you always been located at that address? A. Our office—we have one office at 120 Wall Street.

Q. Mr. Spiegelhalder, I show you Government's Exhibits 120-A through 120-L for identification. Would you

look at these and tell me what they are, please, if you can. Take your time, sir.

(Marked Government's Exhibit 123 for identification.)

A. They are copies of invoices which were subpoenaed by the Federal Government from our office.

Q. Will you tell me, please, Mr. Spiegelhalder, who these invoices are prepared, on what basis they are prepared?

A. When the order comes in, an order blank is made up,

(1895)

and the name of the company who ordered comes at the head; and the trucker with which the shipment should go out is mentioned, the terms and the price, and any other information pertaining to the transaction is put on an original and several copies are made. Then after the shipment is made—a bill of lading is also made up to conform with the original one. Then after the shipment is made the weights are shown on the bill of lading and come back to the office. The invoices are then completed. The invoices already showed a price, but then this information on the invoice is used to make up the final charges. And then one of the copies, if there is a broker involved——

Mr. Stryker: Is what? I didn't hear that.

A. If a broker is involved, a sugar broker.

Mr. Stryker: I see.

A. (Continuing) Yes, is involved, it goes to the sugar broker, not necessarily every day, but at least once a week, and the original goes out to the customer, unless he wants it in duplicate, and one copy goes into the file, with a copy of the bill of lading attached. The original of the bill of

lading, the trucker takes along. The memorandum is mailed with the invoice to the customer.

(1896)

Q. Are these invoices that I have shown you kept in the ordinary course of your business? A. Yes, sir.

Q. And is it the regular course of your business to keep such invoices? A. Yes, sir.

Mr. Fraiman: I offer Government's Exhibits 120-A through 120-L in evidence.

Preliminary Questions by Mr. Stryker:

Q. If I understood you right, the group of papers in this batch, pink, I would call them, just what is that? Tell me. I don't know as I quite understand it. Here is a light to help you. A. This is a copy of an invoice which was made out. Here is the date, December 28, '45. The order number is shown here, which would check with the original invoice, and the broker, his name is here.

Q. Yes. A. That would indicate that either the broker telephoned the order here, or he brought an order over to the office, which was then at 120 Wall. We still use the same office for executive purposes.

Q. All right. A. Here is the address of——

Q. The vendee, the people you sold it to. A. That's right; then the terms, cash.

Q. Yes, I see all that. A. And merchandise, and so on.

(1897)

Q. Number of drums? A. Number of drums, the gross weight, the tare of each drum, and the net, the price per hundred pounds, and this would be the figure. Then there is a further charge of 50 cents, freight charge of 50 cents, which is still in effect. It is a freight charge used by National Sugar and other people.

Q. I see. Now let me ask you, that sheet, as I understood it, was made up from some other papers; is that right? A. That is a carbon copy.

Q. Of other papers? A. That's right.

Q. I see here in this file—I hope I haven't mixed them up—this is Exhibit 120-E for identification, and is this the kind of paper that you are referring to, from which the pink papers are made up? A. That's right.

Q. That is right, isn't it? A. Yes.

Q. That is correct? A. Yes, because the name and address and the order, the number of drums which had been ordered, came from the original order.

Q. Does this one match up with one of the pink slips? I suppose it does. Will you show me? A. The totals would be, you see, those totals here of the gross tare and net should be, if the arithmetic is correct.

(1898)

Q. Should match up with 120-E? A. Should match up with this—what is it? I can't see it.

Q. Take your time. A. With the net weight.

Q. Just see if it does. I don't know. A. The net weight here is 26385 pounds.

Q. Is that indicated on the green slip?

Mr. Fraiman: Mr. Stryker, would these other invoices perhaps, bills of lading, help you with those? I don't know whether it will.

Mr. Stryker: I am glad to have them. I don't know. These are the ones we had before?

Mr. Fraiman: No, these are part of the same ones. Perhaps you need some of those.

Mr. Stryker: I see. These go with this particular gentleman.

Mr. Fraiman: Yes, sir.

A. (Continuing) Now this two which you paired here, this is not the bill of lading for this slip. This is order No. 606-A, and this is order No. 604.

Q. Can you show me the one that does match up, if it does? There are only three or four. I hate to bother you. A. It's no bother at all. This one I looked at, 2 drums—oh, yes, 606-A; yes, this would be the same.

(1899)

Now the shipping clerk has no adding machine in the factory. Therefore, all he does is the shipment is loaded on the truck, he takes the pencil and puts the gross tare down, and the office then uses these figures to complete it. They have a machine and it is added up.

Q. So that we have the record a little bit clear, you would say that 120-E for identification is reflected in 120-D for identification; is that what you have been telling me? A. Yes, this would belong to that.

Q. The answer to my question is yes? A. Yes, this would belong together.

Q. Now what is the date on Exhibit 120-E for identification? A. The date would be here.

Q. Up at the top, at the righthand corner, I see a date. Is that the date? A. I don't see it. I just see "December."

Q. It doesn't—— A. I tell you why probably that date here is missing. When——

Q. Well, let me first get the fact. Is the date missing? A. Yes.

Q. On the—— A. As far as I can see, yes.

Q. —what do you call the white slip there, 120—— A. That's right.

Q. The date is missing. And all it says is "December",

(1900)

leaving the date blank; is that right? A. Yes.

Q. Let me stop there for a minute. Now then, this document then does not tell when the goods were actually shipped by your company, or received by the vendee; that's right, isn't it? A. This document——

Q. Well, Document 120-E doesn't tell, does it? A. This one does not. This does.

Q. Look at the one marked 120-E. A. This does not.

Q. Let's take it by number, because this isn't clear to me. A. All right.

Q. 120-E for identification simply has a date, "December". The day is blank; then the year '45. A. That's right.

Q. Now you say 120-D has the date? A. Yes.

Q. Show it to me. A. December 20, right.

Q. Yes. Well, that date, December 20th then, if 120-D was made up from 120-E, the date December 20th wasn't on the paper 120-E, from which 120-D was made up; that is true, isn't it? A. That is true. Do you want me to tell you why?

Q. Well, I am asking you first. If you want to make an explanation, I think it is fair to let you. A. Yes. When

(1901)

an order comes in, especially during 1945, even today it is the same procedure, when an order comes in, the first papers are made up, to which bills of lading, the three bills of lading belong. Now we do not know when that order is being shipped, whether it is going to be today, tomorrow, or in four or five days. Therefore the date does not appear on the bill of lading, but when the bill of lading is executed by adding the gross net and tare, or the gross and tare, from which we can then construe the net then on the same day the bill made out will carry the date.

Q. Well,——A. Therefore, any invoice going out from our office always will bear the date of shipment. Sometimes

if there is a rush and invoices are made up the second or third day after shipment it still carries the date of shipment. All our invoices always carry the date of shipment. That is common practice in the sugar industry.

Q. But that is not so with respect to Government's Exhibit 120-E for identification. It does not carry the date. Am I right about that?

Mr. Stryker: Do you want to see it, your Honor?

The Court: Yes.

Mr. Stryker: I wish you would.

(1902)

By the Court:

Q. Mr. Spiegelhalder, this is the order, isn't it? A. No, this is a copy of the bill of lading.

Copy of the bill of lading? A. Yes.

Q. Which was made out and sent, the original was sent with the order; is that right? A. That's right.

Q. And at the time you made this out you didn't know when it was going to be sent. A. No.

Q. And after this was sent, did they sign a receipt? A. Yes, sir.

Q. And after you got that receipt back, then did you make out this bill? A. This is the signature of the truck driver, or—I can't—I have to see the invoice.

Q. All right, take your time.

Mr. Stryker: Look at anything you want. I don't care.

A. There is the 50-cent delivery charge, so that would indicate that a trucker who works for us or our contract trucker, made the delivery, and this signature would be of somebody from the consignee's receiving platform.

Q. And after you receive the executed bill of lading back, you make out the invoice, is that right? A. That is correct.

(1903)

Q. And you put on the invoice the date on which the bill of lading was executed? A. Bill of lading was shipped yes.

Q. The date it was shipped. A. Yes.

All right, so then, of course, you couldn't take that date because—— A. It could be a week before.

Q. —because when that was taken, you didn't know whether it was going to be shipped. A. Since there is one per cent ten days' discount on it, the shipment must have —I mean the invoice must have the date of shipment, because the customer would complain.

The Court: All right.

By Mr. Stryker:

Q. Now, pursuing his Honor's questions, if I may, a moment, I take it there comes a time when some paper, either the bill of lading or something else, has the date on it; is that what you have told his Honor? A. Yes, sir.

Q. Now what paper is that? A. This would be the original and the copy of the original.

Q. Well, let's take it so I can understand it. A. This one.

Q. Let's take 120-D. Now 120-D was made up after

(1904)

120-E? A. That's right.

Q. Now the date is not on 120-E; we have got that. A. No.

Q. You say you have got the date, December 20th, from some other paper; that is what you said, isn't it? I mean; you got that from some other document? A. Well,

yes and no. I would have to see the original. Most likely the date would be on the original filled in with pencil.

Q. Have you the original? A. No, I haven't got that.

Q. Where is that? A. The customer has that. The original goes to the customer.

Q. This is back in '45? A. Yes.

Q. Well, just so I have it clear, then, I am going to stop, it is a little boring, I am afraid; the date of December 20th, that appears on 120-D for identification is not supported by 120-E for identification or any other document that has been shown you; is that correct? A. It is supported by the order No. 606-A, which appears also on the copy.

Q. I am not talking about the whole document. I am quite interested at the moment in the date. A. No, there is no date on this.

(1905)

Q. Well, my question was, and if it isn't clear please tell me. It may not be as good as it should be. Is it a fact that the date, December 20, on Exhibit 120-D for identification, that date—I am only talking about the date—is not supported by 120-E for identification or any other document that the Government has shown you in this trial; am I right now?

Mr. Fraiman: I object to that, your Honor.

A. That's right.

Mr. Fraiman: The witness has already testified to that several times.

Mr. Stryker: Wait a minute. He said "That's right." I don't know if your Honor got it.

The Court: All right, I think it is perfectly clear.

Mr. Stryker: It is clear to me.

Q. For instance, I notice in 120-J, K— 120-J, 120-K and 120-L, they all do nave the dates. For instance, J is December 28th. A. That is correct.

Q. K, is that right? Follow me. See if I am right. A. Yes. As you can see, it was put in with pencil.

Q. I do. A. While on your other invoice and your other bill of lading, it was typed, December was typed, but

(1906)

for some reason it doesn't appear. I don't know why, but the common practice is that the date would be put in.

Q. I can save everybody's time by saying, if it is not the fact that J, K and L, and 120-I, were done in the course of practice as you have outlined? A. That's right, yes.

Q. And Exhibit 120-E does not contain the date as the exhibits I have just enumerated; am I correct? Do you understand me? A. Yes.

Mr. Stryker: All right. I object to the documents on the grounds that they are incompetent, irrelevant and immaterial; that no foundation has been laid for their receipt.

The Court: I will receive them.

Now, Mr. Fraiman, are you offering both sets of documents? You started off with the invoices, and Mr. Stryker got the bills of lading. Now are you offering the bills of lading too?

Mr. Fraiman: Yes, your Honor. I offered, the exhibits that I asked to be marked had one invoice with the bill of lading.

The Court: Oh, they are a combined group?

Mr. Fraiman: Yes, sir.

(1907)

The Court: Very well, I will receive them.

Mr. Stryker: I respectfully except.

(Government's Exhibit 120-A to 120-L for identification, received in evidence.)

By Mr. Fraiman:

Q. Mr. Spiegelhalder, I neglected to ask you what business—these were for the Holloway Company, is that correct? A. That's right.

Q. And what business were they in? A. Syrups and molasses.

Q. And these represented the sale of what? A. Of syrup, which is sometimes called liquid sugar.

Q. I now show you, sir, Exhibit, Government's Exhibit 120 for identification, and ask you if you can identify that for me, please? A. Yes, this seems to be coming out of one of our books—yes, names of customers.

(1908)

Q. Could you tell me what book that might come from, sir? A. Well, could be the general ledger.

Q. You recognize that as one of your books? A. Oh, yes, yes, because these are all our customers' names.

Q. Is that kept in the ordinary course of your business, sir? A. Yes, sir.

Q. Is it the ordinary course of your business to keep such books? A. Yes, sir.

Mr. Fraiman: I offer Government's Exhibit 123 for identification in evidence.

Mr. Stryker: Same objection I made to a similar document before. I won't take time——

The Court: All right. This is a ledger sheet, is it?

Mr. Fraiman: Yes, sir.

The Court: All right, I will receive it.

Mr. Stryker: Exception.

(Government's Exhibit 123 for identification received in evidence.)

By Mr. Fraiman:

Q. Mr. Spiegelhalder, were there any sales by your other company, the Sunhill Company, to the Tavern Fruit Juice Company? A. I believe so, yes.

(1909)

Q. Do you have any records of any such sales? A. I was asked to bring one specific—also a ledger sheet, and I was asked for an order number which would appear then. Let me look at it—yes, this is an account ledger. A record of sales to one company are kept, and this is the month of, I believe, January—yes—no, it is January, April, May and June.

Q. What year was that, sir? A. 1946.

Mr. Fraiman: Would you mark this for identification, please, Mr. Dilberian.

The Court: Mr. Spiegelhalder, this Exhibit 123 is your sales account for December, 1945?

The Witness: Yes.

The Court: All right.

(Marked Government's Exhibit 124 for identification.)

By Mr. Fraiman:

Q. I show you Government's Exhibit 124 for identification which is the document you were just talking about, and ask you, did this document come from one of the books of your corporation, company, that is the Sunhill Company?

(1910)

A. Yes.

Q. And is that book kept in the regular course of business of the Sunhill Company? A. Yes.

Q. Is it the regular course of the business of that company to keep such books? A. Yes.

Mr. Fraiman: I offer Government's Exhibit 124 for identification in evidence.

Preliminary Examination by Mr. Stryker:

Q. On that, this paper, 124, is the only document that you produced with respect to the transactions enumerated on the paper; is that right? A. Yes.

Q. Were there invoices and receipts in connection with these various matters? A. Otherwise it would not be in because any information shown on these sheets comes from copies of invoices.

Q. In other words, this is a copy from some other paper? A. That's right.

Q. Namely, invoices and bills of lading, have I got that right? A. Yes.

Q. Have you got those with you? A. No.

Q. Where are they? A. I could not tell you.

Q. What? A. I don't know.

(1911)

Q. Did you make up this document, 124 for identification, did you make it up yourself? I take it not as president of the corporation? A. No. That is done by the accountant, and the accountant on the payroll not the CPA.

Q. And you don't know where the documents from which he made the entries on this sheet are; I believe you said that? A. We keep our bills of lading, copies of invoices about seven years. After that we destroy them. But documents of original entry as this is are kept indefinitely because that is a permanent record of the company's operation.

Q. Would you call this paper a document of original entry? A. That is a document which is used by the certified public accountant in making out income tax returns and things of that sort.

Q. Well, I am beginning to learn— A. A permanent record.

Q. —a little bit about books, not much. Would you call this paper a book of original entry or is it a— A. It is our permanent record; let's put it that way.

Q. It is your record? A. It is our permanent record.

(1912)

Q. A book of original entry means a book where the transaction is originally or first transcribed, doesn't it? A. I wouldn't know how to answer that question.

Q. Well, I don't know how I could criticize you. A. To me it is our permanent record which is kept.

Mr. Stryker: All right. I object to it on the ground there is no foundation, incompetent, irrelevant, immaterial.

The Court: Might I see this?

(Handed to Court.)

The Court: It is the regular course of business to enter into this book the transactions that are first covered by invoices; is that right?

The Witness: Yes.

The Court: The invoice comes in and it is your regular course of business to enter each invoice on this book?

The Witness: After reflecting on it, I always— I would like to say now yes to the question, is it an original book.

The Court: This isn't copied from any book, is it?

(1913)

The Witness: No, because this is the first book-keeping entry made, you see.

The Court: All right. I will receive it. All right.

Mr. Stryker: Exception.

(Government's Exhibit 124 for identification received in evidence.)

Mr. Fraiman: I have no further questions to ask Mr. Spiegelhalder.

The Court: Have you any questions, Mr. Stryker?

Mr. Stryker: I have a couple of questions on cross examination not related to——

The Court: If it is going to be lengthy, we will take our recess now, but otherwise I would finish it up.

Mr. Stryker: All right, let's take it now. It won't be lengthy, I assure you, but I would just as leave take it now.

The Court: All right, let's take our recess now. I thought we could finish Mr. Spiegelhalder first.

(Short recess.)

(1914)

Mr. Stryker: I am just going to ask a couple of questions.

Cross Examination by Mr. Stryker:

Q. When did the Government first ask you for the papers that you produced here? A. I could not tell you that. I don't remember.

Q. Don't think I am trying to pin you to a date. Can you tell me about when it was, what year? A. I do not know.

Q. What year? A. I probably wasn't even in when they were picked up because the office manager would handle that, you see.

Q. Well, weren't you told by the office manager the Government wanted something? Can you help me that way? I don't want to waste too much time on this. I would like to get the year, though, when they asked you for these documents. A. Our office is permanently instructed if a Government man comes in from any department and identifies himself, upon presentation of papers, he can take anything along, as long as we get a record.

Q. Well, would you have a record of the date, then, in your office as to when the Government first asked for these papers?

(1915)

I am interested at the moment only in the date. At the moment I am not expecting you to give me the exact date at all. Can you fix it approximately? A. That should be available, yes.

Q. It should be, shouldn't it? A. Yes, yes.

Q. And you can't help me because you did not do it, I understand that. A. No.

Q. Well, could you produce that document? I don't mean this minute, but could you find it and produce it tomorrow? A. It's a job, but I will certainly go at it. It's a long time ago, but I will try. I will try.

Q. It's a fact I would like to have, and I don't have any right to impose any duty on you, but if you can do it, are you willing to do it? A. Yes.

Mr. Fraiman: Your Honor, does Mr. Stryker mean to call this witness as his own witness?

Mr. Stryker: Well, I have no idea of doing that. I think in fixing a date which is relevant to many issues, with which your Honor is familiar, I don't

have to state them, I think, he says he can produce a paper. It would be seem to me fair that he come

(1916)

back and produce it.

The Court: Well, we can leave it this way: If those issues ever reach the point of fruition, or whatever the right word is, if they ever flower, why, we can call on him then.

Mr. Stryker: Well, the issue has flowered. The determination of them hasn't flowered. I think that is fair.

The Court: I think you should do it as part of your case, Mr. Stryker.

Mr. Stryker: What?

The Court: I say you can call him back as part of your case. I don't see any sense in having him come back tomorrow for this.

By Mr. Stryker:

Q. Do you recall who on behalf of the Government first asked you for the papers that you produced? A. I do not.

Q. What? A. I do not.

Q. The documents, though, that you mentioned before would probably show that, wouldn't they? A. They would, if we can locate them, yes. It would be signed by the Government man.

Q. What is that? A. It would be signed by the Gov-

(1917)

ernment man.

Q. I would imagine so.

Mr. Wessel: If your Honor please, to avoid this, we will find out whatever the date is. I am

sure there must be a copy somewhere in the Government files.

Mr. Stryker: That would be fine if you would and then it would save me a lot of strength.

By Mr. Stryker:

Q. One other question: I guess my previous questions won't enable you to answer this, but I will ask it any way and see——

Mr. Stryker: I think I have asked it. No, I haven't asked it.

Q. Could you tell me, please, when you turned over to the Government these particular papers that you produced? I am talking now about recent events, within the last week or two? A. Recent events—the one you saw me turn over.

Q. Yes, that's right. A. The others I do not know when.

Q. I am just trying to see if some of them were turned over very recently. A. Today.

(1918)

Q. The first time you turned them over today? A. One, one day.

Q. Except for what you may have turned over before, but which you can't, because you haven't the record, tell me when—— A. Yes.

Q. —is that all? A. Yes.

Mr. Stryker: Thank you. Nothing more.

The Court: All right.

Mr. Stryker: Could I leave it this way, that if I want this gentleman back, can I call him by telephone and would you come back?

The Court: My impression of Mr. Spiegelhalder is if you call him by telephone, he will return.

The Witness: In the meantime I have to look for the document if I can find it.

Mr. Stryker: You don't have to, but I am asking you to——

The Court: The Government is going to try to give you the date anyhow.

Mr. Stryker: If it does, I won't need it. I'll try to save your time.

The Court: So if you don't hear from Mr. Stryker, you won't have to.

(Witness excused.)

— —

(1919)

SAMUEL GARTNER, called as a witness by the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Fraiman:

Q. What is your occupation, Mr. Gartner? A. Credit manager.

Q. With what firm, sir? A. The American Molasses Company.

Q. Where are they located, Mr. Gartner? A. 120 Wall Street, New York City.

Q. Mr. Gartner, is the Nulomoline Company a subsidiary of the American Molasses Company? A. It was at that time.

Q. At what time was that, sir? A. That is during the period when we were selling to these particular companies.

Q. Do you know when that was, sir? A. Around 1945, 1946; 1945, 1946.

Q. Mr. Gartner, I show you Government's Exhibits 118-1 through 118-54 for identification, and ask if you can

tell me what these are, without going into any of the specific items on them? A. These are shipping orders to our plants, giving them instructions on the orders received as to quantity, destination, and so on.

(1920)

Q. Now, if I am not mistaken, there are two different types of papers there. A. This is the copy of the shipping order and the billing copy for the invoice, on which the invoice is rendered.

Q. What number is that? A. This is No. 4112.

Q. That is Government Exhibit 118-1 for identification. And what is 118-2 for identification, which would be this one here (indicating)? A. This is the bill of lading or receipt for the shipment.

Q. And are those documents kept in the ordinary course of business of the Nulomoline Company? A. They are.

Q. I notice there are some pencil markings on them. Were they also part of the ordinary course of the business of the Nulomoline Company, those entires? A. Well, these pencil entries are put on after the shipment is made.

Q. Were those pencil entries as well as the other entries made in the ordinary course of business of the company? A. Yes, sir.

Q. Was it the ordinary course of the business of the Mulomoline Company to keep these records? A. Yes, sir.

(1921)

Q. Were you connected with the Nulomoline Company at the time these records were kept, sir? A. Yes, I was.

Mr. Fraiman: I offer Government's Exhibits 118-1 through 118-54 for identification in evidence.

Preliminary Examination by Mr. Stryker:

Q. Are these invoices that the customer receives? A. No, the invoices are typed up from the information contained on that first copy of each one of those orders.

Q. Which do you mean, the yellow sheets here? A. The yellow sheet.

Q. Well, I mean, are they typed up some days the same time, or possibly some days later? A. Possibly a day later.

Q. And then the paper that is typed up, that is sent to the customer, is it? A. Yes.

Q. And his receipt is sought? A. No, the receipt is the paper, the second paper attached to the first copy, for instance, and that is signed for.

Q. Show me, will you? I am trying to learn something

(1922)

about bookkeeping. Is that the white— A. That is the receipt, signed for by truckman when he picked up the syrup at our refinery.

Q. What do you call this thing, this white paper? A. That is a bill of lading or receipt for the shipment.

Q. Have you got a bill of lading for each of the yellow sheets here? I only see two, or are there more, three? A. There is supposed to be one for each.

Q. Oh, is there? Oh, I am wrong. Is there more? Is there one for each? A. There is supposed to be. There should be one for each shipment.

Q. All right. And do these white sheets, like, let's say, 118-4—those are the figures of the exhibit—are they signed by the—is the signature of the vendee or his agent on that? A. The truckman picking up the shipment is supposed to sign this receipt.

Q. I see, I see, all right.

These look as though they had been burned here or something. A. No, what happened there, we had those papers stored in the basement of our building at 120 Wall Street where we are located and every once in a while they

(1923)

have a flood.

Q. Not a very good plumbing system there? A. No, it is the East River backs up, I guess.

Q. Not very pleasant. Is it possible that the invoice might be sent to the customer some days after the goods were ordered—I don't mean that—the goods were delivered? A. They are always sent out after the goods are delivered, the goods are picked up.

The goods were always picked up at our refinery. We made no deliveries.

Q. My question was, are the invoices sometimes dated at a different time from the shipment of the goods? A. Are you referring to the invoice date or when the invoice was mailed?

Q. Well, when it is mailed I have in mind, yes. A. If you will let me see one of those copies, I can refresh my memory.

Q. Surely. I am not asking now about any particular document. A. No.

Q. I am asking about your general system. A. General setup, all right.

Q. There is a light if you want to look at it. A. With your permission, I picked out one particular shipment here,

(1924)

because due to the flood, certain information on these other tickets have been obliterated.

(1924a)

Q. Oh, I see. A. On this No. 4318——

Q. That is Exhibit 118-5? A. This is 50.

Q. Oh, 50. You are right. Now what were you saying to me? A. This shipment was made on January 4, 1946.

Q. Yes. A. That may have been a Friday or a Saturday, I don't know, but we usually try to bill the shipment the next business day and you will notice here the form

reads, "Bill" and we have a January 9th rubber stamp on there, so it——

Q. I see that. A. So the bill was made up on January 9th for this particular shipment.

Q. But you are telling me, as I understood it, something you couldn't show by reason of the flood you had; what point were you making there? A. Well, you see the water washed away the rubber stamp.

Q. But you got an invoice that goes with that bill, have you, 118-3; is there an invoice that goes with that one? A. You mean the receipt.

Q. Well, all right. A. That is this one here; this is December 18th.

Q. I see, all right. A. Yes.

Mr. Stryker: This is only on the admission of documents; am I right? It isn't cross-examination. (1925)

The Court: I don't think so. You haven't got the documents in yet.

Mr. Stryker: Well, just the same objection as I made before.

The Court: All right, I will receive them.

Mr. Stryker: Exception.

(Government's Exhibits 118-1 to 118-54 for identification received in evidence.)

Direct Examination Continued by Mr. Fraiman:

Q. Mr. Gartner, do the bills of lading that have just been admitted in evidence, the white sheets, the date on them reflect the actual date that the merchandise was picked up by the trucker? A. That's right.

Q. Incidentally, Mr. Gartner, were you contacted by anyone on behalf of the defendants concerning any documents? A. I did receive a telephone call.

Mr. Fraiman: I have no further questions.

Mr. Stryker: No questions.

The Court: All right. Thank you, Mr. Gartner.

Mr. Stryker: Oh, just a minute. Will you sit down just a minute. I forgot something.

Cross Examination by Mr. Stryker:

Q. Would you be good enough to tell me when the Government took from you, or received from you your papers (1926) that have just been received in evidence? A. I don't recollect when.

Mr. Wessel: Here is the document.

A. (Continuing) It was sometime ago.

Mr. Stryker: What is that, Mr. Wessel, something for me?

Mr. Wessel: I assume this is the same problem you raised before. I happen to have that document.

Mr. Stryker: Is there a paper there you want to show me?

Mr. Wessel: Yes, I want to mark it for identification.

Mr. Stryker: All right.

(Government's Exhibit 125 marked for identification.)

By Mr. Stryker:

Q. I am showing you a paper that the Government has just kindly shown me, 125 for identification; would that refresh your recollection as to the dates when you turned over these papers? A. Well, this is a letterhead of the Nulomoline Division.

Q. I am not asking for the contents of the letter; I am just asking if it refreshes your recollection as to the dates? A. May I say that this is not my signature on this letter.

(1927)

This was somebody else in the office that sent the information.

Q. I assume it was somebody in authority there in your office? A. Yes, it does refresh my recollection.

Q. And refreshed, what is your recollection now? A. That certain records were asked for and were submitted to the Government.

Q. On May 17, 1950? A. May 17, 1950.

Mr. Stryker: Thank you very much.

I have no further questions.

The Court: All right. Thank you, Mr. Gartner.

(Witness excused.)

Mr. Fraiman: Mr. F. Richard Bauer.

F. RICHARD BAUER, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Fraiman:

Q. What is your occupation, Mr. Bauer? A. Manager of the Accounting Department.

Q. Of what firm? A. Stein, Hall & Company.

Q. Where are they located? A. 285 Madison.

Q. How long have you been with the Stein Hall Company? A. Twenty-four years.

(1928)

Q. What business is the Stein Hall Company in, Mr. Bauer? A. Stein, Hall & Company are importers, exporters, wholesalers and manufacturers of starch and dextrins.

Q. Do you have some records with you, Mr. Bauer? A. I do.

Mr. Fraiman: May I see the records that you have, please, sir?

I ask that these be marked for identification.

(Marked Government's Exhibits 126, 127 and 128 for identification.)

Q. Mr. Bauer, I show you Government's Exhibit 126, 127 and 128 for identification, and ask you if these are the records which you have just given me; and ask you if you can tell me what they are, please without mentioning specifically the items on the documents? A. It covers purchases made by Tavern Fruit Juice Company, September 10th——

Q. Don't go into the dates at this time, sir. All right.

Q. Are they invoices? A. They are.

Q. And do the dates on those invoices reflect the date of the actual shipment of the goods? A. Yes.

(1929)

Q. Were those documents kept in the ordinary course of business of the Stein Hall Company? A. That's right.

Q. Is it the regular course of business of the Stein Hall Company to keep such records? A. Yes.

Mr. Fraiman: I offer Government's Exhibits 126, 127 and 128 for identification in evidence.

Preliminary Questions by Mr. Stryker:

Q. What is the "118" at the top? Would that mean—well, what does that mean? I don't know. A. May I see that, please?

Q. Sure. I am talking about this date up here, at the right hand corner. What do you call that? A. That is what we call "folio numbers" out of stock books. It has no bear-

ing on the date. They all happen to be the same, 118—this doesn't even have it. But this is 118. Those are what we call stockbook folios.

Q. And the date, the invoice date is up here, "12-14-45" in this box, under printed invoice date; is that right? A. That's right.

Q. I notice here on 126 for identification there didn't seem to be any date, or am I wrong? A. That is the date here. In other words the carbon evidently slipped.

(1930)

Q. I mean, the date—I am not criticizing that, but the date is down below there? A. It is lower than the regular invoice block.

Mr. Stryker: Well, the same objections as to the other documents.

The Court: I will receive them.

(Government's Exhibits 126, 127 and 128 for identification received in evidence.)

(Government's Exhibit 129 marked for identification.)

By Mr. Fraiman:

Q. Mr. Bauer, I show you Government's Exhibit 129 for identification, which is one of the other records which you have just given to me, and ask if you can identify that, for us, please? A. It is our ledger sheet for Tavern Fruit Juice Company.

Q. Would that be a sales ledger or— A. It is not a sales ledger; it is actually your accounts receivable.

Q. Your accounts receivable ledger? A. That is right.

Q. Are those pencilled notations, as well as the notations in ink, part of the regular entries in that book? A. Yes, they are.

Q. And is that document kept in the regular course
(1931)
of business of the Stein Hall Company? A. It is.

Q. Is it the regular course of business of the Stein Hall Company to keep such records? A. Yes.

Mr. Fraiman: I offer Government's Exhibit 129 for identification in evidence.

Mr. Stryker: Same objection. I won't stop to examine.

The Court: I will receive it.

Mr. Stryker: Exception.

(Government's Exhibit 129 for identification received in evidence.)

Q. Mr. Bauer, were you contacted by anyone on behalf of the defendants? A. Yes.

Q. Will you tell me what the nature of the conversation was that you had? A. It was Mr. Holzer of Mr. Stryker's office, regarding having access to our records.

Q. And did you offer to make your records available to Mr. Holzer? A. The question at that time was referred to the treasurer, and as far as I know at the present time, the treasurer would not commit himself, but said for them to call back at a later date, which I don't think or believe was ever done.

Mr. Fraiman: I have no further questions to ask this witness.

(1932)

Cross Examination by Mr. Stryker:

Q. Wasn't Mr. Holzer, if it was, told that the Government has subpoenaed the records and you wouldn't show them to us? Weren't we told that? A. No.

Q. Sure? A. Mr. Holzer was told that the records had been subpoenaed.

Q. That is what I mean, by the Government. A. Yes.

Q. And when the request was made to examine them, it was declined? A. At that moment.

Mr. Stryker: All right.

Q. Let me ask you just one or two short questions. I hope they are short. Can you tell me when the Government first contacted you about this Tavern Fruit matter? A. It did not contact me direct. It was through the treasurer's office.

Q. I don't care. You can tell about that. A. I don't remember the date.

Q. Could you give it to me approximately? Was it '52 or '53, or '51, or when it was? A. Oh, it was this year. I think beginning of the year, approximately, or the latter part of 1954. I am depending on memory there and I am not sure.

(1933)

Q. Do you happen to remember who of the Government, whether it was one of the agents, or who it was, that contacted you or your firm? A. I think it was one of the agents.

Q. Do you happen to remember his name? A. No, because I didn't get it.

Q. Did you see him? A. No, I did not see him.

Mr. Stryker: That is all.

The Court: All right, thank you, Mr. Bauer, that is all.

(Witness excused.)

Mr. Fraiman: If your Honor pleases, with your Honor's permission Mr. Wessel will interrogate the next witness.

Colloquy

Mr. Wessel: It is now five minutes to four, if your Honor please. We have a long witness, and we have a hearing in chambers.

The Court: All right, we have a question of law we have to decide anyhow. We will excuse the jury now. Don't discuss the case and we will start at ten-fifteen tomorrow.

(Jury excused.)

(The following took place in the court room in the absence of the jury):

(1934)

The Court: Now, Mr. Wessel, you wanted to strike those income tax returns?

Mr. Wessel: One of two things, if your Honor please.

The Court: All right, go ahead.

Mr. Wessel: I don't think there is any foundation for those returns. They were taken subject to connection; and I don't think connection has been shown. I don't have any real objection to those returns going in, provided other returns for the same years were to go in. I am referring to the individual returns for Messrs. Giglio and Livorsi for '47 and '48.

Now, I didn't think I could get those returns in, because I didn't think they were material to the issues. I hesitate to see part of the picture go in on an offer of this kind by the defendants unless the whole picture goes in. I am not trying to keep these out than I am to have the whole picture in or the whole picture out, one way or the other. I think, technically speaking at least at the present time the objection is a sound objection.

The Court: All right, Mr. Stryker.

Mr. Stryker: I will let Mr. Wolfram handle this.

(1935)

The Court: All right, go ahead, Mr. Wolfram.

Mr. Wolfram: If your Honor please, as far as individual returns are concerned, there is no claim as far as I know that there is a loss carried back on behalf of the individuals, so that the same issue doesn't arise; and confining myself to the American Brands returns, the issue in this case, as I understand it, Mr. Wessel stated sometime ago, and I believe in the presence of the jury, that non-payment is definitely in issue in this case.

Furthermore, there is a charge of a conspiracy from 1947, I believe, right down to the date of the finding of the indictment, and I believe on both of those issues, namely, the non-payment of taxes and on the charge of conspiracy, these 1947 and '48 returns of American Brands are very vital.

The Court: As I see them right now, they are nothing more than self-serving declarations.

Mr. Wolfram: No, your Honor, they were filed in connection with the claimed loss, which the parties, as I understand it—Roth himself made a statement to the Government that he anticipated a loss at or about the very time that the American Brands return was filed, and then subsequently the loss did develop, and the corporation——

(1936)

The Court: You haven't given me any proof yet that the loss didn't develop. There is no proof before me to that effect.

Mr. Wessel: There has just been, as far as I can make out, no foundation laid in to the witness Roth

and there is no other witness who has testified about this matter.

Mr. Wolfram: I don't think that we have to show the connection at the very moment that the returns were offered, or at the very moment that a particular witness is on the stand. I understand we can show a connection at any time.

The Court: All right, they were put in during the Government's case. I am going to strike them out now and after you establish a foundation, if I see some different picture, why, I will take them, I will consider it at that time, but as I see it now, they don't prove anything. Roth says that he copied them from some accountant's report, and that the last he saw of them, he gave them to your accountant, and that is where it lay. He never said that they were accurate; he never said there was an actual loss, as I recall it. So I don't see that they help us.

(1937)

Mr. Wessel: May I also, if your Honor please—I didn't make any objection to competence yesterday, but I now want to assert an objection to competence on these documents. Mr. Roth testified that he handed them to Mr. Lawn, who gave them to Mr. Holzer, and the only proof of filing is the document itself, which shows on its face it was filed.

(1938)

Obviously, that will in fact prove the fact in any normal situation. But I know of no foundation that has been shown and nobody has testified of his own personal knowledge to the filing.

If your Honor please, there is an additional objection on that ground.

Mr. Wolfram: If your Honor please, the documents were not only stamped, but produced by the Government and they have been filed, and Mr. Wessel knows they were filed.

Mr. Wessel: If counsel wishes to put me on the stand he will have an opportunity to do so, but at the moment there is no evidence that they were filed. I mean, I want to put into the record that I will be perfectly happy to put these in provided the whole story on '47 and '48 goes in on the part of these defendants.

The Court: I am going to strike them from the record, and at the same time I am going to strike any testimony as to their contents. As far as I am concerned, Roth was asked, I remember, "Does that return show a loss for the year so and so?"

Now, the document goes out and Roth's testimony as to what it contains goes out at this moment. (1939) I will reconsider, as I have told you, at any time when there is proper foundation for it.

Mr. Wolfram: I respectfully except.

Mr. Wessel: There is one other problem I think it may be appropriate to raise now with regard to the checks which are in evidence. The proof now establishes and will in the next day be even clearer that Mr. Lubben's net income from Eatsum was in excess of $100,000. Mr. Roth $124,000.

We will have a slight exception to that, very minor, because of certain acts, but that is substantially correct. These checks serve only to confuse. My information from the accountant is that all those checks, or at least most of them that we can trace, were made a part of the charges to Mr. Lubben on the Eatsum account.

The Court: Well, Mr. Wolfram was going to tell me at some point what those checks add. If you want to do it now, fine. If you are not ready, all right.

Mr. Wolfram: I understand Mr. Wessel was supposed to do the same thing.

The Court: He said they don't add anything. He (1940)
said what you have got is Mr. Roth's computation which shows Mr. Lubben's—

Mr. Wessel: Lubben's drawing is 200-some-odd thousand, and his net is 100-some-odd thousand.

Mr. Wolfram: As I understand it, your Honor, I don't think defendants are bound either by Roth's computations or the Government's computations. I think the defendants are privileged to show what Lubben drew from the partnership, even if that doesn't agree with Roth's computation.

The Court: I think you are absolutely right on that, but I don't see—you will remember on those checks, they were handed up as individual vouchers, and I don't recall that Lubben was able to say what they were.

Mr. Wolfram: Well, in many cases he did say what they were.

The Court: There are enough documents in this case already, I mean, that we need, and I am going to be less liberal than I otherwise would in just taking in documents that are harmless. I just don't see any sense, and that is the thing I am interested in now.

Now, if you will show me where these documents add to your proof, apparently they can stay, but I don't see—to me they are just cumulative at this (1941)
moment.

Mr. Wolfram: If your Honor please, there is a group of checks that are already in evidence. There is a larger group of checks, I believe, that were excluded from evidence.

The Court: That is correct.

Mr. Wolfram: It is our position that not only should the checks that are in evidence stay in evidence, but that the checks that were excluded should be in evidence. I think it is all part of the same picture, and that is why I wanted to produce to your Honor, either that way——

The Court: Do you want to do it now?

Mr. Wolfram: I prefer not to, if your Honor doesn't mind.

The Court: What I would really like is a schedule or something like that which would show me what does have materiality and what doesn't.

Mr. Wolfram: I think we can work that up for your Honor, but I would like to present it as one picture, and not a divided picture.

The Court: Either way.

As I understand it, the second group couldn't tell us anything except that they were checks either to Lubben or to cash, which he drew. One of them,

(1942)

I think, was deposited in a bank which he had an account in, but he wouldn't say that it was his account.

Mr. Wolfram: Yes, your Honor, there was one group of checks that he utterly and completely refused to look at and your Honor ruled that he didn't have to look at them, he didn't have to identify them. It was the last group of checks we showed him. They are marked for identification, and we have them

here, and I would like to present that whole picture to you.

The Court: All right, fine.

Mr. Stryker: Besides that, may I make—perhaps I will spoil Mr. Wolfram's good argument, I am so exhausted from walking back and forth—may I make this point, your Honor, in regard to this whole subject matter:

The Government is under a definite obligation to prove its case, if it can, beyond a reasonable doubt. There is no burden whatever on the part of the defendants to prove anything. They have no obligation to go forward or to prove anything.

The Court: I think we can start with that agreement.

Mr. Stryker: Now that, I guess, we will certainly agree on.

(1943)

Now we have these returns filed by Roth or made by Roth.

The Court: Roth said he simply copied the figures.

Mr. Stryker: Yes, I know, but he made them, he made them. Now that is evidence. I don't think that the defendants are bound by Roth's statement that he only copied them, or that he did it fraudulently or corruptly or anything else he wants to say. There is the accountant who certifiies to it, and I submit that prima facie those returns show, prima facie, that if the losses taken and recorded on those returns, written by a certified accountant, are so, obviously there was no tax on it—wait a minute, please—on the 1947 return.

Now, the fact that Roth now comes in here and says, "Well, I lied about everything. Everything I did was wrong. Some defendant told me to do it," now that he has a right to say. That is an issue of fact, and I submit that when we come in with the returns, prepared by the accountant that we hired and paid, no matter what he now says about them, that those are prima facie, prima facie evidence of that fact, and that it is the Government's obligation to go

(1944)

forward and beyond a reasonable doubt show that the losses were not in that sum, and that it is not our obligation to go forward and show that fact.

That I wanted to add.

The Court: All right. Well, I will say that I disagree with that, and there is a further point, even assuming there is a loss in 1947——

Mr. Stryker: And '8.

The Court: —the loss occurred after the allegedly fraudulent returns were filed. Now at the time they were filed—I mean, if they were lucky enough to have a loss—it is sort of a contradiction in terms—but if they were lucky enough to have a loss, a future loss that could be carried back, at the time they filed their return they had no business—at least the Government says, and, as a matter of fact, the law is—they had no business to take that into account. I mean, that doesn't excuse a return that was false at the time it was filed.

Mr. Stryker: Have you in mind, your Honor, that about that time, the document—I have forgotten, 118 or something—for a carry-back, was also filed? In other words, they were saying to the Government, "Well, here is a return as we have it

(1945)

now, but we are filing for a carry-back that we know we are going to have," because they did from that time, and I can't see where that isn't——

The Court: Well, Roth said he added 200,000 —I am not sure of the amount—he said he added $200,000 arbitrarily to it.

Mr. Stryker: Yes, your Honor. Just let me get my point once and for all. I won't labor it. That's right; Mr. Roth said that.

The Court: Yes.

Mr. Stryker: Now, are we, because—you think I am going to give you a characterization. That is why you smiled.

The Court: No, I don't.

Mr. Stryker: I am going to spare you that.

The Court: All right.

Mr. Stryker: Are we foreclosed, when this Mr. Roth gets up and says, "Oh, yes, I made this document; it is a fraud; somebody told me to do it"?

The Court: You are not foreclosed, Mr. Stryker, but you can't put a document in on the ground that what he now testified to is false. If you produce a witnesss who will say that this—I mean, first of all,

(1946)

if there is any relevance to what their loss was in the subsequent year, if you will produce a witness who will testify that they had such a loss, fine, of course you are not bound by what Mr. Roth says. But I don't remember Mr. Roth saying, I don't remember his being called upon to testify as to the loss in that subsequent year.

Mr. Stryker: I think you are right; I think you are quite right.

The Court: You just asked him what the figure was in this return.

Mr. Stryker: I believe you are absolutely correct, but I asked a certified account who at one time in his life was deemed an honest man and who in our behalf filed that statement.

Now it is a relevant and an important fact here, and if Mr. Roth's testimony is so worthless because of what he says now about it, that ought to be a two-way street and it ought to be definitely worthless from the standpoint of proving anything that the Government contends.

The Court: You see, Mr. Stryker, what I don't see is any inconsistency between what Mr. Roth says now and that paper. He says now that that paper was a false statement. I mean, he isn't now

(1947)

testifying that there was a profit or a loss. I don't see what relevance it has. It is not here as an inconsistent statement of Roth's, because it is not inconsistent with anything he testified to. It is not here as proof of loss.

Mr. Wessel: That is exactly what he did testify to.

The Court: Roth says, "I don't know whether it was accurate or not. I copied it from other accounts"; so I don't think it helps us at all.

Mr. Wessel: If I may say something, Mr. Stryker, three things are being mixed up here.

Mr. Stryker: One moment. Perhaps I am not half as perceptive as your Honor is. When you said you didn't see the connection, I think I do, and the connection is this, that here is a statement—I believe it was under oath; I think so—by a witness,

one of the important Government witnesses, who at that time was acting in behalf of the defendants. Now he makes that statement then. That is in evidence. He can say that he was told to do it or anything else—all the things he has said—but that is evidence on that subject.

(1948)

I say no, facetiously, I don't think anything he says is very good evidence, but it is evidence, and there we go forward and show that.

(1948a)

Now, I submit that if anything of Roth's is going to be taken as evidence, it ought to be two ways and we ought to have the benefit—to use your paradoxical observation—of the loss.

Mr. Wessel: May I explain some things that we are talking about, because it is important that we all understand. First of all, Mr. Roth was never certified. These two tax years, 1947 and 1948, total about $400,000-odd. 1947 totals $205,000, only 1947.

The witness testified that the loss in 1947 was about $200,000 but that he added on $150,000 more to make this $350,000 figure.

There is no inconsistency between the document and what he said or the carry-back extension of time that he filed. It is perfectly consistent.

Counsel has sought to add on the 1948 carry-back, to prove that what the witness said about having a $200,000 loss was false. That isn't so at all. It is another year entirely.

Mr. Stryker: I did not add it on to 1947. I took it as it was.

Now, the difficulty, your Honor, and I am really concerned about this: you know I am frank to you——

The Court: Yes.

(1949)

Mr. Stryker: —I admit I have a double point of view. On the one hand, as an officer of the court, I want to prevent error, I want to not push your Honor into error, but I want to prevent it.

On the other hand, I wouldn't be candid if I didn't say that from the point of view of the record I would, if anything went wrong with this case, I would be glad of the error, and I can't be franker than that.

I think this would be error for a number of reasons. Here is this man Roth. Now, he is certainly a big issue in this case. Now, if your Honor strikes out those returns, and his testimony concerning them, you——

The Court: Just his testimony as to their contents. I mean if I strike them out, there is no sense in leaving his testimony in as to what the loss was. I mean that is the whole point of them.

Mr. Stryker: Well, all right, if you strike them out, then I am debarred or I am afraid I am debarred, I am afraid you will hold that I am debarred from analyzing that situation to this jury, and I am then debarred from saying to this jury that everything this man says he did for us now he says, well, some

(1950)

one of the defendants told him to do it, or forced him to do it, or whatever his testimony is.

Now, it is my definite submission, and I—if I have to go to the jury—I hope that God will give

me strength to make it more definite than I am now, that this man is totally, completely unworthy of belief by anybody, and these are factors relating to the vitals of his testimony.

Here is a fellow who files a return—he is not a certified accountant, true, but he is your witness, and then he says, "Well, I was told not to do it so I did something phoney" or crooked or whatever it is.

Now, if your Honor takes that out—if you strike out this testimony, I say to you, very frankly—and I assure you with deep sincerity—that I think you will be making a mistake with all respect to the Court.

The Court: Mr. Stryker, let me make my ruling so that I think we both understand it. The only thing that goes out of this case is the contents of that return.

The manner in which it was filed, why it was filed, anything you want to use as to the manner of his filing, the reflection on his credibility, of the

(1951)

accountant filing a return which he did not himself prepare, all of those things are left to you; they are still in the case.

But all I am asserting now is there is no proof in this case of the truth of the contents of that return, and they cannot be used to prove a loss in the years for which they were filed, and Roth's statement as to what they said as to the loss is not proof of that loss.

That is all I am holding at this time.

Mr. Stryker: Of course, we haven't finished yet.

The Court: Yes.

Mr. Stryker: And I know you naturally will have to make these things more or less tentative, but just so that I get my position clear to you, I don't see how I am going to really discuss this man before these 12 people unless I discuss his whole conduct, and I don't want to be debarred by the exclusion of evidence of anything that he did.

He is produced here—I suppose I should say it is more or less of a technical thing, that anybody would vouch for him, but the Government at least legally has vouched for him.

(1952)

Mr. Wessel: And in every other respect.

Mr. Stryker: And vouched for him—all right, vouched for him generally, then, all right.

Now, there is a man they vouch for; he did certain things. Now, am I to be debarred from the proof of the things he did because he now says that he was a totally and thoroughly corrupt man in these matters?

The Court: Now, Mr. Stryker, if Mr. Roth had said that he computed the profit to be such and such, or that it was such and such, we would have a different problem.

He didn't, and I don't see—and I am not—you can say anything you want to about any fact you have proven here as to Roth's actions in so far as they reflect on Roth, but I am saying, this is not proof of loss by this partnership—I think it was a partnership. It was American Brands' return, was it?

Mr. Wessel: This was the consolidated return.

The Court: All right, it is not proof of loss by these organizations, and I am not precluding you from proving there was a loss. That is your problem.

Mr. Stryker: I understand that. But I haven't (1953)
any burden to prove anything.

The Court: As long as you don't claim something you haven't proved, we will have no argument.

Mr. Stryker: So I will be clear—because I don't want the Court in my hair when I sum up; it is hard enough when I sum up; I don't want to walk on the feet of the judge if I can help it, and I intend to say —it is a little odd to be, because I don't know exactly what I will say——

The Court: There is nothing like a preview. Go ahead.

Mr. Stryker: I don't think you have the strength at this hour. But under your ruling I am going to discuss these loss figures as he gave them. I can't discuss them as that being evidence of the fact, but you are not going to debar me, are you, from discussing what he did?

The Court: I am going to put it in perfectly blunt terms. I don't want this jury confused into thinking there has been a loss proven here for the year 1947. I think that is the year involved.

Mr. Wessel: And 1948, if your Honor please.

The Court: And 1948.

Now, if you prove such a loss, and I conclude that (1954)
it is relevant and material for you to do so, we will have a different bridge to cross.

Mr. Wessel: He did testify there was a $250,000 loss in 1947. That, of course, could not, probably, be taken out of evidence.

Mr. Stryker: Well, then, the point is, I think just so I am clear, because I want to be, I want every

place, whether I have the temerity to disagree with the Court or not, to bow with just complete respect to your rulings and orders.

Now, as I understand it, the limitation—and this, of course, is tentative, subject to what happens later on, but at the moment, you are not going to debar me from discussing those figures provided I don't claim that they prove the fact; is that it?

The Court: I don't see why those figures have any bearing at all. I mean, the reflection, if any, on Roth's credibility would be the same as to whether those figures were $200,000, $20,000 or $5,000. I don't see that there is any basis for referring to the figures in those returns.

Mr. Stryker: Well, he made them.

The Court: So if he is a liar for making them, he is a liar for making them, but what the figures

(1955)

were don't bear on it. He is just as big a liar if he said 200,000 or 198,000.

Mr. Stryker: Here he is, and if he is a liar in that respect I should think that I should not be inhibited in discussing that factor of his lying.

The Court: I think as of the moment the exclusion includes the contents of that report, other than the fact that he signed it.

Now, what have you to say?

Mr. Wessel: I want to add——

Mr. Stryker: What good is it? Here is a paper, he has signed it; I can't tell them what is in it. I might as well pick up something from the floor and show it to them.

The Court: All the testimony here about how he came to sign it and what he said about it——

Colloquy

Mr. Wessel: I want to be sure the record indicates my objection is not only to relevancy and materiality, but also as to authenticity and foundation, specifically.

The Court: I understand.

Mr. Wessel: One final thing, your Honor. May I unseal the Lubben documents and take out the two tax returns referred to?

(1956)

The Court: Yes.

Mr. Stryker: Just——

The Court: All right, Mr. Stryker.

Mr. Stryker: There is one thing here, Mr. Wolfram always has something else.

(Discussion off the record.)

Mr. Stryker: You go ahead and state it.

Mr. Wolfram: The Government put in Exhibit 89, your Honor, which is Roth's claim for a refund, and then on direct examination Roth said that that was $200,000 out of the way.

The Court: Yes, something like that.

Mr. Wolfram: He just guessed and added $200,000 to his figures. Now, the exhibit that your Honor is now striking out under the circumstances which you mentioned is the followup on that very document which was signed by Roth and which also makes a claim in almost the exact same fashion, except that it is a carry-back for even more money than he now says he said he claimed originally, and we feel that you can't get the whole picture unless the two exhibits are added to what the Government itself brought out.

We didn't bring out the original transaction. I think if our picture goes, I think if our exhibits go,

(1957)

theirs should go with it.

The Court: On the theory of completeness?

Mr. Wessel: Let me see if I can understand it, because if Mr. Wolfram will answer this question, I think we can perhaps settle it now.

Am I correct, Mr. Wolfram, the only foundation of relevancy and materiality that you are referring to here is the carry-back loss as it relates to Exhibit 90 which is the——

Mr. Wolfram: 89.

Mr. Wessel: —or 89, which is the extension of time, $350,000 estimated loss, and if that is correct, I think I can answer it right now and we will dispose of it?

Mr. Wolfram: That is one ground of relevancy.

Mr. Wessel: I was afraid of that.

Mr. Wolfram: That hasn't been mentioned up to this point.

Mr. Wessel: The witness testified there was a $200,000 loss. The document adds nothing to that. I don't have any great concern about the 1947 tax return at all. It is the 1948 return which adds the extra $200,000-odd that, of course, is disturbing.

The witness' testimony as to the 1947 loss is

(1958)

in the record, irrespective of the 1947 tax return, and I don't care about the 1947 return.

The Court: Well, is the 1947 return—did he testify as to the loss for 1947?

Mr. Wessel: Yes, he did.

The Court: Did he testify that return was an accurate estimate?

Mr. Wessel: I don't know whether he said that. He said the loss was $200,000, and the return is $200,000, so it is accurate in any event.

The Court: That one shouldn't be stricken, should it?

Mr. Wessel: It doesn't make any difference. The fact that Mr. Wolfram is talking about is already in evidence; the document adds nothing to it. But I don't care about that document. It is the additional $200,000.

The Court: Is that 1947 return one of the documents that he said he filed by simply copying it from the accountant's report?

Mr. Wessel: That is right, and filed after the informations, the criminal informations were filed in this court.

But in any event, I don't care about the 1947 (1959)

return, really, because that evidence is in the record anyway.

It is the 1948 return which makes it look as though these men did not ever owe any tax. A jury would be confused, I think, by that fact.

If the personal returns will show income or are added in, then the picture is complete, and we know where the money is.

Without those, the picture is distorted.

The Court: I think, considering that, we will stay out of 1948 as to both personal and corporations until someone shows me a better reason for getting into it.

In other words, I will amend my ruling not to exclude the 1947 return, then.

I did not recall that he had testified as to the loss for that year, but if he has, why, I will let that stay.

Mr. Wolfram: The 1947 return is in?

The Court: Yes.

Mr. Wolfram: But not the 1948?

The Court: Not the 1948, right.

Now, Mr. Stryker will be even less curbed in his summation.

(1960)

Mr. Wolfram: May we except to that ruling?

The Court: Yes.

10:15 tomorrow.

(Adjourned to February 4, 1955, at 10:15 a. m.)

(1960a)

New York, February 4, 1955.
10:15 a. m.

(Trial resumed.)

(In robing room.)

Mr. Stryker: Your Honor, yesterday, before the jury, Mr. Wessel charged that I was delaying the trial. It was a very prejudicial statement, and not in accordance with the fact.

Your Honor will recall that when we were impaneling this jury, one or more mentioned the problem of a long trial, its effect on their business. One of the persons, I think, who made that statement, is a member of this jury. In all events it was made in his presence.

I felt that I would prefer to make this application to you rather than to do it in the presence of the jury. I regard the statement, under the cir-

cumstances, as so prejudicial that I am forced to move for a mistrial.

(1961)

I won't go into it any further, except p ..aps to use as an example that you recall when Lubben was a witness it took me 17 pages of the record—17, is that right?—approximately——

Mr. Wolfram: Maybe a little more.

Mr. Stryker: Maybe a little more—to get an answer to a direct question.

Now, if there has been delay, it has not been mine, and this type of thing stated to the jury, in my view, is highly prejudicial.

That is all I want to say.

Mr. Wessel: May I, if your Honor please, because it does require a response, and because of the nature of the motion—I know what I said yesterday, and I read the transcript again this morning, and Mr. Fraiman is now getting the transcript and I would like to read the comment Mr. Stryker is referring to into the record at this time.

The Court: It is in the record, isn't it?

Mr. Wessel: I would like to read it here in connection with this motion for a mistrial, which will be extracted from the record at a time when I probably will not be with the Government, because I am leaving after this case, and I would like to have it complete at this time.

(1962)

It was in connection with the testimony of Mr. Gordon, and if your Honor recalls, during that testimony I produced some grand jury minutes with regard to Mr. Gordon, and at the conclusion of Mr. Stryker's cross, he said, "Now I may have some more questions, and I don't know, and I would like

some time to read these grand jury minutes. If you will just bear with me for just one moment."

Mr. Wessel said at page 1849:

> "I turned over those minutes voluntarily, your Honor, not in the expectation that it would delay the trial at all. If counsel wishes an adjournment or delay of any kind in completing the examination of the minutes, I would like the grand jury minutes back.
>
> "Mr. Stryker: I resent the suggestion that I am trying to delay this trial.
>
> "Mr. Wessel: I did not suggest that";

and I repeat now, most affirmatively, I have never suggested that, and do not suggest that.

I am sure Mr. Stryker isn't doing that.

The Court: All right. I will deny the motion, and, incidentally, your comment about 17 pages to

(1963)

get an answer from Mr. Lubben, I don't want my failure to take issue with you to indicate that I agree with you.

I think that some of your questions were not simple, as you would suggest; that there were, I don't say with any deliberate intent, but nevertheless, there were distortions of what the witness thought the facts were, and Mr. Lubben, to say the least, is cross examination shy, having been cross examined in goodness knows how many proceedings, as to his previous testimony, and he was a person who was not going to give a yes or no without having the question in exactly the form he thought he could say yes or no to.

I think if there was any mistaken judgment it was perhaps mine in letting you insist on a yes or no

answer to some of these questions, and I have, since the experience with Lubben, been less insistent on such answers.

I just think that we lost a lot of time in the examination of Lubben insisting on a yes or no when in substance the question had been answered.

Mr. Wessel: May I suggest this, if your Honor please, however, because what counsel says, of course, is important, that is, delay might involve the

(1964)

jury. I would suggest an instruction by your Honor now, in view of what Mr. Stryker has said, to the effect that "unfortunately"—that is to the jury—"unfortunately the case has taken some time; I don't want anybody to in any way take that against either party or consider anybody as deliberately or otherwise delaying the case; it is as expeditiously as possible under the circumstances; you will just have to bear with it," or some instruction like that, assuming Mr. Stryker wishes that.

The Court: I will do whatever you want on that, but my own feeling is that there is no need for it and in my charge I thought I would cover that problem there, and I think that both counsel have done well. I mean, each counsel has a different problem, and each may think the other takes longer with his problem than he should, I think you have both done well and I am going to tell the jury so, and I think if I tell them that now, in a sort of piecemeal fashion, it looks apologetic, where as if I tell them in the charge, in which I will make it clear to them, I think there will be no misunderstanding in this regard at all.

Mr. Stryker: I take exception to your view.

Colloquy

Off the record.

(Discussion off the record.)

(1965)

(The following took place in the courtroom:)

(Jury in box.)

The Court: Mr. Foreman, ladies and gentlemen: We haven't been quite as punctual in the opening and closing of the trial as I would like, but I am going to ask you to do your part and try to be here say by ten minutes after ten each morning. At the beginning of the day and at the close of the day very often there are questions of law to be passed upon, as there were this morning. That is where we have been for the last ten minutes. But you folks, in timing your arrival at the court, can't count on that because sometimes there are those applications and sometimes there aren't. So I think that you have been very cooperative, and you can try to be here at ten after ten, and I will certainly try to see to it that I am here, and counsel are particularly good in this trial; they are usually here good and early; and if there are no applications, we will get in that extra few minutes that will cut down the length of the trial. I know that you are all interested in cutting it to a minimum, and although you may not fully understand all of the proceedings that go on, I can assure you that counsel on both sides have gone out of their way to take every possible short-cut, and

(1966)

the Court has tried to go along with them.

Have you got your next witness, Mr. Wessel?

Mr. Wessel: Yes, sir. Government's next witness is Bernard Bercu.

BERNARD BERCU, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Wessel:

Q. Are you the Bernard Bercu who was in the test case between the accountants and the lawyers, Mr. Bercu? A. Yes, sir.

Q. Can you identify the defendants, William Giglio, Howard Lawn and Frank Livorsi, Mr. Bercu? A. I know Mr. Giglio. I can't say that I recall any of the others.

Mr. Wessel: Will the record show that the witness has identified Mr. Giglio.

Q. What is your business, Mr. Bercu? A. Certified public accountant.

Q. Would you state some of your background and experience, please; just generally. A. I was certified by the State of New York in 1924. I have been practicing for some five years before that, both as an employee and as a public practitioner.

(1967)

Q. You have testified on numerous occasions? A. In the first ten years of my practice the great bulk of my time, personal time was spent in investigating bankruptcies on behalf of trade associations and creditors. In that connection I had occasion to testify primarily in the Federal courts on numerous occasions.

Q. Mr. Bercu, were you at some time the accountant for David G. Lubben, or any of his companies? A. I was.

Q. Would you state what your relationship, accounting relationship, was with Mr. Lubben or his companies? A. Chronologically?

Q. Yes, sir, if you could. A. I first met Mr. Lubben in late March or very early in April, 1944 through a client

of mine who had secured office space in the same building from Mr. Lubben. Mr. Lubben explained to me that he was starting what he regarded as a new business at that time, a sole proprietorship.

Q. I don't want to get into conversation with Mr. Lubben, Mr. Bercu. I really would like you to explain the companies in the period of time during which you were associated. A. I became the accountant for Mr. Lubben's

(1968)

sole proprietorship, which was then called the Eatsum Food Products Company. We set up a complete accounting system for him and continued to make monthly audits and furnished him with monthly balance sheets and profit and loss statements. Until late April 1945 Mr. Lubben continued as the sole proprietor. He then—do I understand I am not to mention conversations with Mr. Lubben?

Q. No, don't. Just the companies, kind of companies. A. In late April of 1945 I accompanied Mr. Lubben to the Pennsylvania Hotel to discuss a possible change of Mr. Lubben's business to a partnership by his sale of half interest in that sole proprietorship to Mr. Giglio and his associates. For the next six weeks there were negotiations concerning this proposed sale. I prepared figures for Mr. Giglio—figures of the Eatsum Food Products Company status for Mr. Giglio. We discussed various items with regard to the net worth of the Eatsum Food Products sole proprietorship, and finally in the middle of June 1945 I was told by Mr. Lubben that he had agreed to the terms by which he would sell one-half of his interest in the Eatsum Food Products Company to Mr. Giglio and his associates.

(1969)

Q. Did you thereafter become accountant for the partnership from the time that it commenced until some later time? A. Yes, our firm audited, continued to audit the

books of the Eatsum Food Products Company. In fact, we set up the partnership records of the Eatsum Food Products Company and continued to audit those records, and prepared and presented monthly financial reports to both Mr. Lubben and to Mr. Giglio through the month of January 1946.

Q. And when did you stop, or your company stop acting as accountants for the Eatsum Company? A. Well, we made the audit for the month of January 1946, and never did any work on the partnership records after that.

Q. Would your audit for the month of January have been done sometime in February 1946? A. It was completed just before the end of February 1946.

Q. Did you thereafter have any business relationship with one of Mr. Lubben's companies? A. Yes. Mr. Lubben formed a new corporation, which he called General Confections Inc., and we opened the books of this new corporation and continued as auditors for the corporation through the month of June 1946.

(1970)

Q. Would your last business relationship with one of Mr. Lubben's companies have ended some time in July '46? A. July 29, 1946, with regard to Eatsum Food Products; three years later Mr. Lubben organized a corporation in New Jersey, and we were the accountants for that corporation for two years.

Q. What was the name of that company, do you know? A. General Confections, Inc. of New Jersey.

Q. I show you, Mr. Bercu, Government's Exhibit 70-B and ask you if you can identify that as a book which you either supervised or kept for Eatsum proprietorship from January 1945 to the end of the proprietorship in 1945? A. This is the general ledger of the Eatsum sole proprietorship

from January 1st through May 31st, 1945. All of the postings were made by one of my partners in that period.

Q. Would you tell me, Mr. Bercu whether or not there were any adjusting and closing entries posted to that ledger? A. No, there are not.

Q. Do you know why, sir? And in that connection I want to show you Government's Exhibit 70-A, which is the Eatsum partnership general ledger—excuse me. 96-A, which is the Eatsum partnership general ledger for the fiscal year ending May 31, 1946. A. The partnership general

(1971)

ledger was opened by the same partner of our firm as of June 1st, 1945. General ledger postings were made by him through January 31, 1946, but not thereafter because our connection with the partnership records ceased as of January 31, 1946.

Q. Well, now, let me ask you this, Mr. Bercu, if I may: the 1946 general ledger had opening entries; do you know where or how those opening entries were obtained? A. From our work sheets, and from the records of David Lubben sole proprietorship.

Q. In other words, the '45—— A. The previous——

Q. The '45 ledger plus the adjusting and closing entries, which would be reflected in work sheets were added together to give you the opening entries in the 1946 general ledger? A. Provided all the adjustments had been made in the sole proprietorship general ledger.

Q. Would you look at the '45 sole proprietorship general ledger and tell me if it isn't the fact that those entries, the adjusting entries, were not posted? A. The adjusting entries were not posted in the sole proprietorship general ledger.

Q. So in order to get the opening entries in the '46 general ledger, you would have to take the entries in the
(1972)
'45 general ledger, find out what the adjusting and closing entries were from the work sheets, and then you would have your opening entries in the '46 ledger? A. That is correct.

Q. Now, with regard to those work sheets—— A. The last time I saw those work sheets was when I gathered together every scrap of paper in our files concerning our connection with, or shall I say, my continuing connection with any of David Lubben's financial affairs.

Q. I will come back to that Mr. Bercu, but that is the last time you saw these papers? A. And that was in the fall of '52.

Q. Just at this moment, briefly, was that in connection with the Shotwell case? A. Yes, all those records were delivered to the custody of the United States District Court at Chicago.

Mr. Wessel: At this time, if your Honor please, may I offer Exhibit 70-B, which is the proprietorship ledger, and which was offered at the earlier time only for the purpose of reflecting the entries made, upon which the later book was based. Now I offer them for the truth of the contents.

Q. I should ask you, Mr. Bercu, was Exhibit 70-B a
(1973)
book of the Eatsum Company, kept in the regular course of business? A. It was.

Q. And was it a part of Eatsum's regular course of business to keep that book? A. As I testified, all of the postings in the general ledger were made by a certified public accountant partner in my firm.

Mr. Wessel: Thanks.

(1974)

Preliminary Examination by Mr. Stryker:

Q. Mr. Bercu, this book, Government's Exhibit 70B for identification, as I understand it, was a ledger that you kept for Mr. Lubben before he became a partner of Mr. Giglio's; is that right? A. Yes, sir.

Q. That was the proprietorship or the individual business of Eatsum that he was running before he became a partner of Mr. Giglio's; is that right? A. Yes, sir.

Mr. Stryker: I object to it as not binding on the defendants in any way.

The Court: I will receive it.

(Government's Exhibit 70B for identification received in evidence.)

The Witness: May I—perhaps it is purely technical—may I point out that the general ledger was kept through the month of May, 1945, and that the partnership technically began as of June 1, 1945, but the partners, Mr. Giglio and his associates, received one-half of the net profit as determined by us for the month of May, 1945, and that was reflected in the sole proprietorship general ledger so that there are transactions affecting Mr. Giglio in the sole proprietorship ledger.

(1975)

Mr. Wessel: Thank you, sir.

By Mr. Wessel:

Q. Mr. Bercu, I show you Government's Exhibit 78, which is in evidence for a limited purpose, being the Burlan Corporation general ledger and other books, and ask if

first of all, you can identify that as a book which you kept as accountant for Burlan Corporation, during the period that you were accountant for Eatsum, which would be through January of 1946? A. The headings, particularly the first eight or nine pages, the account headings are in my handwriting. The flysheet, Burlan Corporation ledger is in my handwriting. The postings are practically all in the handwriting of the Eatsum bookeeper, although I notice one journal entry in the handwriting of my partner, who carried the detail of the Eatsum accounts for the first. But primarily the entries and the postings are in the handwriting of the Eatsum bookkeeper.

Q. Do you recognize that book as a book kept in the regular course of business by Burlan Corporation during the period that you were accountant for Burlan Corporation, which would be through January of 1946; is that

(1976)

correct? A. That is correct.

Q. Is that correct? A. Yes, sir.

Q. And was it a part of Burlan's business to keep a book such as this, Exhibit 78? A. Burlan Corporation had been organized some months prior to the—organized by Mr. Lubben some months prior to his sale of a half interest in his sole proprietorship to Mr. Giglio and his associates, and the corporate setup was availed of by the partnership to enter into a, shall we say, side line, the sale of——

Mr. Stryker: One moment. I object to—I think it has not yet been offered, but I object to all this line of testimony upon the ground that it is not alleged or set forth in the indictment or the bill of particulars, and is no part whatever of this particular lawsuit. It applies to both——

Mr. Wessel: I will withdraw the question.

Mr. Stryker: Just a minute, counsel. It applies to both the gentleman's testimony about it, and if the book is offered, to that, but I want to be timely in my objection.

Mr. Wessel: I have withdrawn the question, counsel.

(1977)

By Mr. Wessel:

Q. Mr. Bercu, can you recognize Exhibit 78 as a book which it was the business of Burlan Corporation to keep? A. Yes.

Mr. Wessel: I offer this exhibit in evidence. As your Honor may recall, it is in evidence for the period after Mr. Bercu left the partnership and I now offer it in evidence for the period before—after Mr. Lubben left the partnership. I now offer it in evidence for the period before Mr. Lubben left.

Mr. Stryker: If your Honor please, the charges contained in the indictment and amplified by the limited bill of particulars that we received—and I will stand corrected if I am wrong, but I am sure I am right, that there is no charge in the indictment or the bill of particulars concerning this particular Burlan Corporation, or whatever it is; therefore it is irrelevant to any issue here.

The Court: I will receive it, Mr. Stryker.

Mr. Stryker: I except.

(Government's Exhibit 78 for identification received in evidence.)

By Mr. Stryker:

(1978)

Q. Mr. Bercu, I believe Government's Exhibit 96A is in evidence for all purposes, but I wish you would look at

it and identify it, if you can, during the period you were accountant for Eatsum partnership; that would be through January, 1946?

(Marked Government's Exhibit 130 for identification.)

A. This was the—I believe this is repetitious, Mr. Wessel.

Q. I don't think I have shown you this book, have I, sir? A. Yes, I have testified that this was the general ledger of the Eatsum partnership.

Mr. Wessel: I withdraw the question, then. Excuse me.

By Mr. Wessel:

Q. I show you, Mr. Bercu, Exhibit 130 for identification, and ask if you can tell me what that document is? A. This was a report prepared by our firm, typed on our stationary, and presented in duplicate copies, one each to Mr. Lubben and to Mr. Giglio, concerning the transactions of the Burlan Corporation from August 28th to October 31, 1945.

Q. Was that a document prepared by you or your company in the regular course of its business? A. Pre-

(1979)

pared by our firm in the regular course of our accounting services; however, not prepared for the Eatsum Food Products Company as such, but it was our understanding we were asked to do this work separately for the Burlan Corporation and not as part of our work for the Eatsum Food Products partnership.

Q. Yes, sir. Do you know whether you got a separate fee or retainer of any kind for your work for the Burlan Corporation? A. It is my impression or recollection that

we presented an invoice for that work, Mr. Roth as the financial guide or controller of the Eatsum, of the Giglio affairs, refused to pay the bill, and I then told him we would have nothing further to do with the Burlan Corporation records.

Mr. Wessel: I offer Exhibit 130 in evidence.

Mr. Stryker: I have the same objection to this document as to the prior one.

I respectfully except.

(Government's Exhibit 130 for identification received in evidence.)

By the Court:

Q. This Exhibit 130 is a report by your firm? A. Yes, (1980) your Honor.

Q. And it accurately summarizes the information on the books of Burlan at the time of that report? A. Yes, your Honor.

The Court: All right, I will receive it.

By Mr. Wessel:

Q. Mr. Present states that I did not ask the question with regard to Exhibit 96A, Mr. Bercu, and rather than read the record back, would you tell me whether Exhibit 96A was a book kept by you in the regular course of the business of the Eatsum Food Products partnership during the period you were accountant for the partnership? A. That is correct, and the actual postings in this general ledger were made by one of the partners of our firm for the period from June 1, 1945, through January 31, 1946, in the regular course of such part of the business of the Eatsum Food Products Company as we were permitted to audit.

Q. I show you, sir, Exhibit 70C for identification and ask if you can tell me what that is? It appears to be a group of sheets. A. This group of sheets I recognize only because of my general familiarity with the records of the Eatsum Food Products Company partnership. They are a

(1981)

very small percentage of the total number of accounts payable ledger sheets that were in the accounts payable ledgers.

Q. That is not a complete book in any respect? A. Oh, it doesn't, probably doesn't represent one per cent of the ledger sheets.

Q. I show you—— A. None of the items on these sheets were, so far as I can see at a quick glance, were posted by any members of our firm. Apparently there was no occasion even to check the individual transactions.

Q. I show you, sir, Defendants' Exhibit K, which is in evidence, and which is a balance sheet and income statement of Eatsum Food Products Company partnership as of January 31, 1946, prepared by you. I ask you, sir, whether or not that balance sheet and income statement takes into account any inventory, closing inventory as of the end of the period? A. The balance sheet shows for merchandise inventories at cost blank; in other words, the profit shown by this balance sheet just is headed "Balance Sheet Without Closing Inventory as of January 31, 1946."

(1982)

The actual profit of the Eatsum Food Products Company as reflected in the records which we audited from June 1, 1946, to January-June 1, 1945, to January 31, 1946, was the amount shown here, plus the value of the inventory as of January 31, 1946.

Q. How did you value, at cost, market or on what basis? A. Well, we valued the inventories at cost.

Q. And do you know what the cost was as of January 31, 1946? A. Well, we had some schedules on that, and

my recollection is that the inventory at that period was around $350,000.

Q. If I am correct, then, the amount of income or profit shown on Exhibit K would be increased by approximately $350,000, with closing inventory to be added to the figures in that sheet, in that gorup of sheets? A. That is correct, with reference to the transactions recorded on the books of the Eatsum Food Products Company partnership.

Q. Incidentally, Mr. Bercu, what life expectancy did you use in computing the depreciation for plant and office equipment for Eatsum? A. Apparently 10 per cent per year.

Q. It would be a 10-year life? A. Yes, 10-year life, (1983)

because the plant and equipment was listed at $85,000, and for eight months there was depreciation of $4,793.

Q. Well, you say apparently. Would a 10-year life on plant and equipment be a reasonable life expectancy for this kind of business and this kind of equipment, in your opinion as an expert accountant? A. There was no doubt in my mind at the time, since I happened to have had a complete knowledge of the way in which that plant was erected, that 10-year life would be the maximum for that equipment. It was all bought during the war period, all secondhand.

Q. Now, Mr. Bercu, did there come a time after Mr. [redacted]bben left Eatsum partnership, when Mr. Roth and Mr. Giglio came to your office? A. I am sorry, I didn't get the first part of the question. Was that a question?

Mr. Wessel: Yes, sir.

The Court: Read the question.

(Question read.)

A. Yes, sir.

Q. Would you state when that was, who was present, what took place at that time? A. It was sometime in late May or probably early June of 1946. Mr. Lubben had left

(1984)

the Eatsum partnership, set up his own plant and corporation as of March 9, 1946, because there had been a verbal agreement with Mr. Giglio that Mr. Lubben could step out of the plant, out of the partnership, and take wtih him, for his share—for both his investment and his share of the net profits or the net assets of the partnership, Mr. Lubben agreed to take the plant, located in the Bronx, in full consideration for everything that was due to him from the Eatsum partnership.

On the basis of that verbal agreement, Mr. Lubben then set up his corporation in the Bronx, bought the inventory of the Eatsum Food Products Company at full cost, without one penny allowance for any obsolete goods or worthless goods of any kind; whatever the items had cost the Eatsum Food Products partnership was the amount that was billed to Mr. Lubben, to General Confections, Inc., as of March 9th.

That inventory, as I recall, ran to over $300,000. Mr. Lubben paid cash and gave notes for the entire amount of that inventory.

He began to run his business from March 9th on, but he couldn't get Mr. Giglio to agree to give him title to that plant, so that he was running a very large operation, in-

(1985)

volving himself in hundreds of thousands of dollars, but he had no title to the plant.

Mr. Lubben told me that Mr. Giglio refused to give him title to that plant, to go through with his agreement, unless I would agree to destroy all of the working papers concerning the partnership affairs, while our firm had been the accountants for the partnership in that eight-month period.

I told Mr. Lubben that those working papers belonged to the accountants, not to the clients; that Mr. Giglio had no right to ask us either to turn over the papers to him or to destroy them.

Mr. Lubben told me that Mr. Giglio was insistent upon that; he didn't want those work papers in our files, and that he simply would refuse to go through with any deal with Mr. Lubben unless those papers were either turned over to him or destroyed.

Mr. Lubben was my client. I finally agreed—all this was over a period of March, April and most of May. I finally agreed to have Mr. Giglio and his accountant come to my office and destroy these working papers.

What I did not tell Mr. Lubben when I made that agreement was that I had—I saw to it that the major papers,

(1986)

major working papers, were photostated before they were turned over to Mr. Giglio for destruction.

I had been an accountant for quite a number of years, and I felt that we were entitled to that protection because it didn't require so much imagination to foresee the day that I would be sitting in federal court testifying about the Lubben and Giglio affairs. So we had the major work papers, the trial balance work sheets, loan exchange accounts, and so on, photostated.

Mr. Giglio and Mr. Roth came to our office by appointment. Mr. Roth and one of my partners, Mr. Weinert, went into a separate office, and proceeded to literally tear up every sheet of work paper that had been given them, and those did include all of the work papers that I thought we had in the files at the time. Those work papers were extremely voluminous. They ran to possibly two or three full drawers in a legal sized cabinet.

Personally, I had nothing to do with—I didn't supervise that destruction in any way, because while Mr. Roth and Mr. Weinert—and I think two assistants—were destroying, tearing these papers apart and destroying them,

(1987)

Mr. Giglio was in my private office, explaining to me—perhaps I will put it directly: Mr. Giglio said to me that these work papers were being destroyed because of his—because, as he said, he wanted to know that his partnership affairs were kept within his control and that no outsider knew anything about them.

He then said to me, "We have ways of taking care"—and this is in substance, because this happened ten years ago, or nine years ago—in substance he said, we have ways of taking care of any man who talks about our affairs out of turn.

I didn't discuss the question of what he was talking about, because to me it was quite obvious. I let the matter drop because so far as he was concerned he had gotten his way in having all of these work papers destroyed.

I never saw Mr. Giglio after that until I saw him in the courtroom this morning.

Q. Did you have a communication from him recently? A. Yes, he called my office a few weeks ago.

Q. Would you state what happened? A. Just about a month ago; and I called him back. He said he would

(1988)

like to see me down in Mr. Stryker's office.

Q. What happened? A. I told him that I wasn't interested in seeing him or Mr. Stryker.

Mr. Wessel: If your Honor please, I would like to show the witness the red folder which was shown to Mr. Roth, but which was not marked for identification, although I requested it.

The Court: I thought it was.

Mr. Wessel: Two pages were marked, I believe Exhibits AAA-1 and AAA-2, but the folder itself, I don't believe was marked, nor the contents, although the witness testified as to what, and counsel said subject to correction, the contents of the documents were in part.

The Court: All right, show it to him.

Mr. Stryker: Let's see if I have got it. It is just an ordinary folder.

(1989)

Q. Now, Mr. Bercu, I would appreciate your opening this folder——

Mr. Wessel: Which I ask to be marked with the next exhibit number.

(Marked Government's Exhibit 131 for identification.)

Q. —and tell me what the papers in that folder are, if you can?

Mr. Wessel: May I state, while the witness is looking at the documents, that counsel said, subject to correction the other day, that all of these papers had a printed stamp on, "Bernard Bercu & Company." Mr. Present informs me that he looked at them and there are five that do not have that stamp printed on it.

The Court: All right.

Q. Perhaps you might have these questions in mind as you look at those papers, Mr. Bercu. Are these papers prepared by your company, people under your supervision,

while you were accountant for Eatsum? Generally, what kind of transactions they reflect.

Mr. Stryker: Could I bother the reporter to read that? I didn't hear it.

The Court: Read the proposed question back.

(While the reporter was preparing to read the question, the witness said something to Mr. Wessel.)

(1990)

Mr. Wessel: I will repeat what the witness said to me. He said, "These are fantastic. These appear to be our office file copies."

Q. Would you continue, please? A. Of reports presented to the partnership for the period from June 1st, 1945—when I say "these" I am referring to the first few that I was looking at.

Q. They are white sheets that you are holding in your hand? A. Yes. These are, so far as I can judge, the original—they are office file copies of the statements typed and presented to our client in the regular course of business.

Mr. Stryker: Could I see what he is looking at?

The Court: Yes.

Mr. Stryker: May I? You are looking at the white sheets in that——

Mr. Wessel: Now counsel will have a chance to cross-examine.

Mr. Stryker: I am only asking politely so I know what is going on. I couldn't see from there what he meant.

The Court: Do you want to come around, Mr. Stryker, so the jury can see, too?

Mr. Stryker: Yes, sure.

(1991)

A. The reason that I remark about it is because I was under the very strong impression that those were the very papers that were destroyed or were to have been destroyed at Mr. Giglio's insistence, and I don't recall having seen them since the time of their destruction. I find it hard to understand how they appear in court now, unless they are part—they escaped destruction with part of the papers which I turned over to the Federal authorities in October '52.

Mr. Wessel: I would like your Honor and the jury to recall the color of the pages shown to Mr. Roth in court the other day.

Mr. Stryker: I think as long as that comment is made, it will be remembered that I showed Mr. Roth both white and yellow sheets.

Mr. Wessel: Those here who have recollections will follow through whatever recollections they have.

A. (Continuing) There is a group of papers here which represent the transactions of Eatsum Food Products Company for the year ended December 31, 1943, which had been furnished to our office by Mr. Brewster of the Burry Biscuit Company, in connection with Mr. Lubben's original business in New York. They are attached to a report of our firm dated March 5, 1945.

(1992)

Q. That was before the Eatsum partnership ever commenced? A. These attached papers for the year '43 represent transactions before I had ever known Mr. Lubben.

Q. Do you know where they came from? A. My recollection now is that Mr. Brewster, the treasurer of Burry Biscuit Company, had forwarded them to our office or

given them to Mr. Lubben to transmit to us in connection with his affairs.

Q. And was that group in the group of documents to be turned over to Mr. Giglio and Mr. Roth that day in your office? A. I haven't any recollection of the specific documents turned over.

Q. Continue, please, looking through those papers, if you would, Mr. Bercu.

Mr. Wessel: I think I should also state for the record that a comment was made subject to correction, and since my accountant, Mr. Present, who will take the stand, looked through these papers and said there were only five do not bear the printed name, that none of the papers that Mr. Bercu is now looking at have the printed name on and were not the papers looked at by Mr. Present, and my subject to connection now is amended to include all these papers now that do not have the printed name on it.

(1993)

Mr. Stryker: I think again the recollection of what I referred to were the yellow sheets, and I stated that on them, according to my superficial observation, they contained the Bercu name. Those are the only sheets with reference to which I made that statement, as I remember it.

Mr. Wessel: Well, I am just correcting whatever was taken subject to correction.

Mr. Stryker: All right.

A. (Continuing) There are three groups of inventory sheets of the Eatsum Food Products Company, respectively dated 30th of November, 1945, 29 December, 1945, 31 January, 1946, which were used by our office to calculate,

to price and calculate the physical inventories for each of those three months, but they were not—these inventories were supplied to us.

Mr. Wessel: I hold in my hand a group of documents about, I would estimate, three-quarters of an inch to an inch thick, which I should like the Court —which I should like to have identified and sealed by the Court, if I may.

Mr. Stryker: Not until I have used them on cross-examination.

(1994)

Mr. Wessel: I think they certainly must be used during the course of this trial, but to have kept by the Court.

The Court: Should each one be identified separately?

Mr. Wessel: Yes, I think that would be right.

Q. You are now holding in your hand two documents which have the identification mark "AAA-1" and "AAA-2," on them. Am I correct, sir? A. That is correct.

Q. Would you look through the group of yellow papers that are in your lap, please, and tell me specifically what those papers are, whether they were all prepared during the partnership period, while you were accountant for the Eatsum Company, and also whether they were turned over by you on this occasion in your office, as you described, and I suggest you look at them somewhat carefully, Mr. Bercu. A. Do you want to segregate the papers concerning the partnership from the papers concerning the sole proprietorship?

Q. If you can, do it, Mr. Bercu. I would like to have the following group——

(1995)

Mr. Stryker: If your Honor please, he is talking to Mr. Wessel, and we don't, any of us, hear it back here.

Mr. Wessel: The witness asked me, counsel, what he should do with the documents, and I said——

Mr. Stryker: May the reporter's record of it be read? I didn't hear what was going on. I am sorry. No one back here could hear a matter that was spoken rather quietly up there. May I have the record of that?

(Record read.)

Q. Mr. Bercu, if you can do this: in one pile put the documents which relate to the proprietorship, in one pile the documents which relate to the partnership, in one pile the documents which relate, if they do, to anything that happened after you left as accountant, and in another group the documents, if there are any, with which your company, Bernard Bercu & Company, had nothing to do, if there are any such documents, and as you put them in piles, you might state what you are doing, please.

Mr. Stryker: I think that is a good idea. Could we have the piles as enumerated identified in some way, a clip on them in some way, so we know what they are?

The Court: All right.

(1996)

A. This will be a rather lengthy procedure.

The Court: Take your time.

Q. You put several papers in front of you, Mr. Bercu, and I ask you what those are, the three that you have put there? Is that one pile? A. Yes.

Q. What is that pile, sir? A. These are our work papers concerning the merchandise transactions, specifically one double sheet is a summary of daily material reports, a weekly summary of daily summary reports, showing the quantity of raw materials used in each week by the factory in producing the various candy products produced by that Bronx plant.

Q. I don't want to prolong it too much. I don't think the detail of what these documents show is so necessary as the category into which it falls, Mr. Bercu. A. In this group of papers concerning——

Mr. Stryker: "This group" and "that group" means nothing. If we could have them, I would like very much to have them arranged in categories and identified, that is all. "This" and "that" doesn't mean anything at the moment.

The Court: All right, let's get them into groups, then we will get the groups identified.

(1997)

Wouldn't it be time saving if you let Mr. Bercu have your little table up here with this chair, and we will take a recess while he sorts the papers out?

Mr. Wessel: Yes.

The Court: And then we will come back and he can identify the groups.

All right, don't discuss the case.

Mr. Stryker: I will ask that the witness not discuss this matter with anyone while he is on the stand.

The Court: All right, Mr. Bercu, at least during the next ten minutes, don't discuss it with anybody. You go ahead and work with your papers by yourself.

The Witness: Thank you, your Honor.

(Short recess.)

(1998)

The Court: All right, Mr. Wessel.

By Mr. Wessel:

Q. Have you completed your examination of those papers, Mr. Bercu? A. Yes, sir.

Q. Would you now, if you can, describe what you found there? A. This one sheet prepared by Miss Feldman is undated. I am unable to determine to what year it applies, to which business entity it applies. Apparently it is March, 1945.

Mr. Stryker: I can't hear him, your Honor. I just can't hear back here, I am sorry.

The Court: Try to keep your voice up.

Read the answer.

(Answer read.)

By Mr. Wessel:

Q. In any event, Mr. Bercu, it is either March, 1945, before the partnership, or March, 1946? A. After we had left, ceased our auditing work for the partnership. It is probably March, 1945.

Mr. Wessel: I ask that this paper be given an exhibit number for identification, following the other numbers.

A. (Continuing) This group of papers is all in the year

(1999)

1944, long before the partnership.

Q. 1944? A. Yes.

Mr. Wessel: I ask that these papers be stapled together and be given one exhibit number for identification.

A. (Continuing) All of these papers concern partnership transactions from June 1, 1945, through January 31, 1946.

Mr. Wessel: Well, I don't intend to go through them individually, counsel, so there is probably no need to have them marked.

Mr. Stryker: Why don't you mark them the way you did the others?

Mr. Wessel: If you will permit me to handle my own examination in the way I want, I will continue.

By Mr. Wessel:

Q. Mr. Bercu, could you describe in general fashion what kind of work papers these are, that is, whether they are underlying work papers, summary work papers or any other way in which you can generally describe the group? A. These are for the most part detailed work papers. There are a few of what are known as accountant's work sheets which summarize the transactions, but for the most part (2000)

they are details which were transcribed into those summary work sheets.

Q. Perhaps, if you would, describe for the jury, and for his Honor, now, the relationship between summary and detailed work sheets and how books are prepared from work sheets.

Mr. Stryker: May I ask, to prevent confusion—the witness is holding certain papers and describes them as "these sheets"—I would like to

have them some kind of identification so I will know what he is talking about.

Mr. Wessel: Counsel knows this is my examination. When I asked that his red folder be marked, he refused.

The Court: All right, we won't——

Mr. Wessel: And I intend to mark them as soon as the witness——

The Court: Let's not argue about a thing like that. In other words, you might mark them some other way?

Mr. Wessel: I intend to mark them as soon as the witness has described them. I want to be sure what they are. It may be there is more than one group in these documents.

(2001)

Mr. Stryker: All right.

The Court: All right, go ahead.

A. I have not segregated these papers into individual classes, but I, of course, am familiar enough with the contents of the papers to know that there were first the schedules of expenses, for example, that were drawn off from the general ledger. The totals of those schedules would correspond with the general ledger total of each category of expense, and then any adjustments would be made on the individual account sheet, work sheet, and transcribed in groups of adjustments into our master work sheet.

It is a case of constantly boiling down a mass of figures from a large number to a constantly smaller number until we get down to a workable few figures in the work sheet which is the basis for preparing the balance sheet and profit and loss statement monthly.

Q. Now, Mr. Bercu, you used the term "master work sheet." Would you select from that group any master

work sheets, if you can do so, without taking too much time? A. I should be able to.

Yes, here is one dated July 31, 1945.

(2002)

Q. Would you pick out—would it take long to pick out from that group all of those that are master work sheets? A. It probably would. Might take five minutes or more.

The Court: I think we will take five minutes. Do you want the table back, Mr. Bercu?

The Witness: It won't be necessary, your Honor.

Mr. Wessel: I would appreciate it if you would.

The Court: Put them up here if this will help you.

By Mr. Wessel:

Q. Have you completed that, Mr. Bercu? A. I hope so.

Q. You are now holding in your hand the sheets which you find are master work sheets? A. These are the work sheets from which the monthly balance sheet and profit and loss statements were prepared.

Q. And those are the sheets that you have in your hand.

Mr. Wessel: I ask that these papers which

(2003)

are work sheets dated June, July, August, September——

By Mr. Wessel:

Q. There are two for September, Mr. Bercu. I wonder if you could explain to me how that came about, do you know?

I think I should ask you, are these documents that I have just described, the ones for June, July, August and September, in the handwriting of yourself or your assistants in Bernard Bercu & Company? A. Yes, they are. All come from, they are all prepared by members or assistants in our firm.

Q. Now, how can you explain, if there is any reason or explanation for two sheets for September? A. Yes, in looking at these papers after ten years I realize what had happened. From June 1st until the latter part of October, 1945, we were unable to agree—when I say "we," I was unable to get an agreement from Mr. Roth, the accountant for Mr. Giglio, as to the basis for the assets transferred from the sole proprietorship to the partnership.

We therefore, as I recall now—and this is not a matter of recollection so much as of inference from the nature of these work sheets—we did not post the general ledger until the month of September, 1945. We had taken off

(2004)

what we call work sheet trial balances, simply sumarize the transaction from the original books of account, and prepared trial balances in that fashion for June, July, August and September.

When we finally got agreement in October with Mr. Roth as to the basis for the opening entries, then the general ledger was posted up, and we took a second trial balance directly from the general ledge as of September 30, which explains the two sets of work papers.

Q. And the last of the work paper sheets was for October, 1945? A. October, taken from the general ledger.

Q. Now, I want to show you the general ledger, Mr. Bercu, and ask you if that—if the journal entries that you

referred to there made as of the end of October, that is, some time during November, 1945, are the ones you just referred to, and I specifically refer to the journal entry with regard to Mr. Lubben's capital account; something around $64,000-odd? A. Definitely, those entries were dated November 30th, but actually prepared and included in the records as of October 31, 1945.

Q. And every one of these sheets, these work sheets, (2005) the master work sheets you turned over to me, precedes that journal entry, am I correct? A. That is correct.

Mr. Wessel: I ask that these be given the next exhibit number for identification, stapled together.

By Mr. Wessel:

Q. Are there any work sheets, master worksheets, in the group which you found that are after October, 1945? A. No.

Q. Now, these sheets, the last group that you have here, sir, those are all which you called detailed work sheets? A. Detailed work sheets, very largely concerned with analysis of purchases, sales and inventories.

Q. Were these also part of the group that you turned over in your office that day? A. Turned over to——

Q. Mr. Roth or Mr. Giglio or both. A. I doubt it, because my impression is that everything that was turned over to him was destroyed. These were papers that simply were not turned over to him. I couldn't say today whether it was inadvertently or by design.

(2006)

Q. Well, let me ask you this: Were any of these ever kept at the Eatsum plant or at the Eatsum offices, do you know? A. They were largely prepared at the Eatsum

plant and offices, but they are always brought to our office. They were never left on the premises of either the plant or the office of Eatsum.

Mr. Wessel: This last group I ask be in some way clipped or bound together and marked as one exhibit.

By Mr. Wessel:

Q. Now, Mr. Bercu, is there any doubt in your mind now, of any kind, however small, as to the conversation you said you had with Mr. Giglio in your office? A. Concerning—none whatever.

Q. Mr. Roth said there was one folder, one red folder turned over for destruction that day. Is that your recollection? About two or three inches thick, I think he said. A. That is not my recollection.

Q. Well, first of all, are you certain about your recollection? When I say "certain," I mean reasonably certain. A. I am reasonably certain because this was the first time in then 25 years' accounting practice that anything of that

(2007)

sort had ever been done.

Q. Would you describe, Mr. Bercu, what volume of documents was turned over? A. It is my recollection now that I saw Mr. Roth and Mr. Weinert and I believe either one or two assistants of ours dragging out basket after basket—I kept no count of them, but I should judge that there might have been the equivalent of perhaps 15 or 20 of these red folders of the package of papers which you just gave me, at least 20 times that quantity of papers.

Q. Mr. Roth testified that to his recollection they were all yellow in color; is that correct?

Mr. Stryker: One moment. I object to the question on the ground that it assumes facts incor-

rectly. I do not remember Mr. Roth said it was to his recollection. He said it as a fact.

Mr. Wessel: I will reframe my question.

By Mr. Wessel:

Q. Mr. Bercu, what color were the papers that you turned over? A. Well, all of our work sheets were standardized and printed. They were all yellow buff papers, and all of the 7- and 14-column papers, as we accountants describe it, had our firm name imprinted on them.

(2008)

Q. Was any of it a bluish green or a greenish color or something quite different, distinctively different from yellow? A. I don't recall there having been such papers. There might have been.

(Marked Government's Exhibits 131-1 through 131-86 for identification.)

(Marked Government's Exhibit 132 for identification.)

(Marked Government's Exhibit 133 for identification.)

(Marked Government's Exhibit 134 for identification.)

Q. I show you, Mr. Bercu, Exhibits 131-1 through 86, a few pages of which are yellow, but the balance being apparently white, and ask you, first, whether it isn't the fact that some of the papers you turned over were white? A. Our file copies of typed reports would be white, of course. But the work sheets, so far as I can recall now, there may have been an occasional sheet. I or one of the assistants or partners might well have picked up a sheet of

paper at the client's desk and used that for making notations, without digging for a firm pad.

(2009)

Q. Can you explain in any way how those documents failed to be destroyed on the occasion in your office? A. How these documents failed to be?

Q. Yes. They obviously were not destroyed; is that correct? A. Well, of course, the inventory sheets may not even have been in our office.

Mr. Stryker: One moment. I think this answer should be limited carefully to the question of what he knows about it. What does he know, and not what he thinks or speculates or now says. I think the answer should be confined to what this gentleman says he knows.

By Mr. Wessel:

Q. Well, now, first of all, I think you said that the inventory sheets attached to Exhibit 131 may not even have been in your office; is that correct? A. At that time.

Q. At that time.

Now, secondly, apart from the inventory sheets which were a part of 131, the file copies, can you explain in any way, from your own knowledge, how those came to be not destroyed on the day in your office? In other words, do you have any recollection of any kind of anybody taking

(2010)

any documents out of your office or any folders out or any briefcase out?

Mr. Stryker: I object to the question as highly prejudicial——

The Court: I will overrule it.

Mr. Stryker: —and suggestive.

The Court: I will overrule the objection.

Mr. Stryker: Exception.

A. I have no knowledge or recollection as to the reason why these particular file, office file copies of the typed reports were not given to Mr. Roth for destruction. So far as I can recall at this moment, having photostated the copies of our reports and of our major work sheets, I felt that there was no reason why he couldn't have all these other papers for destruction.

I can only assume that it was done inadvertently, because there were so many folders.

Mr. Stryker: I move to strike out what he assumes, a conclusion, operation of his mind.

The Court: I will let it stand.

Mr. Stryker: How does your Honor rule?

The Court: I overrule the objection.

Mr. Stryker: Exception.

(2011)

The Court: Go ahead.

You may answer.

A. I assume that the folder containing these file copies, which was entirely separate from all of the work sheets, simply was not handed to Mr. Roth for destruction.

(Marked Government's Exhibits 135 and 136 for identification.)

By Mr. Wessel:

Q. I show you, Mr. Bercu, Exhibit 136——

Mr. Wessel: I am tearing off some notes made by a Government agent.

—and ask if you can identify that group of papers for me? A. To the best of my knowledge and recollection, these are papers which we had, which I had had photostated. They are work sheets of ours concerning the affairs of the Eatsum Food Products Company partnership which I had had photostated before I turned over the original work sheets to Mr. Roth for destruction.

I retained the photostats, of course, until a few years ago, when I turned them over to Government agents.

(2012)

Mr. Wessel: Just a minute. May the record show that counsel is standing——

Mr. Stryker: I was just trying to look at the paper.

Mr. Wessel: —close by while I am examining the witness.

Mr. Stryker: I think I am right, with your Honor's permission, that I can at least see what goes on, although I will stand any place you want. I will go there.

Mr. Wessel: These have not yet been offered in any way, if your Honor please and the witness hasn't testified as to their contents. He is describing them.

Mr. Stryker: I don't want to see them if you haven't offered them.

By Mr. Wessel:

Q. Mr. Bercu, you do recall having turned over photostats of some documents to Government agents; am I correct? A. Yes.

Q. Would you name the Government agents? A. My recollection is that they were Mr. Cordes and Mr. Twohig.

Q. Those were special agents, Treasury Department? A. That is correct,

(2013)

Q. Can you describe the volume of photostats that you turned over? When I say "volume," suppose for practical purposes you describe it in inches, so many inches, like that? A. I did not ask for—I didn't prepare or ask for any receipt for the documents. My recollection at the moment is that there may have been twenty or thirty sheets. I couldn't pin it more closely than that.

Q. Did you turn over to the Government all the documents that you had retained photostats of? A. I did.

Q. Were those the documents of the group you considered relating more directly to the Eatsum business? A. Eatsum partnership affairs.

Q. Is that correct? A. That is correct.

Q. Now Exhibit 136, Mr. Bercu, is any original of that in the group that you looked at this morning? A. I did not see any of these originals, although I must say that I didn't examine those originals so thoroughly to state with positiveness that the inventory sheets, for example, were not there, but the analysis of David Lubben's special account, the analysis of the notation as to the inventories for insurance purposes as of December 31, 1945, I am quite positive were not in the batch of papers which I saw this

(2014)

morning. I couldn't state with positiveness about these inventory sheets as of January 31, '46.

Q. Would it take you some time to look through the inventory? A. Again, it would take perhaps five minutes or more, because there were so many inventory items of January 31, '46, in that pile.

Mr. Wessel: Your Honor, I dislike to take any more time on this matter. Yet I think it is worth while the witness being sure about this matter.

The Court: I will ask the witness to go over and compare the two exhibits, but perhaps we can do it at lunch.

The Witness: I wanted to suggest that, your Honor, to save the time of the court.

The Court: All right.

Mr. Wessel: Well, then, I will leave 136 for identification at the present time.

The Court: All right.

Q. Now, if I may turn to a different subject, Mr. Bercu, for a few minutes. During the period of the Eatsum proprietorship—and that is before the partnership commenced sometime in the middle of 1945—can you tell me how on the books any black market overage or premium payments were handled? A. Mr. Lubben, who had started (2015)

in business in the midst of the war period——

Q. I am sorry, Mr. Bercu, but will you speak up a little bit, please? A. —found that he could not purchase goods at ceiling prices, goods that he would be able to resell at a profit, regardless of what price he paid for them. He therefore agreed to buy goods at prices demanded by the vendors, the manufacturers. In a number of instances, I believe there were five or six cases, he bought continuously from certain manufacturers who would bill him at what presumably were their OPA ceiling prices, but who demanded cash in some cases, as much as twice the ceiling price. For instance, take a simple illustration: Lubben would receive an invoice for 10,000 pounds of candy at a billed price of ten cents, or $1,000 for the invoice. Lubben

told me he had to pay 30 cents a pound for that candy. He would sell it for 40 cents a pound, so that he made a gross profit of 20 to 25 per cent over and above what he actually paid for the goods. As an accountant, I had no trouble establishing that he sold the goods for 40 cents because Lubben recorded the sales. His purchase—he explained his problem to me that he was paying 30 cents for these goods. We discussed the matter for some time and finally

(2016)

agreed that if he would enter on his purchase bill a notation that this bill, typewritten $1,000, actually cost him $3,000, by adding the $2,000 of overage right on the face of the invoice, entering the purchase as $3,000 in his purchase book and in his accounts payable, then if he would draw a check to the manufacturer for $1,000, to the order of the manufacturer for $1,000, and draw a check for $2,000 to cash, and post it to the accounts payable, and make a memorandum that he had paid this $2,000 in cash for these goods, specifying the goods, I gave it as my opinion as an accountant that he would then have a sufficient basis to establish the cost of these goods at 30 cents a pound.

I did point out to him that he did have the problem, of course, of convincing the revenue department that he actually paid this cash overage and hadn't simply pocketed it. That was one of the reasons that we, from the first day that we undertook the audit of Mr. Lubben's affairs, we tried to reconcile all of his purchases and sales to the utmost degree, so that we could show to the Revenue Department, if and when an audit was made, that we were selling these goods at a standard mark-up over and above the total cost, both the bill cost to us and the cash overage. That was

(2017)

the method that Mr. Lubben employed on his records and

n conducting his affairs almost from the first day that he started in business on his own account in April 1944, and he continued that method through into the partnership and when he started again in General Confections Inc. in the Bronx, so long as we remained connected with him for a few months, he still used that same method.

Q. Wasn't there a cash box in the partnership? A. There was a cash box in the partnership with regard to the comparatively limited number, small number, smaller amount of candy sales.

Q. Wasn't there a corn syrup cash box? A. As an accountant, I had no official knowledge of the corn syrup box because I was not permitted to audit any of the overage transactions regarding corn syrup by the Eatsum partnership.

Q. You say you were not permitted; who was it that did not permit you to do so? A. Mr. Roth.

Q. Did you have a conversation with Mr. Roth in that connection? A. On a number of occasions.

Q. Well, without going into each one individually, would you state what the substance of those conversations

(2018)

were? A. In substance, I was told that the corn transactions were not to be audited by us, that we would have nothing to do with them; that whatever appeared on the books of Eatsum as the sales price of the corn syrup, that was the subject of our audit, we were not to concern ourselves in any way with overages there.

Q. Would it be fair to state then, if there had been any cash overages of any kind, they were not reflected in any Eatsum books that you kept, at least during the time you were accountant for the partnership? A. It would not only be fair to say it, but it would be a statement of fact.

Q. Now, sir, were you present first when the partnership agreement was signed, Eatsum partnership? A. Yes.

Q. Can you tell me who else was present? A. Mr. Lubben, Mr. Giglio, Mr. Roth, Mr. Goldhill, the attorney for Mr. Giglio. In fact, the signing took place in the office of Mr. Goldhill, the attorney.

Q. Was Mr. Howard Lawn present? A. I don't think so. My impression is I did not hear of or meet Mr. Lawn until a month or two later after I had undertaken the auditing for the partnership.

Q. Now, did you at the time the partnership articles

(2019)

were signed, or before, have any discussions either with Mr. Roth, Mr. Giglio or Mr. Livorsi, or while they were present, with regard to the use of, the having of other partners besides Mr. Giglio and Mr. Lubben in the partnership? A. Yes.

Q. Would you state when those discussions took place, who was present and what was said? A. My recollection is that this was discussed with Mr. Lubben and Mr. Roth. Mr. Roth told Mr. Lubben that he was going to set up a limited partnership with regard to Mr. Giglio's interest by having the wives of Mr. Giglio, Mr. Livorsi,—I think Mr. Loperfido's wife also—and as I recall it, there was one—Mr. Giglio was a general partner; Mr. Lubben was to be a general partner, and all the others were to be special partners.

Mr. Roth suggested to Mr. Lubben that since they expected to earn very large amounts of money in this partnership, that Mr. Lubben should set up a special partnership arrangement also, or a partnership arrangement for himself and his associate. Mr. Lubben then said that he would have Mr. Stone and Mr. Hankermeyer as his associates in this partnership split-up of total profits.

Q. Did you as an accountant know how much Mr. Stone and Mr. Hankermeyer invested in the business? A. My (2020)

recollection is that Mr. Stone invested $10,000.

Q. Mr. Hankermeyer? A. I don't recall whether Hankermeyer actually invested any cash of his own.

Q. Now you referred to Mr. Loperfido's wife. I want to show you Exhibit 36 in evidence and ask if it refreshes your recollection in any way as to whether it was Mr. Loperfido or his wife who was to be a partner? A. According to this, only Mr. Loperfido.

Q. I don't mean to ask you what the document says, but is your recollection refreshed in any way? A. It is refreshed, and only Mr. Frank Loperfido was a limited partner.

Q. Would these other persons that you mentioned, that is, Mr. Stone, Mr. Hankermeyer, Mrs. Giglio and Mrs. Livorsi and Mr. Loperfido, present at the meeting in Mr. Goldhill's office, when the partnership papers were signed? A. My recollection of it is that they were not present at the actual signing of this document by Mr. Giglio and Mr. Lubben, that the other signatures were all attached later.

Q. To what extent did Mrs. Livorsi and Mrs. Giglio participate in the management of Eatsum while you were the accountant? A. To no extent. They wouldn't be permitted to participate in the management as special partners. (2021)

Q. Did you ever have a conversation with Mr. Giglio with regard to the formation of various corporations? A. Yes.

Q. Will you state when, where, who else was present, if anybody, and what was said? A. Late in January 1946, Mr. Lubben was away on a vacation in Cuba. When I had completed the December 1945 audit and had a report

prepared, I brought a copy of it down to Mr. Giglio. Since Lubben was away I didn't want to hold up Mr. Giglio's receipt of his copy. After some general discussion about the affairs of the partnership, he told me he was driving uptown and asked whether he could give me a lift. On the drive uptown he told me that he had organized a corporation—my impression at the time was that the name was American Food Products, Food Products Company—and that he intended to transfer the assets of the partnership to the corporation.

Q. Just to stop you for a moment. Would the name, American Brands Corporation, refresh your memory as to the name used? A. It was—it is my impression and has been all these years, that Mr. Giglio said to me that the name of the corporation was American Food Products Cor-

(2022)

poration.

Q. Continue, please. I am sorry to interrupt. A. I never saw any corporate papers with regard to that corporation. We discussed various points in connection with the conversion of the partnership into a corporation, and Mr. Giglio said to me that he expected me to convince my client, Mr. Lubben, that it would be to his advantage, to Lubben's advantage, to run as a corporation rather than as a partnership. I made no promises to Mr. Giglio, but in the course of the discussion with him I got the impression that——

Q. Don't give your impression, Mr. Bercu. A. Well, ——

Q. Did Mr. Giglio say anything—have you exhausted your recollection as to what Mr. Giglio said now, without regard to your conclusions or anything? A. I have.

Q. Did Mr. Giglio say anything at that time as to whether or not he wanted to discontinue relations with Mr.

Lubben? A. Oh, no. He was very emphatic that he wanted me to convince Mr. Lubben that it would be to Lubben's advantage to go along on this transfer of the partnership assets to the corporation.

Q. Do you recall, Mr. Bercu, a discussion or meeting (2023)

of any kind in which the destruction of documents was discussed, at which Messrs. Giglio, Lubben, Roth and Goldhill were present? A. No, I do not. My recollection with regard to destruction of documents is that the matter was not discussed in the presence of counsel, but that it was —the question was raised—the point was raised later by Mr. Lubben when I kept pressing him for final action that would, I would say, legitimize his operation of that Bronx plant, because he was running it without title.

Q. Mr. Bercu, you were a witness in the Shotwell case, am I correct? A. I was.

Q. And before that time a deposition was taken from you? A. Yes, sir.

Q. I want to show you pages 299 to 300 of your deposition, and ask if that refreshes your recollection as to any discussion of the subject at a time when Mr. Goldhill, Mr. Lubben, Mr. Giglio and Mr. Roth were present? I don't want the contents of the deposition, just whether it refreshes your memory? A. I would say that I was in error in my statement in the deposition because I have had considerable occasion to search my recollection on that point since then.

Q. Incidentally, Mr. Bercu, just so that the record is (2024)

clear in this suit that I asked you about, between the accountants and the lawyers, were you represented by the firm with which I was formerly associated? A. I was represented by the firm of Cahill, Gordon, Zachry & Rein-

del. Mr. Mathias Correa carried the case for the firm. I understand that you were with that firm. I never met you in the course of the extended litigation.

Mr. Wessel: I have no other questions of this witness, your Honor, except just the question of comparison of those records.

The Court: We will save that until after lunch. Mr. Stryker, do you want to go ahead?

Mr. Stryker: Can I have all the papers that you marked as exhibits, all of them for identification?

The Witness: This is part of the papers, and I inadvertently——

Mr. Stryker: Better give it to Mr. Wessel.

Mr. Wessel: Is this something that was not marked?

The Witness: This is part of that big batch of papers that I was going to sort out.

Mr. Wessel: Is this one of the partnership (2025) papers?

The Witness: It is one of the partnership papers.

Mr. Wessel: Mr. Dilberian, will you include that in this group?

The Witness: Will you keep that on top, please.

Mr. Wessel: Keep it on top, if you will, please, the witness asks.

Mr. Stryker: While I am getting these papers in order, perhaps I can start.

Cross Examination by Mr. Stryker:

Q. Let's see. You were charged in the case which Mr. Wessel had mentioned, with practicing law without a

license, weren't you? A. That was the technical charge, yes.

Q. Well, it was the charge that you as an accountant were practicing law; wasn't that the charge? A. Yes, sir.

Q. And you said something about the Court of Appeals: did the Court of Appeals not finally hold that you as an accountant were practicing law without a license? A. Yes, sir.

Q. Let me see if I understand one thing clearly—am I amusing you? I see you are smiling. A. I am very much

(2026)

amused by Mr. Stryker.

Q. By me? A. By—well, I am not a poker player. I can't hide my emotions because of the impression that is left in the mind of the people listening.

Q. You mean I have left some impression that I shouldn't leave? Is that what you mean? A. I didn't say that you shouldn't. I am amused because I have been sitting in cases for many years and I am aware of the fact that as a witness I am required to answer questions precisely in the manner in which they are framed, and I realize of course that if on redirect the matter isn't cleared up, then that impression remains.

Q. Well, now, let's take that up. Is there something about my questions about your practicing law without license that amuses you, or was it incorrect? A. Why, of course——

Q. What? A. I said that that was a technical charge. That is what I was charged with doing. But the facts are that I had done what every other C. P. A. in the United States had been doing since 1916, and that mine was a test case to determine the right of certified public accountants to give advice to clients regarding tax matters, and I think

that that is a slightly different situation than the statement
(2027)
as framed by you in your question.

Q. Now, what is different about it? I don't understand what you are talking about. I have asked you the questions. You think my questions weren't fair, or what? A. I have answered your question, Mr. Stryker.

Q. Who was the plaintiff in that lawsuit? A. The New York County Lawyers Association.

Q. And you know, don't you, that that is the largest local bar association in the world? A. Local, yes.

Q. And they were the plaintiff making this charge against you; is that right? A. Yes, sir.

Q. And the court found——

The Court: Excuse me. This was a civil suit, not a criminal suit?

Mr. Stryker: It was civil, definitely.

The Witness: Civil.

The Court: All right.

Q. They made the charge and the court sustained the charge? A. May I——

The Witness: If it please your Honor, I was never able, since I am not a member of the bar and never pretended to be one my impression is that the litigation was carried on—because it was carried
(2028)
as a test case, it was never defined to me whether it was a civil or criminal suit.

The Court: Well, if the New York County Lawyers was the plaintiff, it is very clearly a civil suit.

Mr. Stryker: Your Honor asked a question, and I think it is fair to say definitely it is a civil suit, not a criminal suit.

Mr. Wessel: I am not sure at all that it was not a criminal suit, because I think the County Lawyers Association has the power in some way to bring suits to enforce practice of law, or whether it is criminal or civil, I don't know. It has a quasi-criminal, quasi-civil nature.

Mr. Stryker: You know more about it than I do. Your firm represented him.

Mr. Wessel: They certainly did, by a former eminent United States Attorney, Mathias Correa.

Mr. Stryker: Now we have that thing straightened out. What was that thing about the eminent United States Attorney?

The Court: Let's get down to where we were. You said that we had the matter straightened out, now let's get down to the next one before we get wound up in this.

(2029)

Q. Now, have I got this clear, that your first talk about destruction of papers was with Mr. Lubben; is that right? A. Yes, sir.

Q. And you have given us the talks you had with Mr. Lubben, have you not, about that? A. The substance of the talks.

(2029a)

Q. Now, you have given us all that was essential about the talk that you remembered? A. So far as the questions call for the answers on the particular points. There were a number of discussions with Mr. Lubben on that point.

Q. I am talking about the talk you had with Mr. Lubben, where you said he asked you to destroy the papers. Have you given us all you recall on that subject? A. As of that moment, yes, all that I recall at that moment, in answer to the questions.

Q. Well, the fact was that Mr. Lubben pleaded with you to destroy those papers, didn't he? A. I would so describe it.

Q. And you acquiesced in Mr. Lubben's pleadings that you destroy these papers; is that right? A. In view of the circumstances I acquiesced.

Q. Well, you did acquiesce, and there is no qualification to that, is there; you agreed to do it? A. Surely.

Q. Then it is a fact, is it not, that you had made up your mind before Mr. Giglio and Mr. Roth came to your office in late May or early June, 1946, you had made up your mind to follow Mr. Lubben's pleadings; is that right? A. Only within—to this extent: I would permit them to

(2030)

destroy those work papers after—and this I did not tell Mr. Lubben—after I had had what I regarded as the essential work papers photostated.

Q. Now, when did you have any——

Mr. Stryker: Strike that.

Q. Are the photostats to which you refer the ones which Mr. Wessel just showed you? A. So far as I know, they are.

Q. And are they all of the photostats? A. No.

Q. Where are the rest of them? A. I should judge that the rest are in Chicago.

Q. Did you give them to some agent of the United States Government? A. I did.

Q. Did you get a receipt for them? A. I did not.

Q. To whom did you give them? A. To Mr. Twohig and/or Mr. Cordes. I don't recall whether they were together or I gave them to one or the other.

Mr. Stryker: Well, I call on Mr. Wessel to produce the papers that the witness says he has given to Mr. Twohig who is here in court.

Mr. Wessel: I have asked the gentleman at the (2031)
table for those papers. I hope to find them during lunchtime or find out where they are.

The Court: All right.

Mr. Wessel: I intended, myself, to produce them.

The Court: Very good.

Mr. Stryker: All right.

The Witness: Might I add that a number of those papers I saw in Chicago, during the Shotwell trial.

By Mr. Stryker:

Q. You saw some of those papers there? A. Yes.

Q. And some of the papers—let me see if I have got that—you saw in Chicago some of the papers you turned over to Agent Twohig; is that it? A. That is correct.

Mr. Wessel: Mr. Present tells me that some of his papers that he knows about are in Chicago, and he can describe them to the witness but he doesn't have them, and I would hesitate to see a delay, this witness getting off the stand and getting papers from Chicago.

The Court: We won't.

Q. Now, Mr. Wessel has brought out that you testified (2032)
in a deposition. I think it was held at the Bar Association. You remember that, you remember testifying there? A. Yes, sir.

Q. Were you under oath? A. Yes, sir.

Q. Were you asked these questions and did you give these answers:——

Mr. Wessel: May I have the page reference please?

Mr. Stryker: Yes, sir, 301.

By Mr. Stryker:

Q. (Continuing) "Q. Did the discussion occur in Goldhill's office or in your office? A. It is my recollection that it occurred in Goldhill's office, in connection with the various other terms of that dissolution."

Did you give that answer? A. I did.

Q. Was that the fact? A. That was my recollection at that time. I have since had a number of occasions to think over what actually occurred, and I can only say that my recollection at this time is that the matter of the destruction of the records was not discussed in Mr. Goldhill's presence.

(2033)

Q. Have you learned—am I interrupting you? A. Beg your pardon?

Q. Am I interrupting you? A. No.

Q. Have you learned since you gave that testimony under oath anything with regard to what Mr. Goldhill said about that? Has that changed your testimony? A. No, sir. I don't know that Mr. Goldhill even testified in this case.

Q. I didn't ask about the testimony. A. I have not learned. I have merely reconstructed the events in my own mind and I realize that the question of destruction of records—and I am giving you the processes of my mind—that that matter certainly would not have been discussed in the presence of a member of the bar. He wouldn't have dared to discuss any such question.

Q. Well, now, I agree with you, and I go back to the question, to your answer:

"It is my recollection that it occurred in Goldhill's office."

That is what you swore to, isn't it? A. Exactly that. It was my recollection at that time.

Q. Wait a minute. In other words, you swore definitely

(2034)

to the fact of your recollection; that is what you swore to, didn't you? A. Exactly.

Q. And you were completely and totally wrong about that particular recollection; is that not so? A. I have come to the conclusion in recasting in my mind the series of circumstances that that was not discussed in Mr. Goldhill's office at the time that the dissolution was considered.

Q. Nevertheless, you were willing, under oath, to state as your recollection that something wrong had occurred in the presence of a member of the bar; that is so, isn't it? A. I stated, under oath, the best of my recollection at that time, two and a half years ago.

Q. The next question and answer, page 301—— A. May I continue on that point?

Q. If you haven't finished, why, I should think you should. A. It is my recollection now that the discussion with regard to the terms of dissolution did not take place until after the records had been destroyed; that there was no occasion for such a discussion in Mr. Goldhill's presence, because Mr. Giglio refused to consider meeting in Mr. Goldhill's office to close the deal until after those records had

(2035)

been destroyed.

Q. Nevertheless you were willing to swear—— A. I did swear.

Q.—that it was your recollection—— A. I did swear.

Q. —that the discussion took place in Mr. Goldhill's office; is that true? A. Yes, sir. And I was totally in error, based on my present reconstruction of the circumstances.

Q. Well:

> "Q. Then did you acquiesce in the destruction of the sheets? A. Upon Mr. Lubben's pleading, I did."

Was that question asked you and did you give that answer? A. If the record so states, that is correct.

Q. Would you like to look at the paper I am reading from and see whether I am reading it right? Do you question my correct reading of it? Do you question my correct reading of it, yes or no? A. I don't question your reading of it, but I have reason to make the precise answer in that form.

Q. I will show it to you, page 301, question and answer (2036) I just read. Did I read that right:

> "Then did you acquiesce in the destruction of these sheets? A. Upon Mr. Lubben's pleading, I did."

A. That is a correct reading.

Q. That is precisely—— A. That is precisely what the record states.

Q. And are you questioning the stenographer's minutes? A. No, sir.

Q. Well, then, is it not a fact that you did give that answer in response to that question? A. I did.

Q. "Q. And of the audit reports? A. Yes, sir."

Did you give that answer in response to that question? A. I did.

Q. "Q. What, if anything, was then done about it? A. They were destroyed."

Did you answer that way? A. That is correct.

Q. Were the audit reports destroyed? A. So far as I knew at that time, those audit reports had been destroyed.

(2037)

Q. You found since they weren't? A. Obviously the file, our office file copies of the typed reports are here in court. I find numerous work sheets, considerable miscellaneous copies of some of the audit reports are on hand.

Q. "Q. Where? A. In my office.

"Q. In whose presence? A. In the presence of one of my assistants—I believe Mr. Weinert.

"Q. And who else? A. And someone assistant from the staff.

"Q. Who on behalf of the—— A. (continuing) Who brought the records in from the files and saw Mr. Roth go over them and tear them up and send them out in bundles—in wastebaskets to the elevator."

I am reading from your answer.

Were those questions asked and did you give those answers? A. I didn't hear my answer to that. I heard you read the question.

Q. I think you might look at it, because the answer interposes. It might be confusing. Start with "Where", and see, just tell me whether you so swore? A. This is the

(2038)

deposition?

Q. That's right. I began—where did I begin with? "Where", I think. "Where", up at the top.

Mr. Stryker: Page 302, Mr. Wessel.

By Mr. Stryker:

Q. Now, read that over and tell me whether or not you swore in accordance with what I have read? A. Yes. In referring to Mr. Weinert I was continuing the answer. That was Mr. Weinert who saw it.

Q. That is all I mentioned.

You did swear, did you not? A. Yes, but I was in error in one respect. Mr. Weinert was not an assistant; he was a partner.

Q. Is Mr. Weinert your partner now? A. No, sir.

Q. Where is he? A. Mr. Weinert is comptroller of a chain of stores in Westchester County.

Q. Where is he located? A. I don't know. I haven't seen him or heard from him in a number of years.

Q. "Q. Did you not retain any copy of those of your own—that is, any copy yourself? A. Not to

(2039)

my recollection."

Was that question asked and did you give that answer? A. And that was my honest recollection at that time.

Q. At the moment I am asking you did you so swear under oath? A. I did so swear in those words.

Q. When did you turn over to the Government—I think, as I remember it, you said to Mr. Twohig—the photostats, some of which have been produced by Mr. Wessel? When was that? A. I believe it was in the spring of 1951. It may have been earlier than that because my recollection is, and this is a case of association of recollection, that when I first discussed this matter with Mr. Cordes and Mr. Twohig——

Q. All I am asking is when. A. I am trying to——

Q. Would you mind, if I might—— A. Thank you.

Q. I would request, if you please, just give your attention to my question, when, and think it out, and then give me your answer.

Mr. Wessel: I would like the question read back, please, to the witness.

(2040)

Mr. Stryker: All right, sure.
The Court: All right.

(Question read.)

A. It might have been as early as the fall of 1949.

Q. Of course, it might have been anything. I am asking your recollection. When, according to your best recollection, was it? A. My recollection is it was somewhere between the spring of 1949 and the late spring of 1951.

Q. I see. A. I can't pin it any more closely than that.

Q. In other words, you had turned them over before you testified in this deposition, that would be right? A. At least a year and a half before.

Q. Now, were you asked in this deposition——

Mr. Stryker: I am going to stop with this. I think your Honor will want to.

By Mr. Stryker:

Q. "Q. Did you ever endeavor to make any provision to do that?"

"do that" goes back to the former question, "Retain any copy of those of your own"—I interrupted. Is that clear? Is my question clear? A. Yes.

(2041)

Q. All right.

And did you answer:

"I don't think so"?

Did you give that answer under oath? Did you, yes or no? A. I did, yes, sir.

Q. All right. Now, was that true? Is that the fact? A. It was the fact that that was my recollection at that moment. I know now that my recollection was completely at fault; I had completely forgotten that I had turned over those photostats to Mr. Twohig or Mr. Cordes long before the date of that deposition.

Q. Now, the question would seem, would it not, pretty clear to you:

"Did you endeavor to make any provision to do that?"

And your answer:

"I don't think so"; is that right? A. You are reading the testimony as I gave it.

Q. I am asking you if you did not swear to what I am reading to you from the minutes. A. I swore to the testimony.

Q. Just what I have read? A. Just as you read it.

(2042)

Q. Just as I have read it? A. No question about it.

Mr. Stryker: All right. I think, if your Honor please, now, I would like to stop for lunch, if it meets your Honor's approval.

The Court: That is a good idea.

Mr. Wessel: I don't quite know——

Mr. Stryker: May I ask your Honor to direct this witness not to confer with anyone as long as he is on the stand?

Mr. Wessel: These people—I don't want him to confer with them, but I want the witness to have the papers and examine and compare.

Mr. Stryker: The papers he hasn't finished he certainly should have. That was your Honor's ruling.

Mr. Wessel: No objection to that. These are all for identification.

The Court: Mr. Dilberian, can you arrange for that?

Mr. Stryker: And may that be done, whatever examination he makes, in the presence of some representative of our side along with the Government?

(2043)

The Court: Well, I thought I would have him do it with the clerk.

If you both want to have representatives there, why, we will do it.

Mr. Wessel: I hesitate to see the clerk lose his lunch hour.

Mr. Stryker: I don't want to bother Mr. Dilberian; he is busy enough.

The Court: All right, we will do that.

Now, I have a problem to add to everything else.

A meeting of the judges has been called for 3:00 o'clock this afternoon, which means that I can't continue after 3:00. So do you suppose that we could get back here, say, about 10 minutes of 2, or would that really—if you have got appointments, why, just say so, and we will get along all right, but otherwise we will start here about 10 minutes of 2.

Mr. Stryker: Your Honor, I realize your problem——

The Court: Can't make it? We will make it 2:00 o'clock.

Mr. Stryker: The point is, here he is going to do something; I want to look at it before I cross

(2044)

examine him, and I would like to comply or go without lunch if you wanted me to, but I can't prepare for the balance of this cross examination, which I think is quite important, in that period.

The Witness: May I point out this is purely a ministerial proposition? I am just going to sort out papers and nothing more.

Mr. Stryker: I didn't hear that.

The Court: He said it's purely a ministerial proposition, all he is going to do is sort out some papers.

We will make it 2:00 o'clock. I don't want to press this in any way.

We will return at 2:00 o'clock.

Don't discuss the case.

(Adjourned until 2:00 p. m.)

(2045)

AFTERNOON SESSION

(Jury in.)

BERNARD BERCU, resumed.

Mr. Wessel: Your Honor, in view of the fact that your Honor has indicated you wish to adjourn at 3:00 o'clock, the next witness shouldn't take more than 10 minutes, I think. He is a man who just came out of the hospital, and has a heart condition. He comes from Westchester and I think if we could possibly fit him in——

Mr. Stryker: I will be glad to do that.

Mr. Wessel: I don't know how long you will take. I don't want to interrupt unless this runs beyond 2:30.

Mr. Stryker: If you want to put on the other witness now, Mr. Wessel, I will have no objection.

Mr. Wessel: Why don't we see if this goes beyond 2:30?

Mr. Stryker: I think I can guarantee it will.

Mr. Wessel: Then suppose we do call the other witness.

The Court: Do you mind stepping down, Mr. Bercu.

(Witness temporarily excused.)

(2046)

Mr. Wessel: Next witness is Mr. Weinert.

SAUL J. WEINERT, called as a witness by Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Wessel:

Q. What is your present occupation, Mr. Weinert? A. I am presently employed as controller for a chain of food markets.

Q. Are you a certified public accountant? A. I am.

Q. How long have you been? A. I believe I was certified in 1940. I am sorry, I am sorry, I passed the exam, I think I got my certificate in 1944.

Q. Were you a partner at one time in Bernard Bercu & Company? A. I was.

Q. Have you discussed the facts of this case with Assistant United States Attorney Fraiman and myself?

Mr. Wessel: Mr. Fraiman, would you stand, please?

A. Yes, I have, with Mr. Fraiman and with you.

Q. Mr. Weinert, do you recall an occasion some time back when you participated in something to do with certain documents with Mr. Roth. A. Yes.

(2047)

Q. Would you state the circumstances as best you can now recall? A. Well, I recall that the papers were the work papers of an Eatsum Food Products, and Mr. Roth and I—I was instructed by Mr. Bercu to destroy these papers with Mr. Roth.

Q. Did you do so? A. We did.

Q. Will you describe how you did it, where, what you did to the documents, please? A. Well, it was in—our offices at the time were in the General Motors Building at 1775 Broadway. We went to the men's room with these papers, destroyed some of them, and sent them down the hopper, but the papers were too voluminous, it was taking too much time, and finally we stopped that and tore up the papers and left them in the wastebasket.

Q. Do you know what was in those papers? A. Just—they were the ordinary work papers.

Q. I mean, do you know whether it related to Eatsum Food Products proprietorship, partnership or what part of Eatsum Food Products Company business? A. As far as I know they were the Eatsum Food Products partnership.

Mr. Wessel: That is all. Thank you.

(2048)

Cross Examination by Mr. Stryker:

Q. When did you first discuss this matter with any representative of the Government? A. I believe it was on January 3rd or 4th.

Q. Of this year? A. Of this year.

Q. Prior to that you had never testified or given any statement at all? A. No, sir.

Q. The incident in question was what year? A. I believe it was in 1945, or may have been '46.

Q. When you discussed it with some representative of the Government was any testimony of anyone shown you? A. No, sir.

Q. Or were any documents shown you? A. A general ledger.

Q. The general ledger of what? A. Of Eatsum Food Products.

Q. Was anything else shown you? A. That is all.

Q. This incident is nine or ten years ago; isn't it? A. Yes, sir.

Q. What? A. Yes, sir.

Q. Well, did anyone tell you what Mr. Bercu had said about this matter? A. No, sir.

Q. Or Mr. Lubben? A. No, sir.

Q. Or Mr. Roth? A. No, sir.

(2049)

Q. As you sit there after nine years, you have had no occasion in the meantime to reconstruct your recollection or compare it with anything, is that right? A. That is correct, sir.

Q. And I take it you have been a busy man in your own affairs—I am not interested—but you have been busy, I suppose, in other things in these nine years? A. Rather.

Q. Are you telling us now, in view of your testimony just given, that you can tell the Court and jury the nature, the details of the papers that you say were destroyed? A. No, sir, I cannot tell you the nature of the details of the papers other than the fact that they were the usual—they appeared to be the usual accountants' work papers in connection with the client.

Q. Mr. Bercu told you to go out and do this for Mr. Roth? A. Yes, sir; as I recollect.

Q. And I suppose Mr. Roth went over the papers carefully to see whether he had what he wanted to destroy, didn't he? A. I don't know.

Q. What? A. I don't know, sir.

Q. Well, don't you remember what Mr. Roth did? A. Well, Mr. Roth and Mr. Bercu were together in Mr. Bercu's room for quite some time, and I was not there.

(2050)

Q. No, but you were there, you say, in the men's room when this episode happened, is that right, with Mr. Roth? A. That's right.

Q. And with someone else? A. I don't recall.

Q. Were any other representatives of the Bercu firm there? A. I don't recall.

Q. Regardless of Mr. Roth being with Mr. Bercu, I am asking you what you saw? Did you see Mr. Roth examining the papers before you say they were destroyed? A. I believe he did.

Q. Well, is that your best recollection after nine years? A. Yes, sir.

Q. He went over them? A. I believe he did.

Q. He was an accountant, although not a certified accountant? A. Yes, sir; he was an accountant.

Q. And would your recollection be that he went over the papers with considerable care? A. I don't recall with how much care he went over them, but I assume he went over them with sufficient care to satisfy himself.

Mr. Stryker: I move to strike out the assumption as not responsive.

The Court: Strike out everything after "I assume."

Mr. Stryker: And your Honor will kindly instruct the jury, I take it, to disregard the statement?

(2051)

The Court: Whenever I strike anything out, the jury is instructed to disregard it.

Q. I am only asking you what you remember after these nine years what Mr. Roth did, not what you assume he did. What is your recollection of what he did in your presence? A. I recall that he went over the papers with Mr. Bercu, and then on Mr. Bercu's instruction, Mr. Roth and I destroyed the papers.

Q. Then you saw him examining the papers with someone, that is, Mr. Bercu? A. Yes.

Q. How long did that take? A. I don't recall.

Q. How many papers were there that you saw Mr. Roth going over? I don't mean for you to tell me the exact count, but—— A. They were quite voluminous, quite many.

Q. Would it be about in volume perhaps a half inch more than the Government exhibit file here? I am only getting dimensions. A. Perhaps.

Q. But no more than that? I mean, it wasn't a group of papers that would be three or four times as high as the envelope I have showed you; is that right? A. It might have been twice as high.

Q. Of course it might have been anything. What is your recollection? A. It was about twice as high as that.

(2052)

Q. Well, it was no more than twice as high, is that right? A. I don't think so.

Q. Can you describe for this jury any of the papers which you say were destroyed? A. Well, they were the usual yellow sheets, seven or fourteen-column papers that are used by accountants to prepare their work sheets.

Q. Had you worked on those particular papers yourself, personally, while the partnership was going on? A. I had worked on some of them.

Q. Well, now, can you after nine years give a little more detailed statement of what was in the papers that you say were destroyed? A. Well——

Q. "The usual work sheets," I am sorry, doesn't mean too much to me. I am not an accountant. Would you tell me? A. I know that on the papers on which I worked there were trial balances, the general ledger.

Q. What else? Go on, please. A. There were analyses of sales; there were other notes and comments that were prepared by the staff of juniors when they were doing the detail work.

Q. Please continue if you would, if you have anything to add, if you can add any more? A. I don't think I can add much more.

(2053)

Q. Did you personally, you yourself, look at any of the papers before they were destroyed? A. No, sir.

Q. Well then how can you tell us what was in them? A. Only in that they were Eatsum Food Products papers, and having worked on some of them I know what was in among those work papers.

Q. But I think my question three or four moments ago was to have you describe as well as you could from a nine years' recollection what the papers were that were destroyed. I asked you to do that and you gave me your list of what they were. Isn't that so? Didn't I just do that? A. As I recall, I believe I said they were the usual accountant's work papers.

Q. Yes, I know you did. A. You asked me to describe what I would consider to be the usual accountant's work papers.

Q. That's right. Now I ask you, did you personally examine those sheets to determine that they were what you now say they were? A. No, sir.

Q. Then your statement a few moments ago as to the contents is not a recollection but a guess, isn't it? A. I wouldn't say so.

Q. What? A. No, sir.

(2054)

Q. No? A. I wouldn't say it's a guess.

Q. But it is not recollection because you didn't look at the papers, you say? Is that right? A. No, I did not look at the papers.

Q. Well, then, you— A. But they came from the files. They were Eatsum Food Products workpapers.

Q. I am aware of that, but if you did not look at the papers, which I understand your testimony to be, then you have no personal recollection of what the contents were of papers that you personally didn't look at wouldn't that follow? A. That is so.

Q. Well, then, I go back. What you are telling me about the contents is a surmise rather that a statement of your personal knowledge; would that not be true?

Mr. Wessel: I object to the form of the question.

The Court: Sustained.

Mr. Stryker: How did your Honor rule on that?

The Court: I sustained it.

Q. Isn't it a fact that what you are giving us is as an accountant what you think work papers should be or could be rather than the papers that you actually saw? Is that not true? A. Yes, sir.

Mr. Stryker: That is all.

(2055)

Mr. Wessel: Thank you, Mr. Weinert.

The Court: Thank you, Mr. Weinert.

(Witness excused.)

BERNARD BERCU, resumed the stand.

The Court: Mr. Wessel, do you want to complete the direct now, as far as the comparison of the two exhibits were concerned?

Mr. Wessel: Just a moment.

Mr. Stryker: Why, certainly.

Direct Examination Continued By Mr. Wessel:

Q. Have you, during the lucheon recess, Mr. Bercu, had a chance to compare Exhibit 136, which are the exhibits produced by the Government, with the other documents produced this morning? A. I have.

Q. Do you find that there are any original papers in the group, Exhibits 131 through 135, of which any paper in 1936 is an exact copy? A. There are no originals of which these are—of which these photostats are exact copies.

Q. Are there any similar documents? A. There are some four or five sheets that are extremely close copies, but they are copies of the papers which were not photostated.

Mr. Wessel: I have no other questions, except, (2056)

if your Honor please, I would like to offer in evidence these exhibits, not for the truth of the contents, because all this financial information has no relevance at this particular time in this case.

Mr. Stryker: No objection.

Mr. Wessel: But merely for the purpose of identifying which documents were destroyed, and so forth.

The Court: All right.

Mr. Wessel: That would refer to Exhibits 136, 135-131 on.

The Court: All right, received.

Mr. Wessel: For the limited purpose referred to.

(Government's Exhibits 131 through 136 for identification received in evidence.)

Mr. Stryker: Do you want to mark this, too?

The Court: I think it is marked.

Mr. Stryker: For identification. I have no objection to its being in evidence.

The Court: All right, received for the purpose offered.

Cross Examination Continued by Mr. Stryker:

Q. As I understood your testimony, you made other and further photostats over and beyond the ones contained in Exhibit 136; is that right? A. Yes, sir.

(2057)

Q. I count twelve pages of that. Would you just verify that a second? It won't take you long. A. Including the cover sheet, I counted eleven.

Mr. Stryker: Did you? I will take your count, all right.

Q. Now, how many more photostats did you turn over to the Government beyond the ones in the exhibit just shown you? A. My recollection is somewhere from nine to nineteen more, a total of twenty to thirty sheets.

Q. They are not here this morning? A. I haven't seen them here.

Q. You turned them over to the agent in Chicago or to Mr. Twohig here? A. My recollection is that I turned them all over to Mr. Twohig early, long before the Chicago trial.

Q. I think you placed that this morning, if my memory is right, sometime in 1951? A. Anywhere from 1949 to 1951.

Q. Now, were there other Bercu papers, workpapers, shown you in Chicago, over and beyond what has just been shown you here? A. Yes, sir.

Q. Well, obviously then it would follow, wouldn't it, that you have not been able to compare these photostats

(2058)

here with those other work sheets not here? That would follow, wouldn't it? A. Except for this point, if I may point out. These sheets were numbered, numbers, consecutive numbers 1334 to 1343, and those—that is, the numbering of the sheets that were turned over from our New York office at the time that this deposition was taken. There was a total of 1343 separate sheets of paper, of work sheet papers, then turned over, work sheet photostats.

Q. Bercu work sheet papers? A. Well, not necessarily. They were every scrap of paper that we had in our files concerning the affairs of David Lubben, from—including apparently these 1943 papers, the 1944 sole proprietorship, the 1945 sole proprietorship—whatever partnership papers we still had left, of which this batch was apparently a part, and also the General Confections of New York.

Q. Now, my question—I had hoped it was a simple one—was whether there were more Bercu work sheets in Chicago of the Eatsum partnership over and beyond those that had been shown you here? Can you answer that question? A. I would say yes.

Q. All right. Then obviously it follows that your comparison, made here at lunch hour, of the photostats here,

(2059)

couldn't have been a comparison of these additional sheets? That just follows as a matter of course, doesn't it? A. Yes.

(2059a)

Q. The papers that I referred to, the Chicago papers, were partnership records, work sheets of Bercu for the Eatsum partnership, if I haven't made that plain.

The answer is yes? A. Papers in Chicago?

Q. That you were talking about, just been talking about for several minutes. A. No, the papers I turned over in Chicago I just explained covered every scrap, every sort of document.

Q. Well, I heard you say that. I am asking you if those papers in Chicago, among other things, contained a large number of Bercu working papers of the partnership? Now, is that plain? If so, would you kindly answer it. A. From recollection, I would say that there was not any large number of partnership papers.

Q. Were there some? A. There probably were—there must have been some.

Q. All right. Would you state whether any of the photostats that were shown you, that you produced for the Chicago trial, would match any of the Bercu yellow work sheets that have been shown you here in this trial? A. Photostats?

(2060)

Mr. Stryker: May I have that question?

(Question read.)

Q. I did not hear your answer. A. The answer is no, that none of the photostats which I have seen, which I saw either in Chicago or in court here today, match any of the work papers that I have seen either today or, to my recollection, in Chicago.

Q. Now let me see if I understand that. You were shown the photostats here this morning, weren't you, by Mr. Wessel? A. Yes, sir.

Q. In order to determine whether or not they were photostats of any of the work sheets, you asked for time to examine them; is that right? A. That is correct.

Q. You felt that that time was necessary in order to determine whether the work sheets here were or were not those of which the photostats here were copies. Do you understand my question? A. Well, to be very specific about it, Mr. Stryker, I recalled, in going through the papers, the work papers the first time this morning, I recalled seeing inventory sheets which were so similar to the photostats that I wanted to make certain that the photostats were actual

(2061)

photostats of the sheets which I saw in the pile of work papers, and I convinced myself that they were not, that there were two groups, two copies of inventory sheets, one set had been photostated, the other set is in the work sheets that are here.

The photostated set, the originals of the sets which were photostated are not in the group of yellow work sheets here, nor do I recall having seen them in Chicago.

Q. Now, let me see, I want to go on to another point if I can. Can you, then, tell us what the work sheets in Chicago represented without making the same examination which you made with respect to the work sheets in this court? Can you do that? A. I have already stated generally, Mr. Stryker, that the work sheets in Chicago were very largely work sheets that covered the period prior to the partnership and the period subsequent to the partnership; that so far——

Q. Well, just——

The Court: Let him finish now.

By Mr. Stryker:

Q. Go ahead and finish. A. So far as I can recall now

(2062)

the work sheets remaining in our files after the destruction

of papers were very, very few and scattered concerning the partnership affairs.

Q. How big were your files of these papers? How many drawers or envelopes would they fill? A. I believe that all of the work papers of the Eatsum transactions that we audited covered either two or three solid legal sized drawers in our files.

Q. Well, I mean, drawers like the drawers over there of the Government's case, something like that? A. That is it exactly.

Q. Now, there were two or three drawers as big as the files that I am facing of the Government of work sheet papers, have I got that right? A. That is correct.

Q. Now, when Mr. Roth was handed the papers, did you hand him three or four drawers like that or only an envelope about the size, maybe a half inch or an inch larger than the Government's exhibit file; which was it? A. He was handed envelopes into which these work papers had been sorted.

Q. All right. How many? A. I have no idea. I didn't personally hand him anything more than the first set of envelopes.

(2063)

Q. Well—— A. After that, Mr. Giglio and I retired to my private office.

Q. Well, can you tell this Court and jury, from your knowledge of this transaction, about how many envelopes were handed, as you say, to Mr. Roth? A. I could not, from any personal knowledge. Mr. Weinert took care of that.

Q. Did you not say on your direct examination that basket after basket of torn papers were dragged out? A. Yes, sir.

Q. Where were they dragged out from? A. From the other private office where the actual destruction was going on.

Q. Did you see them dragged out? A. Yes, sir.

Q. Well, your direct was, as I have it; 15 or 20, at least 20 basketfuls of papers were dragged out; is that right? A. That is the impression that I got at the time. That still lingers with me.

Q. What, if you don't mind, is your best recollection rather than an impression? A. Fifteen to 20 is my recollection of the——

Q. Where were they dragged out from? A. From the private office across the lobby of the main room, out into

(2064)

the corridor.

Q. You saw that done? A. Yes, sir.

Q. They were not dragged out from the men's room, then? A. Oh, no.

Q. And they weren't dragged into the men's room? A. I wouldn't know whether any of them were dragged into the the men's room.

Mr. Stryker: All right now, just a minute.

By Mr. Stryker:

Q. When you testified, Mr. Bercu, in this deposition, will you tell me who was present in the room when you testified? A. When I testified? Mr. O'Brien, I believe, was the examining attorney in the first session of the deposition. Mr. Vincent O'Brien. I am quite certain that my attorney, Mr. Joseph M. Cohen, was present throughout the deposition.

Q. Who else? A. There was a Government attorney present, as I recall.

Q. What is his name? A. I don't recall his name.

Q. Who else? A. An assistant of Mr. O'Brien's.

Q. Who else? A. I don't recall anyone else, other than

(2065)

the stenographer, of course.

Q. Well, did you see any Government agents there in the room when you testified? A. I believe Mr. Twohig was there.

Q. Mr. Twohig was there when you testified, I have that clear? A. That's right.

Q. Any other agent? A. Not that I recall.

Q. Now, then, was Mr. Twihig present in the room when you testified as follows——

Mr. Stryker: Page 302, Mr. Wessel.

"Q. Did you not retain any copy of those of your own—that is, any copy, yourself? A. Not to my recollection.

"Q. Did you endeavor to make any provision to do that? A. I don't think so."

Was Mr. Twohig there when you so testified?

A. I wouldn't know whether he was present when I so testified because I was not watching to see who walked in or out of the room as I was testifying.

Q. Well, he was there when you began testifying, you said that? A. I said I believe that he was present.

Q. And he was there when you ended your testimony, wasn't he? A. I presume he was. I don't recall.

(2066)

Q. Are you saying now he walked out of the room while you gave this testimony? A. I don't know.

Q. How long after you gave this testimony did you subscribe under oath to your deposition? A. Beg your pardon? Will you please repeat that.

Mr. Stryker: Yes, read my question.

(Question read.)

Mr. Stryker: Strike it out. I used the word "subscribe."

By Mr. Stryker:

Q. How long after you gave this testimony, deposition, was it that you signed the deposition? A. Probably six or eight weeks later.

Q. Well, was anyone with you when you—you signed and swore to it then, did you not? A. I did sign to it, did sign it and——

Q. And swore to it? A. And swore to it, of course.

Q. Now, was Mr. Twohig present when you signed and swore to the deposition? A. No, sir.

Q. Between the time of your giving the testimony that I asked you about and the time of your signing, did Mr. Twohig say to you, your testimony is not correct about mak-

(2067)

ing any efforts to preserve the copies or taking any measures or whatever it is, the particular questions I have asked you; did he do that? A. No, sir.

Q. Now, when you testified, did Mr. Twohig remind you that you had already turned over photostats to him? A. No, sir.

Q. Well, the fact was that you had turned them over before you gave this testimony in October, 1952; is that right? A. That is my recollection.

Q. And within about a year, if it was '51; is that right? A. Might have been a year; it might have been three years earlier.

Mr. Stryker: Just a minute, your Honor, if you will.

By Mr. Stryker:

Q. Did you testify in the deposition that you tore up every scrap of paper concerning partnership transactions? A. That I tore up every scrap?

Q. No, I paraphrased it wrong. Did you testify that every scrap of paper in your files relating to the partnership transactions was destroyed? A. To the best of my knowledge at that time and recollection.

(2068)

Q. Well, I ask you, was this question asked you and did you give this answer——

Mr. Stryker: Page 300.

Q. (Continuing) "Q. Is that true also of the audit reports for the partnership that were in your possession? A. Every scrap of paper in our files concerning the partnership transactions."

That is what you swore to, isn't it?

A. That is what I stated at that time.

Q. You didn't qualify it by saying to the best of your recollection or anything of that kind; you just answered as I have read it; is that right? A. No, sir.

Q. Is that right? A. I take it that is what is in the record.

Q. All right.

Mr. Wessel: I would like your Honor to read——.

The Court: Haven't we been over this?

Mr. Wessel: This testimony he just read is not with regard to that subject at all.

Mr. Stryker: Well, let's see.

Mr. Wessel: I would like your Honor to see that, beginning at the bottom of page 299. This is

(2069)

with regard to another thing entirely.

Mr. Stryker: I will be glad to go back.

Mr. Wessel: It is with regard to a meeting in Mr. Goldhill's office, I believe.

Mr. Stryker: Where do you think it should start with, Mr. Wessel?

The Court: I am trying to read this, what Mr. Wessel gave me, Mr. Stryker. I will be with you in just a second.

Mr. Stryker: All right. I will wait until your Honor is finished.

So that I may know what you are talking about, is it 299, Mr. Wessel?

Mr. Wessel: 299 and on to the page that you read.

Mr. Stryker: Show me where you mean, the last question and answer; I will be glad to read them. All right.

Mr. Wessel: My objection was to the question which stated that this question and answer related to destruction of documents, whereas the testimony there relates to the discussion about the documents which were to be destroyed in the future.

Mr. Stryker: Well, I will read any part that

(2070)

you think qualifies what I have read, if you will point it out to me. I will do it gladly. You say bottom of page——

The Court: We read all this this morning.

Mr. Stryker: I don't think so.

The Court: I remember your asking that question about a lot of reports this morning. I don't see any sense in going over it more than once.

Mr. Stryker: Well, this part—Mr. Wessel says there is something here that is not read; I would like to read it, page 299, if your Honor has it before you, and I will ask the witness to look over it with me so as to be sure I am quoting it right.

The Court: All right.

By Mr. Stryker:

Q. I think Mr. Wessel suggests the bottom of page 299:

"Q. What did Mr. Giglio say? A. He said that he would not sign the agreement with Mr. Lubben, turning over the plants to Mr. Lubben, unless I agreed or"——

A. "I agreed to destroy"——

Q. Wait a minute:

—"I agreed to destroy or to have his assistants

(2071)

destroy all the work sheets of the partnership in my possession.

"Q. Was Lubben present when he said that? A. Yes, sir.

"Q. Was anyone else present? A. Yes, sir.

"Q. Who else. A. So far as I recall, Mr. Roth was present, very much so. I believe that Mr. Goldhill may have been present. I can't say definitely.

"Q. Is that true also of the audit reports of the partnership that were in your possession? A. Every scrap of paper in our files concerning the partnership."

Now, I think I have stated everything.

A. Yes, Mr. Stryker, you have read—as Mr. Wessel has pointed out, you have read a discussion of Mr. Giglio's as to what he demanded.

Q. I have read what you testified to. Have I read it correctly? A. You have read correctly.

Q. That is all I want to know at the moment.

Now, let me have this quite——

You testified, did you not, here, that Mr. Giglio refused to agree to the terms of the dissolution unless the records

(2072)

were destroyed.

That isn't the exact words, but isn't that the substance of what you told us here? A. That is the substance.

Q. All right. You also testified here that Mr. Lubben and Mr. Giglio had an oral agreement about a dissolution. You told me that, didn't you, or told Mr. Wessel that day? A. Definitely.

Q. All right. Now, you say the records were destroyed in May or June of 1946; is that right? A. In late—I should say late May of 1946.

Q. Now, I show you a photostatic copy of the Government's Exhibit 31 in evidence and ask you if that paper refreshes your recollection that Mr. Giglio and Mr. Lubben had agreed upon the terms of the dissolution in writing on March 6, 1946?

I have been a little belatedly adding to my question. If it confuses you at all, I would be glad to have the recorder read it.

A. This refreshes my recollection with regard to what I thought was a verbal agreement had been reduced to writing on March 6th, but does not change my recollection that Mr. Giglio refused to turn over the plant as that agreement provides, until those papers were destroyed.

(2073)

Q. Now, this is a document in evidence. It is a written agreement in the form of a letter, directed "Dear Dave," and signed by William Giglio, David Lubben, it looks like

"Witness, Roth", on the bottom; is that right? I don't know whether that is right or not; is it "Roth"? A. That's right, Louis J. Roth.

Q. Louis J. Roth, all right.

Now, that, you recall now, was a written agreement, was it not? A. Not only do I recall now it was a written agreement, but the amendments were made at my insistence, the written amendments.

Q. All right. I am going to read everything—I had better come up there so to be sure I get it right. A. Thank you.

The Court: Is this a document in evidence——

Mr. Stryker: Yes; sir.

The Court: ——you are going to read?

Mr. Stryker: It bears— I must have this in connection with this testimony.

The Court: All right.

By Mr. Stryker:

Q. It reads, does it not—will you follow me please—

(2074)

A. Surely.

Q. (Continuing)—date, "March 6, 1946."

"Dear Dave:

"In accordance with our discussion concerning the future of Eatsum Food Products Co. as a going business I make you the following proposition:

"I agree to take over your 50 per cent ownership in the business beginning May 31, 1946, and myself conduct the affairs of the partnership in its entirety until May 31, 1946. At that time I agree to accept full payment of your federal income tax liability as reflected by the partnership federal income tax return"——

A. Sorry, you skipped.

Mr. Wessel: Wasn't there a line left out?

A. You skipped a line.

Q. I did? I think you are right. ". . . will assume payment of your federal," is that it? A. ". . . At that time I agree to accept full ownership of the business. . ."

Q. Oh, you are quite right. Now follow me. Let me see. Let's go back:

> "I agree to accept full ownership of the business and in return for your interest will assume payment (2075) of your federal income tax liability"—is that wrong?

A. That's right.

Q. (Continuing) —"as reflected by the partnership federal income tax return filed at the close of business on May 31, 1946."

Now, there is an interlineation; is that your hand? A. No, that is Mr. Roth's, as I recall.

Q. Maybe you can decipher this better than I can. A. ". . . as reflected on the books of the company, also all New York State income taxes."

Q. All right. Then it goes on:

> "I will also assign to you the plant and equipment the partnership now possesses for your exclusive ownership. In the meantime, even though you no longer be active in the conduct of the business, I consent to have a salary for you to continue at $200 a week"—"per week," it says—"and permit you to use the plant and equipment for your exclusive purposes beginning March 9, 1946."

Then there is some handwriting; maybe you had better read that; I am not sure I will get it right. A. "Part payments dated May 1, 1945 to terminate"——

(2076)

Mr. Wessel: Doesn't that read "Partner" or "Partnership agreement"?

The Witness: Oh, "Partner's."

Mr. Wessel: Or something like that?

The Witness: "Partner's agreement dated May 1, 1945."

By Mr. Stryker:

Q. Read it again; I can't read it. A. "Partner's agreement: . . ."

Q. Where is that? A. Here it is, "Partner's agreement . . ."

Q. You are right, you are right. A. ". . . dated May 1, 1945 to terminate May 31, 1946."

(2077)

Q. And it goes on, one line: "If this expresses our intention, please sign the acceptance of this letter at the bottom." It is signed by William Giglio, and accepted by David Lubben, whose handwriting you recognize; is that right? A. That is correct.

Q. All right. That being so, the fact is, isn't it, that Lubben took the physical possession of the plant in the Bronx on or about March 9th or 10th, 1946? A. That is correct.

Q. So he already was in possession when you say this tearing of papers incident happened; is that right? A. He had been in possession from March 9th on.

Q. And the rights of the parties had been defined by this written agreement that I have shown you and you have read; right? A. That is correct.

The Witness: Your Honor, is it permissible for me to make a clarifying statement at this point?

The Court: As to your testimony?

The Witness: As to my testimony, and the name of Mr. Goldhill appearing in my previous testimony.

Q. Go ahead, I won't stop you, Mr. Bercu, if you want to say something to clarify your testimony. Go ahead. A. I realize now that the reason I mentioned the name of Mr.

(2078)

Goldhill in connection with the discussions with Mr. Giglio, is because this agreement of March 6 was drawn up and signed in Mr. Goldhill's office.

Q. All right. A. I recall that distinctly, and I place Mr. Goldhill as having been present in connection with the discussion concerning destruction of documents, because I did recall Mr. Goldhill's presence in connection with this agreement.

Q. Am I interrupting you? A. Sure.

Q. Am I? If I am, do you want to go on? A. No, no. I am sorry.

Q. All right. The fact remains though, does it not—these facts remain: when they stopped being partners on or about March 9, 1946, Mr. Lubben continued the operation of his candy plant in the Bronx, exactly the same place, the same way as he had it before? A. With a new corporation.

Q. With a new corporation called General Confections. A. Right.

Q. Are you correct, you think, Mr. Bercu, in saying that this particular document, 31, which you see was drawn on Eatsum Food Products Company paper, was drawn in Mr. Goldhill's office? A. I have a very definite picture, recollection, of this amendment being written in by Mr.

(2079)

Roth right in Mr. Goldhill's office.

Q. Well, the paper itself, though, before the amendment which you have read, was that—— A. The paper might have been typed in the office of Eatsum, the original letterhead, and then brought up to Mr. Goldhill's office.

Q. All right. Well, you remember this morning—I don't mean this morning, I mean in your deposition you testified concerning how and why this destruction was going to happen, is that correct? A. Correct.

Q. This morning—this afternoon, then, did not Mr. Wessel ask you to state what was going to happen? Is that clear?

Mr. Stryker: Pardon me.

The Court: May I have the question read back?

Mr. Stryker: I withdraw it, your Honor. I am having a little—I withdraw my question.

Q. Did you in the deposition, page 302——

Mr. Stryker: Mr. Wessel, one or two questions and answers.

Q. —after the ones that I asked you a few minutes ago—I am not going to read them again—if you made any provision for keeping copies; then it goes on:

"Then you destroyed everything you had at the (2080)

request of Mr. Lubben? A. Concerning the partnership affairs.

"Q. When did that transpire, Mr. Bercu? A. Sometime in the early spring of 1946."

Were you asked those questions and did you give those answers? A. Yes, sir.

Q. I show you——

Mr. Stryker: First I will have marked—you had better clip them or something so that they will stay together—two groups of papers.

(Defendants' Exhibits EEE and FFF marked for identification.)

Q. Will you examine Defendants' Exhibit EEE for identification and tell me in general what they are. A. These are work sheets.

Q. Whose work sheets? A. I don't recognize the handwriting as being that of any associate or employee of mine. There is no indication on the papers that they came from our office in any way.

Q. Well, they relate to the Eatsum Food Products Company, don't they? A. They relate to the Eatsum Food Products Company for the period from April 1944 to December 1944. There is no indication on them that these are work papers from our office.

(2081)

Q. Can you identify them, irrespective of whether there is such indication? A. Oh, they are definitely accountant's analysis of checks drawn to cash, with a columnar indication of what accounts were charged for those checks, but I have no way of identifying those checks, these items or these papers as having come from our work files, from our working paper files.

Q. You have no doubt, though, have you, that these papers I have shown you were accountant's work sheets for the date you have mentioned, concerning Eatsum Food Products, whether you made them or whoever made them? A. They are certainly in the form of accountants' work sheets.

Q. Otherwise you have no way of identifying them? A. I have no way.

Q. You never saw those before? A. There is no——

Q. Would you say you never even saw them before? A. I can't even say that. There is nothing in the papers, in the handwriting, that is in any way familiar to me.

Q. Would you look at them and just tell me whether your recollection is that you did or did not ever see them before?

Mr. Wessel: The question has been answered,

(2082)

if your Honor please.

A. I have no recollection of whether I have or have not seen these before, because there are thousands of work papers in our files.

Q. You knew the handwriting or became familiar with Mr. Roth's assistants, didn't you, Hausman and—— A. Yes, sir, I think I was somewhat familiar with that.

Q. What was the other man's name? A. Starr.

Q. Starr. A. I never knew Starr's handwriting. I did know Hausman's.

Q. I don't know who it is myself, so maybe you can tell me. A. That is not Hausman's handwriting, so far as I can recall it after ten years.

Q. It is hard to recall these things after ten years? A. Not in the case of my own associates and assistants.

Q. All right. Now I show you Defendants' Exhibit FFF for identification and ask you if you can identify that group of papers? A. These are in exactly the same handwriting.

Q. As the former exhibit I have shown you? A. As the former exhibit, and the mere fact that they continue right on from January 1945 through May, 1945, make me

(2083)

feel that these analyses were never by anyone from our office.

Q. It is not your handwriting, of course? A. It is not my handwriting.

Q. Is it the handwriting of Mr. Weinert or any of the other people you have there? A. Not of Mr. Weinert or any of the others who were in our firm at that time. We had barely ten or twelve, more likely fifteen different assistants during that period.

Q. You don't identify the handwriting on that at all? A. I don't identify it at all.

Q. Did you ever see those papers before? A. I don't recall ever having seen these particular papers before.

Q. You wouldn't say you didn't? A. I could not, because of the voluminous nature of the work papers.

Mr. Stryker: I think your Honor wanted to stop at three for your conference.

The Court: Have you got much more?

Mr. Stryker: It will take a bit of time to follow this up.

Mr. Wessel: I would like, if your Honor please—I won't do it now, but I would like your Honor to look

(2084)

at these sheets some time.

Mr. Stryker: I haven't offered them in evidence yet, but I am always glad to show his Honor anything.

Mr. Wessel: I would like it done. We won't do it now. It will be done Monday.

Mr. Stryker: Anything I have here, the Judge is welcome to see. He doesn't have to ask me.

The Court: I would like to look at them.

(Exhibits handed to the Court.)

The Court: All right, I think we will adjourn now to ten-fifteen Monday morning. Don't discuss the case.

(Adjourned to Monday, February 7, 1955, at 10:15 o'clock a.m.)

(2085)

New York, February 7, 1955,
10.20 o'clock a. m.

Trial resumed.

(Jury present.)

BERNARD BERCU, resumed.

The Court: All right, Mr. Stryker.

Cross Examination Continued by Mr. Stryker:

Q. Before we adjourned on Friday, you were shown Government's Exhibit 31, an agreement between Giglio and Lubben on the stationery of the Eatsum Food Company; you remember that? A. Yes, sir.

Q. And you first stated that that agreement was drawn up—an agreement of March 6th, you remember that one? A. Yes, sir.

Q. (Continuing)—was drawn up and signed in Mr. Goldhill's office, and when your attention was called to the fact that it appeared to be on the stationery of Eatsum Food Products Company, you testified that the interlineations were made by Roth right in Mr. Goldhill's office; that is

(2086)

correct, isn't it? A. I so testified, to the best of my recollection.

Q. And you added that the paper might have been typed in the office of Eatsum, on the original letterhead and was then brought up to Mr. Goldhill's office; that is correct, isn't it? A. Yes, sir.

Q. Now, you were present in Mr. Goldhill's office on March 6th? A. I know I was present in Mr. Goldhill's office and I assume it was shortly after March 6th.

Q. I didn't hear that. A. I was present in Mr. Goldhill's office and I assume it was shortly after March 6th, the date of that letter.

Q. Well, you were there on the day that that letter was interlined by Mr. Roth in your presence? A. That is my recollection.

Q. And Mr. Giglio was there at that time, too? A. So far as I can recall, Mr. Giglio, Mr. Lubben were there.

Q. Now, you remember that in your deposition of October 7th or 8, 1952, you stated that Goldhill was present when the destruction of the papers was discussed, you re-

(2087)

member that? A. I recall having said that, and I explained or tried to explain that after seeing that——

Q. I understand. A. —memorandum I realized that he was not present, that the subject of the destruction of the papers was not discussed in Mr. Goldhill's office, nor in his presence.

Q. And you so testified, I believe, in response to Mr. Wessel's questions on Friday? What you have just said? I think you said in response to Mr. Wessel's questions, didn't you? A. No, my impression is that I only said it in response to your questions and in connection with your production of this paper.

Q. Well, it doesn't matter at this point.

Now, you testified, also, that the reason that you knew Mr. Goldhill was not present when the destruction of papers was discussed was that the discussion with regard to the terms of the dissolution did not take place until after the records had been destroyed; you so testified the other day, did you not? A. Well, there were two sets of——

Q. No, no, just a moment, Mr. Bercu, if you don't mind. Did you not so testify the other day. A. I don't recall having testified to that.

(2088)

Q. Let's see if I can refresh you.

Mr. Stryker: Page 2035, Mr. Wessel, bottom of the page.

"Q. If you haven't finished, why, I should think should. A. It is my recollection now that the discussion with regard to the terms of dissolution did not take place until after the records had been destroyed; that there was no occasion for such a discussion in Mr. Goldhill's presence, because Mr. Giglio refused to consider meeting in Mr. Goldhill's office to close the deal until after those records had been destroyed."

You so testified the other day? A. Evidently I did, but the paper, this agreement dated March 6th, has refreshed my recollection as to the series of incidents. The——

Q. Just a moment. All I am asking you, Mr. Bercu, it now appears that I correctly paraphrased your testimony; whatever the reason for it was, that is what you swore to, isn't it? A. I swore what I swore to.

Q. Can't we have that? I just read it from the minutes; isn't that so? A. Yes, sir, yes, sir.

Q. All right. Now, the exhibit that was shown you,

(2089)

Exhibit 31, dated March 6, 1946, contains the terms of the dissolution agreement between Mr. Giglio and Mr. Luhben, doesn't it? A. Yes.

Q. Doesn't it? A. Yes, sir.

Q. All right. Now, does it not, then, follow, as night does day, that the testimony that you gave in this trial, that

the discussion of the terms of the dissolution did not take place after the records had been destroyed, is utterly false? A. No, sir.

(2090)

Q. Well, were the terms of the dissolution fixed before the discussion that you said was had regarding the destruction of documents? Just was it that way or not? A. Those terms were fixed—the terms recorded in the document were fixed on or about March 6, 1946.

Q. All right, that answers that.

Q. Well, then, March 6th, the fixing of the terms was definitely then before the discussion regarding the destruction of the documents; that must be true? A. Yes, sir.

Q. Mr. Bercu, you remember Friday you were shown certain of your work papers which the defendants had produced here in this court; you remember that? A. Yes, sir.

Q. Do you remember being asked certain questions about them by Mr. Wessel on your direct examination? A. I remember being asked questions.

Q. I am not asking what they were. A. Which questions, I don't recall.

Q. But there were questions concerning them by Mr. Wessel. A. Yes, sir.

Q. One of the group of papers that Mr. Wessel showed you, you characterized, did you not, as your master work

(2091)

sheets? A. Yes, sir.

Q. And you stated that those were the work sheets from which the monthly balance sheet and profit and loss statements were prepared, did you not? A. Yes, sir.

Q. And you found, as you looked at those papers, a master work sheet for June, July and August, and two of those master work sheets for September; is that not so? A. Yes, sir.

Q. Then you remember Mr. Wessel asked you if there was any reason or explanation for there being two of those sheets for the month of September; you remember that? A. Yes, sir.

Q. And you answered, did you not, that the reason for there being two of these sheets for September was that you weren't able to get a statement from Roth, Giglio's accountant, as to the basis for the assets transferred from the sole proprietorship to the partnership; do you remember that? A. Not statement, but agreement.

Q. What? A. I was unable to get an agreement from Mr. Roth as to the basis for opening the partnership records.

Q. Did you not state that the reason for there being

(2092)

two sheets was that you were not able to get a statement from Roth as to the basis for the assets transferred? Didn't you say that? A. Well, if I said "statement" I was in error. It should be agreement.

Q. You also said, did you not that you were trying to get such an agreement as to the basis of the assets transferred from the sole proprietorship to the partnership, that is, the basis of the assets transferred from June 1, to the latter part of October '45; you testified that way, did you not? A. Yes, sir.

Q. And you also stated that you did not post the general ledger until the month of September 1945; that is right, isn't it? A. Yes, sir.

Mr. Wessel: If I may, counsel, just for a moment. To set the record straight, on page 2004, the word used was "agreement" and not "statement." "I was unable to get an agreement from Mr. Roth."

Mr. Stryker: The record is whatever it is.

Q. Now,—— A. Mr. Stryker, may I point out——

Q. Is that not what you said? A. I——

Q. I want to know if that isn't what you swore to? A. If the record so indicates.

(2093)

Q. Don't you remember what you swore to on that subject? A. Mr. Stryker, that is what I wanted to point out, if I may.

Q. Just a minute. You may point out anything after you answer my questions. Is that not what you swore to? A. Definitely, as I recall.

Q. All right. And you also swore that you finally got an agreement in October with Roth as to the basis of the opening entries, and it was then that the general ledger was posted up and you took a second trial balance directly from the general ledger as of September 30th; you so swore, did you not? Did you not? A. Yes, sir.

Q. And that was your explanation for the two sets of work papers, wasn't that? A. Yes, sir.

Q. Now, what were the assets transferred from the sole proprietorship to the partnership, concerning which you were unable to get an agreement? Tell me what those were —unable to get an agreement until October 1945—just tell me what those were? A. The valuation of the——

Q. One minute. Take it easy. What was it? A. Valuation of the accounts receivable.

Q. Go on. A. And the valuation of the plant and equip-

(2094)

ment.

Q. Those two items? A. Yes, sir.

Q. Now, is it not a fact that the partners had agreed upon a definite basis for such assets some time before June —June 12, 1945? Is that not a fact? A. That is not my recollection of the fact.

Q. Is it not a fact? A. The basis was agreed to, but the facts were—but the details, the actual figures, were not agreed to by Mr. Roth until late October.

Q. I show you a paper marked Defendants' Exhibit VV for identification, and ask you if you can identify that paper? Mr. Roth here has already identified the signatures of David Lubben and William Giglio. Now just identify that paper, won't you? Without reading it out loud, tell me if you can identify it. A. Yes, sir.

Q. One sheet bears your name, does it not? A. Yes, sir. It bears my signature as a C. P. A.

Q. That is right. Now, what is that paper? I am not asking at the moment for the contents. A. This is a balance sheet of the sole proprietorship.

Q. Pardon me. Take the whole paper before you get

(2095)

the balance sheet. What is the paper? A. An agreement, a partnership agreement between David Lubben and William Giglio, dated June 12, 1945.

Q. A partnership agreement? Look at it. It is an agreement. A. An agreement to sell.

Q. That is what it is, isn't it? A. An interest in the assets of the sole proprietorship to the partnership.

Q. You saw and read that paper on the date that it bears, namely June 12, 1945; is that not a fact? A. My recollection is that I was present when those—on June 12th—when those details were discussed.

Q. And part of that sale agreement, or attached to it, made part of it, was a schedule marked "Balance Sheet, April 30, 1945," that you signed, did you not? A. Yes, sir.

Q. Does not that schedule that you signed show the accounts receivable for the date of the schedule? Look at it. A. Yes, sir; accounts receivable total.

Q. Does it not state in dollars the value of the accounts receivable on that paper? A. Yes, sir.

Q. It states them, does it not, as $273,631.77, for the assigned accounts receivable and $12,256.57, for the unassigned accounts receivable; is that right? A. Yes, sir.

(2096)

Q. Does it not also state the valuation of the plant and equipment as of that date? A. Yes, sir.

Q. What is that item of plant and equipment on there? Just read it over your own signature A. $53,760.42 less reserve for depreciation of $4,275.09.

Mr. Stryker: I now offer in evidence Defendants' Exhibit VV for identification.

Mr. Wessel: No objection.

The Court: All right, received.

(Defendants' Exhibit VV for identification received in evidence.)

(2097)

The Court: All right.

Mr. Stryker: This, ladies and gentlemen, is an agreement made and executed June 12, 1945—June 12—between David Lubben, conducting the business of Eatsum Food Products Co., called the Seller, and Eatsum Food Products Co., a limited partnership.

It has certain recitals, and it says:

(Mr. Stryker read from the exhibit.)

The Court: I would like to have the last paragraph read, Mr. Stryker.

Mr. Stryker: I will read it right now.

The Court: The last paragraph on that page.

Mr Stryker: All right.

(Mr. Stryker read paragraph 6 from exhibit as requested by the Court.)

Mr. Stryker: Now, except where I have read it all—I don't claim to have read it all; I have read the details, I have read what seems to me important—I want you to read it all, particularly Exhibit A, this thing here, signed "David Lubben and Bernard Bereu, CPA," and I want particularly to direct your attention to the items "Accounts Receivable," they are the fourth under the "Asset" column, and the inventories merchandise, $102,839.86, and the equipment, $33,760.42.

(2098)

Mr. Foreman, I will hand that to you. I would be glad to have you look at it as well as the other jurors.

(Handed to jury.)

By Mr. Stryker:

Q. So it is a fact, isn't it, Mr. Bereu, that Lubben had agreed with Giglio on a definite valuation of accounts receivable and valuation of plant and equipment many months before September, 1945; that is a fact, is it not? A. No, sir, that is not the fact. That is exactly contrary to the fact.

Q. Well, doesn't that agreement under Schedule A represent what the seller is selling to the buyer? A. That is the seller's representation as shown by the seller's accountant's report, my signed report as to the valuation of the assets.

Q. That's it. A. That was used as the basis for the agreement, but that was not the final evaluation in Mr. Roth's mind, and the agreement provided that if the accounts receivable failed to realize the amount shown that there would be a further adjustment.

Also, although I didn't read this agreement this morning, my recollection is that the valuation of the plant was

not agreed to by Mr. Roth until three or four months after that agreement was signed.

(2099)

Q. Well, now, regardless of Mr. Roth, it was agreed to by the buyer and the seller, based on a schedule signed by you as a CPA, isn't that true? A. That Schedule is taken from the books of the Eatsum Food Products Company, and Mr. Roth refused to accept the book figures.

Q. I am not talking at the moment about Mr. Roth. I am talking about the parties to this contract, which contained a schedule signed by you as a CPA; that is what I am talking about at the moment. A. Yes, sir.

Q. Now, is it not, then, a fact, regardless of what you say was in Mr. Roth's mind, that the parties to that agreement, Mr. Lubben and Mr. Giglio, did agree on the date it bears—date, June 12, 1945—on a definite valuation of accounts receivable and valuation of plant and equipment many months before September, 1945? Just leave out Mr. Roth for a moment. Isn't that what the parties agreed to? A. They did not agree to that, because the very wording of the agreement which you just read at his Honor's request shows that the accounts receivable were still subject to collection, so they definitely did not agree to accept those

(2100)

assets as shown in our statement of April 30th.

Q. Other than that last item that you mentioned, had they agreed on the valuation of accounts receivable? A. Other than that?

Q. On a definite valuation of accounts receivable. A. Well, I can't understand the meaning of language, when I say that they have not agreed on the valuation because of the provision for readjustment of the amount, then you tell me other than that they agreed on it; well, what is an agreement?

Q. Well, the paragraph that I read to you states that if the buyer should realize from said accounts a sum—you had better read it with me, see if I read it right.

Mr. Wessel: I think I will object to the examination as to the legal meaning of the document, if your Honor please. It is a question of law, I think. We are going to get into a discussion of what is the effect of paragraphs of the contract or the whole contract.

Mr. Stryker: I am not asking any legal opinion from this man at all. I am only asking to verify if I am reading it correctly. That is the sole point of

(2101)

my being here.

Mr. Wessel: If that is all it is, I object to it as irrelevant.

The Court: I listened to you read it, and I think you read it correctly. It accorded with my recollection, Mr. Stryker. I mean, you have the document as it is.

Mr. Stryker: All right, that is satisfactory.

The Court: As I see it, as to the accounts, that document shows a representation by the seller, and the buyer takes those figures tentatively subject to adjustment.

Now, if I am wrong, you correct me; save any time we can on that.

Mr. Stryker: I would never say you are wrong unless I was sure of it, and I know you would quite agree with me.

By Mr. Stryker:

Q. Is not the paragraph 6 that I read to you a definite formula for the valuation of the accounts receivable? It is a definite formula, isn't it?

The Court: Better let him see paragraph 6, because I am sure we don't remember the paragraph.

(2102)

Mr. Stryker: That is the one I read, your Honor. That is the one I was just talking about.

Q. That is the one (indicating).

(Handed to witness.)

A. There is a definite formula for evaluating the final collections from the accounts receivable and also for adjusting the amount if, as the paragraph indicates, the actual amount realized should be less than the amount stated in our balance sheet with an allowance of $3,000 for any adjustment.

Q. Well, it was a valuation, and the only thing open was the $3,000 figure; that is right, isn't it? A. No, sir, the thing open was $285,000.

Q. Well, let's see: Wasn't it expressly agreed and understood that if the buyer—that is the new partnership—no—yes, the new partnership—should realize from said accounts receivable a sum up to $3,000 less than the amount stated in Exhibit A, within the aforesaid time, that no claim shall be made by the buyer against the seller by reason of deficiency? Isn't that what it means? A. If the amount collected came within $3,000 of the net amount shown, then there would be no claim.

On the other hand, if the collections were substantially

(2103)

less than $280,000, then Mr. Lubben would have had to make good to the partnership.

Q. Wait a minute. Doesn't this define it—doesn't it say that if the buyer should realize from the accounts receivable a sum up to $3,000 less than the amount stated within the aforesaid time, no claim shall be made by the buyer; doesn't it say that? A. Yes.

Doesn't it also say that the seller shall make good any amount beyond that?

By The Court:

Q. Mr. Bercu, isn't this what it comes down to: Would it be more accurate to say that unless the partnership realized $282,000 of the $285,000 on these accounts receivable, that Mr. Lubben had to make up the difference? In other words, if they lost 10 per cent for bad debts Mr. Lubben had to make it up, isn't that right? A. Precisely it, your Honor.

Q. And that is what you and Mr. Roth took some time to get to an agreement on; how much was due to bad debts and other things? A. And returns, and discounts and so on.

The Court: All right. Can't we get on to another subject?

(2104)

Mr. Stryker: I will pass it back to the foreman. I think I took it away from him. Sorry.

(Handed to jury.)

(2104a)

Mr. Stryker: Let me for a moment go to something else.

The Court: All right.

By Mr. Stryker:

Q. Now, Mr. Bercu, you testified on direct examination, did you not, that you finally agreed in May or June 1946, to turn over your working papers to Roth and Giglio for destruction; that is what you said, isn't it? A. Yes, sir.

Q. You also testified that when you made this agreement to turn over the papers you didn't tell your client, Mr. Lubben, that you were photostating the major work papers; you swore to that? A. Yes, sir.

Q. The major working papers, you told us on direct examination, were the trial balance sheets, the loan and exchange accounts, and then you add "and so on." You swore to that, did you not? A. Yes, sir.

Q. It is a fact then, isn't it, that your major working papers consisted of (1) the trial balance work sheets—among others. I am going down the list. That's right, first, isn't it? A. Yes, sir.

Q. And (2) the loan and exchange account; that's right, (2105)
isn't it? A. Yes, sir.

Q. Did you also photostat your audit reports for a number of months? A. That is my recollection now after nine years.

Q. The audit reports would come within your category of "major working papers," would they not, Mr. Bercu? A. Yes, sir.

Q. Were there any other working papers? A. I don't recall any at the moment.

Q. You testified on direct examination, did you not, that the reason you photostated these papers was that you could foresee the day when you would be sitting in a Federal Court testifying about the Lubben and Giglio affairs; that is what you said, isn't it? A. Yes, sir.

Q. So the papers you photostated before you turned your files over for destruction were the key papers; that's right, isn't it? A. Yes, sir.

Q. They were the papers that you knew would be needed in case the Government should prosecute anyone for tax fraud? A. Yes, sir.

Q. You knew the great importance of these papers, which you photostated in the event of future tax prosecution, did you not? A. I thought I did.

(2106)

Q. From your knowledge of accountancy, any accountant would know the importance of those papers, would he not? A. Any accountant would know the importance of those papers if the original—if the books of account had disappeared, then those papers would become vital in any prosecution.

Q. Just let's stay with one thing for a moment and go on. Isn't it a fact that a man like Roth or any accountant would realize the great importance of the papers we have enumerated? A. Any accountant would. I wouldn't particularize Mr. Roth.

Q. Well, you felt that he would be certain to look for those important papers, didn't you? A. I have no way of determining what went on in Mr. Roth's mind.

Q. All right, but I am talking about your mind. A. of my mind? I did try to have photostated the work sheets and the audit reports of the last couple of months of operations.

Q. My question was relating to you. Did you not feel sure that if this event happened, as you say it did, that Mr. Roth would have enough intelligence to look for those important papers? A. I can't characterize Mr. Roth's in-

(2107)

telligence.

Q. I am not asking you to, Mr. Bercu. I am asking about you, your state of mind.

The Witness: What was the question? May I have the question, please?

(Question read.)

The Court: You can't ask him to characterize Mr. Roth's intelligence.

Mr. Stryker: No, I am asking his state of mind, your Honor, how he felt.

The Court: You are asking his state of mind in an appraisal of Mr. Roth.

Mr. Stryker: Does your Honor exclude that question?

The Court: I exclude the question.

Mr. Stryker: I except.

Q. You knew, did you not, that if, if any of your working papers were going to be destroyed, these papers that we have been discussing would be the ones to be destroyed; you knew that, didn't you? A. Yes, sir, and so far as I know, the papers I am referring to were destroyed.

Q. Well, just taking as we go the papers that I have been discusing in the last fifteen or twenty questions, your (2108)

answer is "Yes" to my question about that: is that right?

The Court: I think he did say "Yes."

A. Yes, sir.

Q. You also testified on direct examination that there may have been twenty or thirty sheets of photostats that you prepared and turned over to the Government; you testified to that, did you not? A. Yes, sir.

Q. And that you neither asked for nor obtained a receipt from anyone in the Government for those; is that right? A. That is correct.

Q. How many of those 20 or 30 photostats, that you turned over to the Government, consisted of the trial balance papers? A. I wouldn't recall today. Might have been six or eight sheets.

Q. How many of the 20 or 30 photostats, or 20 or 30 papers that you photostated and turned over to the Government, consisted of copies of your audit reports? A. Probably six or eight sheets.

Q. How many of the 20 or 30 papers that you photostated and turned over to the Government consisted of your work sheets concerning the loan and exchange account? A. As I recall the accounts, three or four sheets.

(2109)

Q. Mr. Bercu, certain papers were produced here by the defendants and shown to you by Mr. Wessel last Friday. That is a fact, of course; we all remember that. I show you a group of six papers, and ask you if they do not represent your trial balance work sheets for the months indicated on them? A. Yes, sir, for the months from June 1st through October 31, 1945.

Q. One of the categories of what you have called the "major work papers," which you photostated for the Government, consisted of trial balance work papers; is that right? A. Yes, sir.

Q. They are those trial balance work papers for those months.

Mr. Wessel: I object to the form of the Question.

Mr. Stryker: Withdrawn.

Q. Are those papers which I have shown you not—is it not a fact that they are your work papers, containing your trial balance work papers for the months that you have indicated? That is a fact? A. For those months, yes, sir.

Q. All right. Well, those are here in court, are they

(2110)

not? A. Yes, sir; for those months ending October 31st.

Q. Did you photostat—— A. May I interrupt? May I see those work papers?

Q. Why, certainly (handing). A. Thank you.

Q. The papers I am showing you are marked Government's Exhibit 134 in evidence. A. Thank you.

Q. Are you through looking at it? A. I have been looking through the consecutive numbers to see—numbers to see whether I had turned over these sheets to Mr. Cort in Chicago.

Q. I am not asking any question at the moment. You said you want to look at them and I have no objection. A. Thank you.

Q. So I would like to proceed with the examination. A. Thank you.

Q. Did you photostat for the Government your audit reports for the last couple of months of operations?

The Court: You said "Did you photostat for the Government"?

Mr. Stryker: Yes, I guess the question is——

Q. Did you make photostats, which you turned over to the Government, of your audit reports for the last couple of months of operations? A. So far as I can recall, we did.

(2111)

Q. I show you Government's Exhibit 131(1) to (86), in evidence, being part of the many papers that the defendants produced here, and ask you to state what they are? A. I have previously identified these papers as being our office file copies of the typed reports of the Eatsum Food Products Company affairs, the top one being as of January 31, 1946, our last typed report.

Q. Reports of what, Mr. Bercu? A. Balance sheet, profit and loss statement.

Q. Audit reports, aren't they? A. Audit reports.

Q. All right. A. Monthly.

Q. Monthly audit reports. A. Audit reports.

Q. Now you wanted to say something else and I interrupted you inadvertently. Will you finish. Take your time. I don't want to hurry you. Just give me a rough count. You spoke of six or eight pages. There are about twenty there in your hand. A. Exactly twenty.

Q. Well, a moment ago you spoke of six or eight papers that you photostated and turned over to the Government, papers exactly in this category, did you not? A. Yes, sir.

(2112)

Q. Are those the papers that are now before you, concerning which you said to Mr. Wessel, which none of us could hear, but which Mr. Wessel was fair enough to repeat when you said to him, where you said——

> Mr. Stryker: Page 1991, if you want it, Mr. Wessel:
>
> (Continuing) "Mr. Wessel: I will repeat what the witness said to me. He said, 'These are fantastic. These appear to be our office file copies.'"

Did you say that? A. Yes, sir.

Q. And did you also say, the next page:

> "The reason that I remark about it is because I was under the very strong impression that those were the very papers that were destroyed or were to have been destroyed at Mr. Ciglio's insistence, and I don't recall having seen them since the time of their destruction. I find it hard to understand how they appear in court now, unless they are part—they escaped destruction with part of the papers which I turned over to the Federal authorities in October '52."

You so testified in this case, did you not? I mean, I have read you what you said here in this court? A. Yes, I——

(2113)

Q. Now these are or were your work papers, aren't they? A. These are the typed reports.

Q. All right. A. Which came from our work sheet manuscript reports.

Q. Well, whatever they came from, they were your papers? A. Oh, yes, they were from our files.

Q. And you found it fantastic that they were here, not destroyed, when you had sworn that all the master work papers had been destroyed, that is why you found it fantastic, wasn't it? A. No, what I said was that all the papers were turned over for destruction. I don't know what was destroyed because I wasn't present when the destruction took place.

Q. Yes, I understand. On page 1987 of this record, this case, did you say under oath:

> "I had been an accountant"—this was on direct examination, when Mr. Wessel was interrogating you—"I had been an accountant for quite a number of years, and I felt that we were entitled to that protection because it didn't require so much imagination to foresee the day that I would be sitting in federal court testifying about the Lubben and Giglio affairs.
>
> (2114)
>
> So we had the major work papers, the trial balance work sheets, loan exchange accounts, and so on, photostated.
>
> "Mr. Giglio and Mr. Roth came to our office by appointment. Mr. Roth and one of my partners, Mr. Weinert, went into a separate office, and proceeded to literally tear up every sheet of work paper

that had been given them and those did include all of the work papers that I thought we had in the files at the time. Those work papers were extremely voluminous. They ran possibly two or three full drawers in a legal sized cabinet."

Mr. Stryker: Do you want the rest of it read now?

Mr. Wessel: Yes.

Mr. Stryker: Surely.

(Continuing reading.) "Personally, I had nothing to do with—I didn't supervise that destruction in any way, because while Mr. Roth and Mr. Weinert—and I think two assistants—were destroying, tearing these papers apart and destroying them, Mr. Giglio was in my private office, explaining to me—perhaps I will put it directly: Mr. Giglio said to me that these work papers were being destroyed

(2115)

because of his—because, as he said, he wanted to know that his partnership affairs were being kept within his control and that no outsider knew anything about them.

"He then said to me, 'We have ways of taking care'—and this is in substance, because this happened ten years ago, or nine years ago—in substance he said, we have ways of taking care of any man who talks about our affairs out of turn.

"I didn't discuss the question of what he was talking about, because to me it was quite obvious. I let the matter drop because so far as he was concerned he had gotten his way in having all these work papers destroyed.

"I never saw Mr. Giglio after that until I saw him in the courtroom this morning."

Now I have read the part that I thought was significant, and I have added everything that Mr. Wessel wanted added. Now you so testified, didn't you? A. Yes, sir.

Q. You have told us that these audit reports were part of the major work papers, have you not? A. Yes, sir.

(2116)

Q. Which you photostated and gave the photostats of them to the Government before your papers were turned over for destruction; you have told us that, is that right? A. No, that we had them photostated before they were turned over, not that we gave them to the Government before.

Q. If I said that, I didn't mean that. I know that is so. But you had photostats? A. Right.

Q. Which photostats you later turned over to the Government. A. Right.

Mr. Stryker: Your Honor, it would help me, and I might save time if we took our usual recess at this point.

The Court: All right, we will take a recess now. Don't discuss the case.

(Short recess.)

(2117)

Q. You stated a moment—a few moments ago, that the documents that you photostated were for the last couple of months of operation; is that right? A. That is my recollection.

Q. Now, aren't these audit reports that you have been looking at the white papers, Exhibits 131-83 to 86, the audit papers not for the last couple of months but for more than that? A. Yes, sir.

Q. How many months? A. I believe there were either three or four months here.

Q. Just look at that and then tell me. A. Four months.

Q. Beginning when, and ending when? A. October 31, 1945, and ending January 31, 1946.

Q. And these four sheets, contained in Exhibit 135, which I haven't specifically directed your attention to, are what? A. Work sheets of December 31, 19—June 1 to December 31, 1945.

Q. Go on. A. Here are some journal adjustments of November 30——

Q. Wait a minute. I showed you four sheets, didn't I? Did you look at that? A. That is part of the work

(2118)

sheets of December 31, 1945, two sheets.

Q. All right. Those were sheets made by you or under your supervision? A. Under my supervision.

Q. They are trial balance sheets for the last couple of months of the Eatsum partnership operation, aren't they? A. Yes, sir.

Q. And they are produced here by the defendant? A. By the defendant, yes, sir.

Q. That's right. Now, you have told us, have you not, that you photostated copies of your work sheets concerning the loan and exchange account of Eatsum partnership; that is right, isn't it? A. That is my recollection.

Q. That is what you said here. A. That is what I stated, yes.

Q. Now, in the papers which Mr. Wessel showed you on Friday, did you find any of your work sheets pertaining to this loan and exchange account? A. Are you referring to the comparison between the photostatic sheets and the work papers?

Q. No. I am just talking about the sheets. Did you find—the sheets here that the defendant produced, those

yellow sheets that Mr. Wessel interrogated you about,

(2119)

that is all I am asking for the moment, your sheets. A. There was one sheet in the entire batch of papers which was headed "Loans and Exchanges," and had two or three items on it, that was apparently a discarded sheet.

Q. Now, was one sheet, did you say —— A. May I point out, Mr. Stryker: I examined those sheets to compare the batch of photostatic sheets, photostats, with original work papers in that batch which you just handed me, and as I recall now there was not one of the photostated sheets, of the photostats was represented by an original work paper in the pile of papers which you have clipped together there.

Q. Now, are all those other loan and exchange accounts —were they destroyed? A. I assume they were.

Q. I asked if you know. A. I don't know what was destroyed.

Q. But you swore to it in your deposition? A. I swore that I turned over papers for destruction.

Q. Well, did you merely assume that they were destroyed on your direct examination or did you testify to the fact? A. I assumed that they were destroyed because I believe I

(2120)

testified on direct that I was not present when any paper was torn or destroyed.

Q. Did you testify before the grand jury? A. Yes, sir.

Q. When? A. On at least two different occasions.

Q. Well, give the the last time. A. I don't recall the dates specifically.

Q. Well, approximately; I don't care especially. A. I believe it was in October of 1952.

Q. And again later on? A. I think earlier than that.

Q. Sometime in 1952, but earlier; right? A. Either 1952 or 1951.

Q. Did you testify before the grand jury that all of these master work papers of yours were destroyed? A. If I stated that——

Q. I am asking you. A. I don't recall.

Q. I am asking if you testified to that? A. I don't recall having made the statement that they were destroyed. I stated to the grand jury that I had turned over those papers or should have stated to the grand jury that I turned over the papers to Mr. Weinert and Mr. Roth for destruction. I was not present at the actual destruction.

(2121)

Mr. Stryker: I would like to have, under the same ruling, presented to your Honor and then to me, if you so rule, this man's testimony before the grand jury on the occasions that he speaks.

The Court: I don't think there is any basis for it. I am going to deny it.

Mr. Stryker: You are going to deny that application?

The Court: Yes.

Mr. Stryker: I except.

By Mr. Stryker:

Q. The loan and exchange work papers, work sheets, were included in your category of major work papers, were they not? A. Yes, sir.

Q. Which were in the two or three full—in two or three drawers of the size of the cabinets over there; is that right? That is what you said, I believe, here. A. Well, they would have been present for each of the months. Each of the eight months that we audited we would have had a schedule of loans and exchanges.

Q. Now, you said that you had photostated about two or three sheets—I beg your pardon—three or four sheets

(2122)

of loan and exchange account work papers which you subsequently turned over to the Government. You so testified, did you not? A. I believe I did.

Q. I show you these papers——

Mr. Stryker: Nine, I could them. Maybe you will verify that count.

I ask to have them marked for identification.

Is that right, nine?

The Clerk: There are ten here.

(Marked Defendant's Exhibit GGG for identification.)

Mr. Stryker: I can't even count. All right.

Q. I show you Defendants' Exhibit GGG for identification, consisting of ten yellow sheets, and ask you what they are (handed)? These are work sheets from our office of the Eatsum Food Products Company partnership, exchange accounts and loan and exchange accounts for the period from June, 1945, to January 31, 1946.

Mr. Stryker: I ask to have them marked in evidence.

(2123)

The Witness: May I amend my statement and

Mr. Wessel: For a limited purpose, I take it.

say that these are certain loan and exchange accounts on the books. There were other loan and exchange accounts on the general ledger of the partnership at that period.

By Mr. Stryker:

Q. And you say that those others were destroyed? A. I said——

Q. What? A. I have said that I was not present at the destruction of any of the papers.

Q. I know. A. I assume that all the papers turned over to Mr. Roth and Mr. Weinert for destruction were destroyed. I don't know that these papers were even turned over to them for destruction.

(Marked Government's Exhibit 137 for identification.)

Mr. Stryker: Oh, you are offering one. I thought I had an offer before the house.

The Court: You do.

Mr. Wessel: Yes, this is on the voir dire.

Mr. Stryker: All right.

Preliminary examination by Mr. Wessel:

Q. I want to show you, Mr. Bercu, one of the sheets you have just identified, which is headed "Loan and Exchange, November 30, 1945," and another photostat which (2124) has been marked Exhibit 137 for identification, and ask you if you can tell me whether the one in your hand is the original of which 137 is a photostat?

Mr. Stryker: Can I look at it? Is this marked?

Mr. Wessel: This is yours (indicating).

The yellow sheet is the one which was just marked as part of Defendants' Exhibit GGG, and it is headed "November 30, 1945."

Mr. Stryker: All right, all right.

Mr. Wessel: And it is one of two sheets for that date, three sheets for November 30, 1945.

A. This is a photostat of this sheet without any question.

Q. Now, would you examine that, if you would, Mr. Bercu. You will note that on the photostat there is a check mark at the bottom of the page, which does not appear on the yellow sheet in your left hand; is that correct? A. That is correct.

Q. Furthermore, at the bottom of the photostat there is the number 21A which does not appear on the yellow sheet? A. Right.

Mr. Stryker: Where is that, Mr. Wessel?

(Mr. Wessel indicates.)

A. There is a number on top which doesn't appear on

(2125)

the yellow sheet.

Q. There is a number on the top also, 168.

Now, does that in any way change your recollection as to whether the yellow sheet is the original of which the photostat is a copy? A. Obviously the photostat was taken from another sheet which had a stamped number 168, which had on the bottom a check mark opposite the balance, and which again had on the extreme bottom 21A, which are not on this yellow sheet.

Q. Now, I ask you this question, sir: Would you again examine the Exhibit GGG shown to you by the defendants, by Mr. Stryker, and tell me whether you are sure that those are in all respects exact papers prepared by your company or men in the employ of Bernard Bercu & Company?

I would appreciate your examining it closely, sir, the pages.

Mr. Stryker: You don't mind my standing here to look at it?

Mr. Wessel: No, sir.

A. So far as I can determine from an inspection of the papers, these are our printed work sheet forms. They bear the initials of either partners or assistants of the firm, and

(2126)

they appear to have been part of our work papers prepared in the regular course of our monthly audits.

Mr. Wessel: I have no objection to the documents, for the limited purpose of showing the documents destroyed or not destroyed, but for the mathematical computations included therein it would require, of course, quite a detailed analysis.

Mr. Stryker: Let's do one at a time. I am offering them generally. They are papers kept in the ordinary course of business by this gentleman——

Mr. Wessel: There is no foundation——.

Mr. Stryker: —in his business, and I thought that had been the standard for the admission of papers; they were kept in the ordinary course.

The Court: If you are offering them to prove the transactions of Eatsum partnership, they are secondary evidence, and you haven't laid any basis for secondary evidence.

Mr. Stryker: At the moment I am not offering it for that purpose.

The Court: All right. That is all Mr. Wessel is objecting to.

Mr. Stryker: Then you will mark them; is that

(2127)

right? I think you have one mark on there.

(Defendants' Exhibit GGG for identification received in evidence.)

Mr. Stryker: While the judge is looking at that, would you be good enough to mark this for identification. Count it.

(Marked Defendants' Exhibit HHH for identification.)

By Mr. Stryker:

Q. These papers in evidence, HHH, are the Eatsum Food loans payable special; that is what you said; they are loan and exchange accounts—— A. Which are you referring to now?

Q. The ones you have been over. Oh, I am wrong, I am wrong.

These papers, GGG in evidence. A. Yes.

Q. What are they? You have told me once. A. These are exchange accounts, certain of the exchange accounts on the books.

Q. From when to when? A. From June 1, 1945, through January 31, 1946.

Mr. Stryker: All right, Mr. Foreman.

(Handed to jury.)

(2128)

By Mr. Stryker:

Q. Now, Mr. Bercu, I show you Government's Exhibit —I mean Defendants' Exhibit HHH for identification, and ask you to examine the sheets. Are they numbered? Well, I will take your count, whatever there are.

The Clerk: Five pages.

Q. Five pages, and tell us what those are. A. These are five work sheets apparently from our office files, prepared in the regular course of our audit of the transactions of the Eatsum Food Products partnership between June 1, 1945, and November 30, 1945.

Q. What accounts do they relate to? A. Loans payable special, special loans, special loans, loans special, special loans.

Q. They were kept, you told us, in the ordinary course of business by you or one of your assistants under you? A. One of our assistants or principals.

Mr. Stryker: All right, I will offer those in evidence.

(2129)

Preliminary Questions by Mr. Wessel:

Q. Mr. Bercu, I want to hand you Exhibit 96-A, which is the Eatsum general ledger, and ask you if you will compare just some of these sheets with the items in the general ledger and see if they are the same or different? A. I see a difference here of two cents.

Q. Does that difference in any way indicate that these sheets may not be authentic? Would you care to look and compare these items? A. They appear to be work sheets that were prepared in the course of our audit.

Q. I am pointing to a part of page 1, and I want to ask you whether that in any way, pointing to the right hand portion——

Mr. Stryker: Point to anything. I don't care.

Mr. Wessel: There appears to be an erasure here.

Q. (Continuing) I want to ask you whether or not that erasure in any way was on the document when it was in your custody and control, or not? Do you know? A. I have no way of knowing after nine years whether that erasure was made before the paper left our office or afterwards.

(2130)

Mr. Stryker: This one here? Is that what you are referring to, the one I am pointing to?

The Witness: That is correct, yes, sir.

Mr. Stryker: All right.

Q. Is this series of five sheets, by the way, complete, in so far as it relates to the accounts during the period mentioned by you in your questioning by counsel? A. I don't think so. I believe that there were more sheets besides these that covered this account.

Mr. Wessel: I have no objections to the document for the limited purpose again referred to.

The Court: All right.

Mr. Stryker: The purpose of this, of course, and of the other, was to establish that these documents were not destroyed. That is the purpose I am offering it.

Mr. Wessel: That is correct.

(Defendants' Exhibit HHHH for identification received in evidence.)

Mr. Stryker: This, Mr. Foreman and ladies and gentlemen, Defendants' exhibit in evidence, produced by the defendants, HHHH, you have heard the witness's description of it. I won't bother to repeat

(2131)

it. Would you be kind enough to look at it (handing to jury).

By Mr. Stryker:

Q. Is it not the fact that papers that have been shown you here, produced by the defendants, relate to the only two loan and exchange accounts on the books of Eatsum part-

nership? A. They relate only to specific loan and exchange accounts. There were still other loan accounts and drawing accounts on the books.

Q. Are they key loan and exchange accounts, the others you speak of? What are they? A. Well, I have in mind specifically, I saw here photostats of the David Lubben special loan or drawing account, and I have not seen the original work papers from which those photostats were made.

Q. Those were Lubben's drawing accounts? A. Lubben's drawing accounts or special accounts.

Q. Now, Mr. Bercu, what you have described as the major work papers of the Eatsum partnership, vital for tax prosecution, those papers have not been destroyed; is that not the fact? A. It is a fact that they have appeared here, so obviously they haven't been destroyed.

(2132)

Q. Either by the defendants or anyone else. That is evident; isn't it? A. Yes, sir.

Mr. Stryker: All right.

Q. From time to time, during the existence of the Eatsum partnership, did Mr. Lubben explain to you the disposition of the cash checks which had been charged to the loan and exchange account of the partnership? A. Yes, sir.

Q. The very purpose of the Eatsum partnership loan and exchange account was, was it not, to record cash purchases by Lubben until explanations were made by Lubben as to where the items should be assigned; that is correct, isn't it? Is that not correct? A. I believe that in substance that is correct, but——

Q. All right. A. (Continuing) But when I say I believe that, I infer that from the nature of the special loan

account and the analysis made by my associates or assistants.

Q. Well, you were in charge of the bookkeeping of this Eatsum partnership while it lasted, were you not? A. Yes, sir.

Q. You either audited or participated or supervised (2133) audits of those books, didn't you? A. Yes, sir.

Q. Well, now, let me see if I understand an audit. An audit is an examination by an accountant, not only of the figures, the mere arithmetic in the books, but to obtain the underlying data, facts or documents on which the figures are based. That is probably a very rough definition of an audit, but is it about that? A. A very good one, Mr. Stryker.

Q. Thank you. You knew that these black market transactions, from your examination of the books and your knowledge of Lubben, were conducted by him in connection with the company that he bought in, the candy company, did you not? A. What do you mean by black market transactions?

Q. Well, overpayment transactions. A. Overpayment? Yes.

Q. All right. Now, is it not a fact on January 31, 1946, there was an unexplained balance of $101,064.07 in the Eatsum partnership loan and exchange account?

Mr. Stryker: Can I have the general ledger?

Q. I am handing you Government's Exhibit 96, and ask you to look at it and answer my question if you can.

The Witness: May I have the question repeated?

Mr. Stryker: Yes.

(2134)

(Question read.)

Mr. Wessel: Not to hold it up, perhaps if the witness looked at Exhibit GGG, it might help.

Q. It is account 15 in the ledger, I can help you. A. Yes, there is a debit balance, according to the photostatic copy of the ledger sheet number 15——

Q. Well, —— A. ——of $101,064.07 in the loan and exchange account as of January 31, 1946.

Q. That was a balance from whom to whom? A. There is no indication in this loan and exchange account as to the origin of these loan and exchange items.

Q. Look at this GGG in evidence and see if that doesn't help you answer my question, your work sheets, produced by the defendants. A. Yes, sir; these work sheets were drawn up with the intention of——

Q. Well—— A. ——for the purpose of trying to reconcile the sources of the receipts in the exchange accounts and the payees of the amounts.

Q. Do they indicate anything about Mr. Lubben, amounts that he owed? A. Some of the items are marked "D. Lubben."

Q. Quite a few of them, aren't there? A. I beg your

(2135)

pardon?

Q. Quite a few?

The Court: Aren't we going into the contents of these now, in so far as they reflect on the transactions of Eatsum?

Mr. Wessel: We are also going into the issue of another trial, if your Honor please.

Mr. Stryker: The point that I am coming to will, I think, appear obvious. I am not interested in the correctness or incorrectness of these papers.

The Court: Tell me where you are going.

Mr. Stryker: I will be glad to tell your Honor, but I don't think I should be required to disclose the purpose to the Government.

Mr. Wessel: I will tell his Honor something; then you may tell his Honor something.

(Mr. Wessel then had a discussion at the bench with the Court, off the record.)

Mr. Stryker: I had a simple question there.

The Court: Incidentally, it should have been on the record, shouldn't it?

Mr. Wessel: Well, I don't know whether it should or not.

The Court: All right.

(2136)

Mr. Wessel: It should be on the record perhaps out of the hearing of the jury.

The Court: Yes, I mean that. Come up.

(The following took place at the bench, out of the hearing of the jury:)

Mr. Wessel: It is my information that the loan and exchange account analysis which the witness is now looking at, photostats of which have been in the possession of the Government for some time, which now are apparently in Chicago, was one of the key issues in the Shotwell case in Chicago. The payments to D. Lubben, listed on that loan and exchange account, are shown in that case to have been actual payments of overage to Shotwell, and as a result of that, defendants in that case were convicted.

Now, the issue of whether or not that money went to David Lubben or somebody else involved

the trial of a case which I think lasted several months in Chicago.

The Court: We will put this on the record now, Mr. Stryker, and I will see that counsel for the Government is not apprised of it until you complete your cross-examination.

(The following colloquy took place not in the presence of Government counsel:)

(2137)

Mr. Stryker: I am not the least bit interested in the Shotwell case or any evidence pro or con. The purpose of this cross-examination is to develop what I believe to be the fact; and perhaps I can elicit it from this witness.

The Court: What fact is this?

Mr. Stryker: The fact that when Lubben came back home from Cuba, an investigation of his accounts had been made and he was asked to explain a large sum of money that he had withdrawn, which appeared on the loan account of the partnership. It was because of his failure and inability to do that that Giglio broke up the partnership. It is my submission that what happened here was, that Mr. Giglio wanted these papers to examine them, with respect to the controversy then raging between him and Lubben as to the disposition of these funds, and that this tearing of things is a pure fake, invented by Roth and by this witness, and which has now been shown, I think, to be totally untrue, and that the real purpose of wanting those documents was to enable him to settle this controversy as to how much Lubben had stolen from the partnership.

Do I make that clear?

The Court: I am going to sustain the objection (2138) to going into the contents of these documents until you establish these facts. At this point I don't see the materiality.

Mr. Stryker: Let me try it a different way.

The Court: All right, but I am not going into the contents of that.

(The following took place in the presence of the jury:)

By Mr. Stryker:

Q. Well, without going into the details of that document, although it is in evidence, a Government's exhibit, did you try to ascertain from Mr. Lubben what he had done with the money charged to him on the Eatsum general ledger? A. With regard to those items that were charged on loan and exchange account, we did try every month to match up the items against any merchandise transactions that might have occurred.

Q. Who is Beatrice Feldmann? A. The head bookkeeper of Eatsum Food Products Company.

Q. You know her signature, don't you? A. Her signature?

Q. Yes. A. I believe I know her handwriting.

Q. All right. I show you a group of papers——

Mr. Stryker: Somebody will have to count them: (2139) I may be wrong, but I ask to have them marked for identification first. Mark them as one exhibit for the time being to save time.

I am told there is a group in there that have been marked. I don't know which ones they are.

The Clerk: With the exclusion of the others we will mark them later on.

Mr. Stryker: All right.

(Marked Defendants' Exhibit III for identification.)

Q. I show you Defendants' Exhibit III for identification. I have not counted them and I will not take the time here. I ask you first if you can identify the maker of those particular checks I am handing you? A. Do you mean the company on which they are drawn by the maker, or the person that signs the check?

Q. I am interested in the maker, the man that signs the checks. You can give me the company on which they are drawn. A. These checks are drawn on the account of the Eatsum Food Products Company, first of 1841 Broadway and later of 19 Rector Street, New York.

The Court: Can I take a look at those, Mr. Bereu? I want to decide where we are going here.

(2140)

(After looking) All right.

Mr. Stryker: I think I had an unfinished answer, if I remember. Read my question, will you, Mr. Reporter.

(Question and answer read.)

Q. Well, you identify the signatures of the makers on these various checks, do you not? A. The only signature that I recognize is that of David Lubben. I don't recall myself Beatrice Feldmann's signature, although I knew her handwriting in connection with figures.

Q. Figures that you examined? A. That's right.

Q. From your knowledge here of her handwriting, would you not say——

The Court: Mr. Stryker, before we get off on the question of proving handwriting: I would like to know again where we are going on this?

Mr. Stryker: Well, let me ask this then. Perhaps I can indicate it.

Q. Are those checks entered on the loan and exchange account of the partnership? A. I wouldn't know without reconciling the individual items against the loan and exchange accounts.

Q. Well, you have the loan and exchange account here.

(2141)

Mr. Stryker: Is this it? Have I got it?

Mr. Wessel: This is it.

Q. I am handing you GGG in evidence, and I am handing you the ledger of Eatsum, a Government's exhibit. Now take those. I don't want to take every one.

The Court: Mr. Bereu, let me ask you this: before they would be posted in the ledger, would there first be an entry made on the check stub?

The Witness: Check stub, yes, your Honor.

The Court: And in the cash disbursement book?

The Witness: Yes, sir.

The Court: Then ultimately in the ledger?

The Witness: Yes, sir.

The Court: I am not going any further with this.

Mr. Stryker: Let me ask this, if your Honor please.

Q. Did you ever see checks, when you were making an audit of the partnership, of Eatsum partnership? A. I personally did not.

(2142)

Q. Well, if you didn't see them personally, were the fact of their existence—was the fact of their existence drawn to your attention as an auditor? A. Through the work papers, yes.

Q. Well, then, having been drawn to your attention, did you not, as a CPA, regard it as your duty in making an audit to inquire into that matter?

The Court: What matter is this, Mr. Stryker?

Mr. Stryker: The checks, what they were for, what was done with them, auditing this account.

The Court: Well, now, Mr. Stryker, we have been over this before. I am not going to have a man shown a group of checks, ten years after the events, without all of the books relating to them, and then asked a series of questions as to what those checks were for.

Mr. Stryker: Well, if your Honor please, will you bear in mind, please, that I have this gentleman's work sheets.

The Court: Work sheets, but not the underlying books.

Mr. Stryker: I have the ledger, and I have the checks.

The Court: You are trying to use these work

sheets now, as I understand it, based upon the correctness of their contents. Now, on that, they have not been admitted for that purpose.

Mr. Wessel: They are not complete either.

Mr. Stryker: With all due respect to the Court, that is not what I am trying to do at all.

The Court: All we have these work sheets in the record for is to show they exist. Whether the entries have anything to do with the accounts of Eatsum, that has not yet been proved.

Mr. Wessel: Let me also state they are not complete according to the witness' testimony, and the record should indicate that the group of checks, I think, is about two inches thick.

The Court: I made an erroneous statement. There is no proof that they relate to Eatsum. I say, of course, the face of the record shows that, but the accuracy of those records has not been established.

Mr. Stryker: I propose, for your Honor's submission, and I regard it as definitely germane to my duty to the gentlemen that I am here representing, now that I have the main accountant for the partnership, I have such records as I have—as you know, I have these checks—and regardless of what books

(2144)

may not be here, I submit that I have a right to interrogate this witness regarding those checks, what was done with them, what his audit was, what he found out from the audit, and particularly his talks with Lubben.

Now, that is vital to my defense, as I explained to you—as I have explained to you.

The Court: All right. When and if you establish a foundation for this evidence, Mr. Bercu can be recalled.

Mr. Stryker: Well, now, let's see if I can't do it right now. Let's see.

By Mr. Stryker:

Q. The general ledger of the Eatsum partnership was kept by you or under your supervision, wasn't it? A. Kept under my general supervision.

Q. All right. And these various work sheets of the loan and exchange account were kept by you or under your supervision, weren't they? A. Under my supervision.

Q. Yes. Now, there came a time, as an accountant, when it was your duty to audit the books and records of the Eatsum partnership; is that not so? A. Yes, sir.

(2145)

Q. Now, what did that audit consist of?

The Court: Now, Mr. Stryker, I am a little bit slow here. Is it your contention that these checks all relate to the loan and exchange account?

Mr. Stryker: I think it is, yes, sir.

The Court: Well, then, on the additional ground, then, of materiality I am not going to entertain it at this time without some further connection.

Mr. Stryker: Well, it is very material to this transaction alleged by the witness in his direct examination to have occurred.

I assure you that it is material to that, and I submit I should not be foreclosed to cross examine this man about matters in this partnership, about which he knows personally.

The Court: I mean, there is just a limit, that is all. There have to be limits to avoid this trial getting completely out of hand, and I think this is one of the limits I am going to impose.

By Mr. Stryker:

Q. Without stating what is in them, do the work sheets, GGG, I think before you, analyze the loan and exchange account No. 15 on the Eatsum books, Exhibit 96?

(2146)

The Court: That question presupposes the accuracy of the contents of GGG, and I will sustain an objection to it.

Mr. Wessel: Objection.

Mr. Stryker: If your Honor please, I respectfully except.

Won't you hear me on that? Here is a document kept by this man under his supervision. I don't know whether it is accurate or not. How can I know? I have got him here. Can't I interrogate him about it?

Mr. Wessel: Counsel, the witness has already said that it is not complete.

Am I correct, Mr. Bercu?

Mr. Stryker: It is a hundred per cent complete, as I understood his testimony.

Mr. Wessel: Is GGG a complete list of all the work sheets relating to the loan and exchange accounts?

The Witness: No, they are certainly not. Certainly there is no relation between the June 30th balance of the first sheet of GGG and the balance as shown in the general ledger, account No. 15.

(2147)

By Mr. Stryker:

Q. There is a what? A. Account No. 15 shows a balance of $26,000 as of June 30th, and this exchange account shows a balance of $19,000.

Q. Well, both of them were kept by you or under your supervision, weren't they? A. Yes, but this is part of a tremendous mass of work papers.

Q. Isn't this on page 14—doesn't it show an opening of 7250 on the ledger which you kept or kept under your jurisdiction, 7250, page 14? A. It does.

Q. All right.

Well, now, is there that item on your work sheet? A. There is not.

Q. Well, regardless——

Mr. Stryker: Strike that.

Q. Do you remember, when you discovered the fact—if I am right in recalling that you said that—of these checks, that you discussed them with Mr. Lubben? Just yes or no. A. May I have that question, please?

Mr. Stryker: I will withdraw it.

Q. Well, have you an item on your work sheet of (2148) $19,000-some-odd under June 30th? A. Yes, sir.

Q. Now, if you add that to the figure of 7,250, you get the opening statement of $26,000-and-some-odd; is that not so? A. Mathematically, that is correct, but this is not a transcript of that ledger sheet.

Q. Doesn't that show that these work sheets tie right into the ledger? A. As of June 30th, by making that additional calculation, yes.

Q. All right. Now, is it not a fact, then, that those work sheets are complete? A. In what respect?

Q. Well, are they complete? A. You asked me whether it is——

Q. Aren't they complete as an analysis of the loan and exchange account? Isn't that a fact? A. They are an attempted analysis, an attempted reconciliation of the debits and credits in the loan and exchange account.

Q. And that was done by you or under your jurisdiction? A. That was done under my general supervision.

Q. To whom did you charge those checks that I have shown you? A. To whom did I charge them?

(2149)

Q. You or your assistant. A. I couldn't say without examining the individual checks.

Q. Well, look at the loan and exchange account and your work sheets, and see if they help you at all.

The Court: Wait a minute. You are asking him to use those work sheets on the assumption that they are accurate, aren't you?

Mr. Stryker: I am not assuming anything he did was accurate. I am asking the facts of what he did.

Mr. Wessel: I object to examination on a document which is not in evidence for the purpose being used.

The Court: I don't understand that they have been received for that purpose, Mr. Stryker.

Mr. Stryker: I didn't understand your Honor.

The Court: I don't understand that this document has been received for that purpose.

Mr. Stryker: I am now talking about some other documents, the ones I marked for identification. I am trying to lay a foundation, to show what they were.

Mr. Wessel: Counsel has——

(2150)

Mr. Stryker: ——what his audit consisted of with respect to them.

The Court: How is what his audit consisted of with respect to them as yet relevant in this case? That is what I miss.

Mr. Stryker: Well, I will tell you, the relevance is this: What the dispute and the controversy is about.

The Court: When you lay that foundation, then we will go into this, but we are not going into the accuracy of the dispute and the controversy until we get some underlying evidence regarding it.

By Mr. Stryker:

Q. Will you look at the loan and exchange account, page 14 of the account No. 15, page 14—I have it—and will you look at the item, January 26, 1931—January 31, 194.?, and the figure, 1—what is it?—101,064.

Will you find that, about the middle of the page. A. Yes, sir.

Q. Does that not agree with your work papers?

Mr. Wessel: I object to examination of a document not in evidence for that purpose.

The Court: I will sustain the objection.

(2151)

Mr. Stryker, maybe I haven't made it clear. It is my holding that as of the moment there is no materiality in the loan and exchange account, whether you prove it by checks, whether you prove it by work sheets, or whether you prove it by books.

Now, when you lay—when I see the connecting links more clearly than I see them now, we will come back to it, but if I don't, we won't.

Mr. Stryker: Well, so long as I understand your Honor's ruling in that respect, as in all others, when you make a ruling, and I am clear——

The Court: I appreciate that.

Mr. Stryker: —as to the point, why, I obey it.

The Court: Very well.

Now I think we will go to lunch. We all agree on that.

Don't discuss the case.

Mr. Wessel: If your Honor please, may I, during the luncheon recess, discuss some things with this witness? I have not had an opportunity to do so, and there are a great many——

Mr. Stryker: I must, with this particular witness—I am sorry—I must object to that.

(2152)

The Court: I see no basis for objection. I will permit it.

Mr. Stryker: Your Honor allows that?

The Court: Yes, and if you want to discuss something with him, why, go ahead, too.

Mr. Stryker: I?

The Court: Yes.

Now, there were some—you still don't know the grounds of Mr. Stryker's offer, and I think that the Government's attorney at this point is entitled to it, and I don't think there was any disclosure in there that would prejudice the defense.

Mr. Stryker: Now that your Honor has ruled that I can't go into the line at all, I submit that I would say that I would agree with that; I think he is entitled to know what I said to you.

The Court: The other stenographer had that, but I think you should ask him or get the minutes from him.

Mr. Stryker: In view of the way the record stands now, I would agree with you.

The Court: Fine, Mr. Stryker.

Back at 2:05. Don't discuss the case.

(Recess taken at 1:45 p.m. to 2:05 p.m.)

(2153)

AFTERNOON SESSION (2:05 p.m.)

(Jury in box.)

BERNARD BERCU, resumed the stand.

Cross Examination Continued by Mr. Stryker:

Q. With whom have you been talking during the lunch hour? A. Mr. Wessel, the assistant district attorney.

Q. Who else? A. Mr. Present.

Q. One of the Government agents? A. Yes, sir.

Q. Who else? A. And Mr. Tilzer.

Q. One of the Government agents? A. Of the Government agency.

Q. Had lunch with them? A. Yes, sir.

Q. Did Mr. Wessel propound his theory to you? I am not asking you what he said. A. What theory?

Q. The theory that he mentioned, didn't say what it was, but you remember after we adjourned you were standing down here and I asked Mr. Wessel if someone on my side might be present at the interview, and he said no, that he wanted to propound his theory; do you remember that? A. Yes, sir.

Q. And did he propound his theory? He propounded certain questions to me. I don't know whether they were theoretical or practical.

(2154)

Mr. Stryker: I see.

Now, if your Honor please, I am not going forward further with this cross-examination, on the ground that my fundamental right of cross-examination has been curtailed by this episode, and also, I am respectfully moving for a mistrial because of it.

The Court: All right, I will deny your motion.

Mr. Stryker: I except.

The Court: Do you want redirect, Mr. Wessel?

Mr. Wessel: Yes, I have some questions.

Redirect Examination by Mr. Wessel:

Q. Mr. Bercu, was, I believe, Friday in court when I showed you Exhibits 131 through 135, the first time that you had seen work papers relating to the Eatsum partnership or proprietorship since the time of the destruction in 1946?

Mr. Stryker: One moment. I object to the question upon the ground that it assumes a fact not established, but on the contrary disproved the destruction. We have shown they weren't destroyed.

The Court: Let me hear the question.

(Question read.)

The Court: Overruled.

Mr. Stryker: Exception.

(2155)

A. It is obvious that certain work papers were destroyed, but not all of them, and the papers which I saw in the courtroom on Friday, I don't recall having seen since possibly the spring of 1946.

Q. You testified in the Shotwell case; am I correct, Mr. Bercu? A. I did.

Q. Were you shown certain documents in the office of one of the attorneys for the defendants out there? A. I was.

Q. Can you describe those documents, please. A. I was shown either the originals or photostatic copies of our report as of January 31, 1946. I believe that I also saw some interim reports between June 1st and January 31, 1946.

Q. Is this one of the subjects you and I discussed during luncheon? A. Yes, sir.

Q. I show you Exhibit 96, which is a part of the Eatsum general ledger, the loan and exchange account, in which you testified to very briefly on cross examination, and I ask you whether in the course of your audit for Eatsum partnership you did not discuss that account with the Eatsum partners, or some of the partners? A. We tried to analyze it——

Mr. Stryker: Just a moment. Under your (2156)

Honor's ruling, when I was examining him along those lines, that was excluded.

The Court: No, I excluded the testimony as to the content of that account. I distinctly remember your asking a question somewhere along this line and I permitted it, and I assume that is what provoked this further interrogation.

Mr. Wessel: Precisely.

Q. Can you answer that, please? A. I discussed some of the items which appeared.

Q. I don't want to go into detail, Mr. Bercu. Go ahead. A. May I continue?

Q. Yes. A. Which appeared in this account, with Mr. Lubben, in order to determine whether any part of these items should properly have been charged to cost of goods sold, so far as our analysis of purchases and sales was concerned.

Q. I show you the last two pages——

Mr. Stryker: One moment. I move to strike out the answer upon the ground it is precisely the matter concerning which I sought to inquire and which your Honor ruled I might not do, precisely.

The Court: I don't think so, Mr. Stryker. You asked him what he did with respect to his audit. (2157) You asked him did he discuss this with Mr. Lubben, and I assume that this question in Mr. Wessel's mind fills out that picture, and I will let it stand for what it is worth. But we are not going into the content of that account.

Mr. Wessel: I don't intend to go into the content of that account.

Q. Without regard to content at all, Mr. Bercu, will you tell me if the last two pages of 131(83) represent work you did in regard to this account in connection with your audit? I think you can answer it yes or no. A. Yes, work which I personally did. (2158)

Q. And when you say you personally did, is this page of Exhibit 135, headed "Eatsum Food Products Co. Summary Analysis of Sales and Estimated Gross Profit by Departments," in your handwriting, and the work that you did? A. Yes, sir.

Q. Is this one of the subjects that I discussed with you during lunch? A. Yes, sir.

Q. Mr. Bercu, I show you the general ledger, and ask you, if, with that book in front of you, which is Exhibit 96, and Exhibit 135, you can select from Exhibit 135 the page which represents the journal entry you made as of November 30, 1946, as the result of the discussions with Mr. Roth in connection with the value of the accounts receivable and so forth, discussed on cross examination?

Mr. Stryker: I object to it upon the ground that the question, as I understand it, purports to refer to a document not in evidence. I don't recall any jour-

nal being offered here. If I am wrong, I will stand corrected.

Mr. Wessel: If you will wait just a moment.

By Mr. Wessel:

Q. Do you know where the journal of the Eatsum Food Products Company is? A. I do not.

(2159)

Q. When was the last time you saw it? A. I probably had not personally seen it after September or October of 1945.

Q. Now, would you look at entries J23 and J24 in the Eatsum general ledger, and tell me whether or not those two numbered journal entries refer to the journal entry which resulted from your discussions with Mr. Roth as to the value of plant and the value of accounts receivable?

Mr. Stryker: I object to it as calling for a conclusion, and referring to a document not in evidence.

Mr. Wessel: The general ledger is in evidence, counsel.

Mr. Stryker: No, you said something about a journal entry.

Mr. Wessel: The journal entry is referred to in the general ledger as J23 and J24.

The Witness: May I have the exhibit in evidence, our office copies of the audit reports?

(Handed to witness.)

The Witness: No, there are more of them.

(Handed.)

(2160)

A. These are the entries that were written on the books as at November 30, 1945, J23 and J24.

Q. "These" refer to Exhibit 131-84, the last two pages: is that correct? A. That is correct.

Q. And those are reflected in the general ledger as J23 and J24, being two journal entries as of November 30th? A. That is correct.

Q. And those two journal entries represent—— A. Two pages of the journal.

Q. Those two pages of journal entries represent the adjustment which resulted from your conversation with Mr. Roth; is that correct?

Mr. Stryker: Object to that as calling clearly for a conversation, as to whether some papers resulted in his conversation. It calls clearly for a mere operation of this man's mind as to cause and effect.

I submit that there is no foundation for it at all.

Mr. Wessel: I will withdraw the question and rephrase it.

By Mr. Wessel:

Q. The journal entries 23 and 24——

Mr. Wessel: Strike that.

(2161)

By Mr. Wessel:

Q. Did you write journal entries 23 and 24 as the result of your conversations and agreement with Mr. Roth?

Mr. Stryker: I object to that, too. Whether an entry in some book was a result, the result of something he said or did or says he did is a mere operation of the man's mind. It is not evidence——

Mr. Wessel: I will withdraw the question.

Mr. Stryker: ——object to it.

Q. Did you cause journal entries 23 and 24 to be entered in the general ledger? A. I did.

Q. Did you do that subsequent to conversations with Mr. Roth? A. I did.

Q. When were those conversations with Mr. Roth? A. Sometime in the month of November, 1945.

Q. Had they taken place before that time also? A. They had been taking place continuously from the 1st of May until the middle of November, 1945.

Q. And did you have any such discussions after the middle of November, 1945? A. Not with regard to these particular transactions.

Q. Was this one of the subjects I discussed with you,

during lunchtime? A. Yes, sir.

Q. Incidentally, where did we have lunch, Mr. Bercu? A. Upstairs, in the private luncheon club, I believe it is called.

Q. How many people were there, approximately? A. Possibly 50, 60.

Q. Did they all see us having lunch together, do you know? A. I wouldn't know what they saw. I saw them.

Q. Now, Mr. Bercu, I show you Exhibit 134, which you identified the other day as being master work sheets from June through October, 1945, and ask you if there are not in Exhibit 135 two more master work sheets? A. There are.

Q. Have you picked those out? A. The work sheets for December 31, 1945, and for January 31, 1946, both.

Q. Those should properly be part of Exhibit 134? A. Well, these are the master work sheets. I haven't been able to locate the November 30, 1945, work sheet, although it might possibly be there.

Q. And was that the month in which the journal entry was made that we have referred to? A. That is when it was placed on the books——

(2163)

Mr. Stryker: Was what?

A. That is when this, the series of journal entries as of November 30, 1945, was placed on the books. Up to that time they had been carried in our work sheets from month to month.

Q. Now, Mr. Bercu, I notice a work sheet dated August 31, 1945. Should that also be part of Exhibit 134? A. That is part of the August 31, 1945, work sheet which is here.

Q. That is Exhibit 134? A. That is correct.

Q. And this page headed "Journal Adjustments August 31, 1945" should also be part of the August—— A. Not necessarily, because there are many adjustment entry sheets throughout, although from an accounting standpoint the journal adjustment sheet should be attached to the master work sheets.

Q. During luncheon, Mr. Bercu, did you and I also go through these various sheets, and you described to me which of them were properly part of Exhibit 134? A. Yes, sir.

Q. That was another subject we discussed? A. Yes.

Q. Is your recollection clear, Mr. Bercu, that all the

(2164)

documents, that is, all the photostats that you turned over to the Government, you turned over to either Mr. Twohig and/or Mr. Cordes? A. That is my recollection.

Q. Do you have any recollection of turning over through your secretary photostats to Mr. Present, the revenue agent? A. I have no independent recollection of that no, sir.

Q. At page 2036 of the transcript, Mr. Bercu, you made the statement in regard to a question of Mr. Stryker's in which he read the transcript:

"I don't question your reading of it, but I have reason to make the precise answer in that form."

I ask you what the reason was that you referred to in that answer?

Mr. Stryker: I object to it, calling for a conclusion.

Mr. Wessel: I will withdraw the question.

I have no further questions of this witness.

The Court: All right.

Recross Examination by Mr. Stryker:

Q. During your luncheon with the agents, and with the assistant, in the midst of my cross examination, did they (2165)

show you the checks that I have shown you here? A. No, sir.

Q. Did they mention them? A. Only in passing.

Q. Now, you said a moment ago that you turned over, as I heard you, photostats—you used the words "and or," as I wrote it down—either to Mr. Twohig or to Mr. Present.

Do I remember you right on that? A. Mr. Twohig or Mr. Cordes.

Q. Mr. Cordes, that is correct, and you don't know which one it was? A. Probably to both, although——

Q. Well, when you say "probably," have you a recollection on which you base that? A. No, I have no distinct recollection about it, because I——

Q. And you took no receipt? A. No, sir.

Q. All right. During this luncheon conference, in the middle of my cross examination, did Mr. Wessel ask you

whether you had inquired of Mr. Lubben with regard to the item of $101,004.07 on the general ledger of Eatsum partnership of January 13, 1946? A. No, sir.

(2166)

Q. What? I didn't get your answer? A. The answer is no, sir.

Mr. Stryker: That is all.

Mr. Wessel: Thank you, Mr. Bercu.

The Court: All right.

(Witness excused.)

The Court: Next witness.

Mr. Wessel: The next witness is Mr. Hexter.

Mr. Fraiman, if your Honor permits, will examine.

The Court: All right.

(2167)

HERMAN HEXTER, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Fraiman:

Q. What is your occupation, Mr. Hexter? A. Bakery supply manufacturer.

Q. Where is your firm located, sir? A. Cleveland, Ohio.

Q. Where? A. Cleveland, Ohio.

Q. What is your position with that firm? A. Owner.

Q. Did you receive a subpoena from the United States Government, Mr. Hexter? A. I did.

Q. You brought certain documents with you in response to that subpoena? A. I did.

Q. You did. May I see them, please? A. Yes, I have.

Mr. Fraiman: Would you mark these for identification, please.

(Marked Government's Exhibits 138 and 139 for identification.)

Q. Mr. Hexter, I show you Government's Exhibits 138 and 139 for identification and ask you if you will identify them for me, please. A. Well, 139 is our daily ledger—I (2168)

shouldn't say our daily ledger. It is our ledger where we enter our accounts receivable and moneys paid into. That is the one on this side here, we enter our bills, and when we get our checks in we put on this side, which we copy from this sheet here, which is our daily ledger.

Q. By "this sheet" you are pointing to Exhibit 138? A. 138. On Exhibit 138 we enter our collections as they come in every day, as our checks come in, and we take it from this sheet here and put it on here.

Q. Will you explain to me, Mr. Hexter, how the initial entries are made on Government's Exhibit 139 for identification? A. I don't quite understand you.

Q. That would be the entries on the left hand column. What is the foundation for those entries? A. Oh, the ones on the left hand side is for merchandise sold and shipped to Tavern Fruit Juice Company.

Q. Where do you get those figures from? A. We get those from the order that came into our plant.

Q. Are invoices prepared? A. Invoices are prepared and these invoices are entered on this particular sheet and sent out to the customer, Tavern Fruit Juice, as this hap- (2169)

pens to be.

Q. Does your firm retain copies of such invoices? A. We do.

Q. Do you have the invoices that relate to those entries that are on Government's Exhibit 139 for identification? A. No, not at this time, because this is 1945, and since we moved; why, they got lost or destroyed somewheres down the line.

Q. Have you made a search for those invoices? A. Oh, yes, made a very thorough search for it.

Q. Government's Exhibits 138 and 139 for identification, are they kept in the regular course of business of your company? A. Yes, sir.

Q. Is it the regular course of business of your company to keep such records? A. Oh, yes, we keep records of this stuff.

Mr. Fraiman: I offer Government's Exhibits 138 and 139 for identification in evidence.

Preliminary Questions by Mr. Stryker:

Q. What did you say this paper was, these two sheets the Government has offered now? A. One is a daily ledger and one is a book from our bookkeeping books.

Q. That is the only record you have of the transaction? A. That is correct.

(2170)

Q. Before you turned these over, were you communicated with by some agent of the Government? A. No, all we had was a subpoena.

Q. A subpoena? A. That is correct.

Mr. Stryker: I object to the documents on the ground that they are not binding upon the defendants or any of them. They do not establish when or what goods were delivered to the defendants.

Mr. Fraiman: May I ask a few further questions, your Honor?

The Court: All right.

By Mr. Fraiman:

Q. Mr. Hexter, can you tell me from looking at these documents what shipments to the Tavern Fruit Juice Company these documents relate to? A. Yes.

Q. And when the time of the shipments were? A. June 19th for $72. I happen to recall that we received an order for some apple extract, June 19th, for $72, right there.

Q. Yes. A. And that happened to be a trial order and if it worked out they were going to buy some more.

Q. I am interested primarily—— A. All the way through here?

Q. —in the last two shipments that were made, two

(2171)

sales; would you tell us when they were? A. Those two sales happened to be two sales of apple extract. The reason I happen to remember this is because it happened to be an unusual order.

Q. What were the dates of those sales, sir? A. $420 was on December 5th and December 12th.

Q. Was the total of both sales $420? A. No. December 5th was $420 and December 12th was an amount of $1,330.

Mr. Fraiman: I again offer Exhibits 138 and 139 for identification.

Mr. Stryker: I wish to ask a question before the Court rules—well, on the voir dire, I make the same objection.

The Court: All right, I will overrule the objection.

Mr. Stryker: Exception. Here they are (handing):

(Government's Exhibits 138 and 139 for identification received in evidence.)

Mr. Fraiman: I have no further questions to ask Mr. Hexter.

The Court: All right.

Cross Examination by Mr. Stryker:

(2172)

Q. Mr. Hexter, when did the Government first get in touch with you about any of your documents at all? A. Oh, possibly a good two weeks ago, I would say, two or three weeks.

Q. Who was it that got in touch with you? A. Some U. S. Marshal, I guess.

Q. Did you talk to any representative of the Government? A. Oh, somebody who just served me with papers.

Q. Did you talk to any representative of the Government? A. No.

Q. What? A. No, not that I recall it.

Q. This is only two weeks ago. You would remember, wouldn't you whether you talked to any agent of the Government or not? A. Not in my home to.m, no.

Q. What? A. No, sir.

Q. Did someone in your firm talk to an agent of the Government? A. No, sir; nobody talked to any Government man.

Mr. Stryker: That is all.

The Court: All right.

Mr. Fraiman: Thank you, Mr. Hexter.

(Witness excused.)

Mr. Wessel: Mr. Present is the next witness, if your Honor please.

(2173)

THEODORE PRESENT, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Wessel:

Q. What is your occupation, Mr. Present? A. Accountant.

Q. Are you in private practice at the moment? A. Yes, I am.

Q. Are you certified? A. No, sir.

Q. How long have you been in private practice? A. Since the first of the year.

Q. What were you before that? A. I was an Internal Revenue Agent for nine years.

Q. What is the requirement for certification in this State? A. Well, it requires three years of accounting experience with a certified public accounting firm.

Q. Mr. Present, before we get on to any other matters, did you, last Thursday or Wednesday, have occasion to look through a folder——

Mr. Wessel: Strike that.

Q. Did you last week sometime have occasion to examine certain documents which had been produced by the defendants in court? A. Yes, I did.

Q. First of all, what was the color of those documents?

(2174)

A. They were yellow sheets.

Q. Were they in some kind of a folder? A. They were removed from a red folder, yes.

Q. Did you see them removed from the red folder? A. I believe I did, yes, sir.

Q. Were Exhibits 131, which consists of a group of papers, in that red folder, or were they shown to you? A. No, the only sheets that were shown to me were yellow

sheets and contained—the only part of the sheet that I saw—the sheets were masked. There was a little cutout on the folder and the only part of it that I could read was the name, "Bernard Bercu & Company" that was imprinted on the sheets. There were some sheets that did not have the name imprinted on it.

Mr. Wessel: I ask that this paper be marked.

(Marked Government's Exhibit 140 for identification.)

Q. Were those yellow sheets masked with a piece of paper similar to Exhibit 140? A. Yes.

Q. You said they had a cutout on it. Correct? A. Yes, that's right.

Q. Could you describe and reconstruct the cutout, and I will give you in that connection Exhibit 134 to assist you.

(2175)

If I understand the motions you have been making with your hands, which are not reflected on the record, you—not you, but Exhibit 140 was torn out in the manner similar to the way it now appears, and it was placed over each sheet so that all it showed was the printed name which the top sheet of Exhibit 134 has, Bernard Bercu & Company, Certified Public Accountants. A. That's right; that is exactly the way it was done.

Q. And you did not see the contents of any of those sheets? A. No, sir.

Q. You could see that they were all yellow through this little hole? A. That's right, yes.

Q. Mr. Present, would you give your background in accounting, your accounting background, in some detail? A. I am a graduate of the C. C. N. Y., major in accounting. I also took graduate work in accounting at C. C. N. Y., and

New York University. I worked for a public accountant prior to entering the service, and then shortly after being discharged from the service I was employed as an Internal Revenue agent with the United States Treasury Department, field agent, for nine years.

Q. You were a prisoner of war during the service, Mr. (2176)
Present? A. Yes, sir.

Q. For how long? A. About six months.

Q. While a revenue agent, did you have occasion to teach in the Internal Revenue Agents Training School? A. Yes, sir; in 1950 I was an instructor in the school that the Bureau runs for new agents.

Q. When did you first commence working on the joint investigation which resulted in this case? A. It would have been sometime in the latter part of 1948.

Q. Have you been working on this case ever since that time? A. Yes, sir; on and off.

Q. What agents have you been working with? A. Well, during the investigative stage, it would have been with Special Agents Twohig and Mahon, and also we consulted with Mr. Cordes, who was the group chief at that time.

Q. And you have been working now in the latter portion of the prosecution of this case with Revenue Agent Fichtenholz? A. That is right; and also at the time, at one time in 1952, I had, oh, as many as five different men assigned to assist me in the investigation.

Q. Now I would like, Mr. Present, you to direct your answers to my questions to the tax year 1946, if you would, (2177)
and I would like to ask you certain questions about tax and accounting provisions which were applicable in that year. First of all, what was the provision in regard to the splitting of income by husbands and wives? A. That was not—

there was no provision in the law in 1946 permitting the splitting of income between husbands and wives. That did not come into effect until the year 1948.

Q. What was the provision in law with regard to the filing of a consolidated return by a corporate group? A. Well, Section 141 of the Internal Revenue Code sets forth the necessary degree of ownership and defines the affiliation group. Roughly it calls for a parent company or an interlocking parent company owning 95 per cent of the stock.

Q. During what period? A. During the entire year; and the only portion of the year for which you can file a consolidated return would be that portion of the year in which there was that necessary degree of ownership.

Q. What was the requirement with regard to the filing of estimated tax returns and payments thereon by individuals in 1946? A. There was a requirement in the law, setting forth the requirements for filing, and payments of estimated tax. Roughly, without going into the reading of

(2178)

the law in detail, any individual who had a hundred dollars worth of income not subject to withholding tax was required in 1946 to file a declaration of estimated tax.

Q. Was there any requirement for corporate estimates? A. There is no requirement for corporate estimates. There is a provision in the law under which a corporation which wants to file a tentative return and receive permission to file a delinquent return is required to estimate the tax that is due for the year on this tentative return and pay—in 1946 it would have been required to pay 25 per cent of the estimated tax due on the filing of that tentative return.

Q. What was the requirement for filing final returns by individuals and corporations? A. There was a requirement in 1946, requiring that both corporations and individuals file tax returns. In connection with individuals that

requirement existed only where there was income in excess of $600—in 1946, excuse me, it would have been $500. In other words, any individual who had gross income in excess of $500 would be required to file a return.

Q. And when did he have to file it? A. It is due two and a half months after the close of the year, or in the case

(2179)

of a calendar year individual it would be due on March 15th

Q. Incidentally, have you ever testified before, Mr. Present? A. No, sir.

Q. When did corporations have to file returns? A. Similarly, two and a half months after the close of the year, with the exception if they received permission to file a later return.

Q. Could individuals also get extensions of time to file returns? A. Yes, sir; they may.

Q. What were the general circumstances under which individuals or corporations could get extensions? A. Well, normally you would have to send a letter to the—at the time it would have been the Collector of Internal Revenue for the district in which you were going to file, setting forth the reasons for the delay and requesting an extension.

Q. Did a copy of that, the letter granting the extension——

Mr. Wessel: Strike that.

Q. Was there a requirement that a copy of the letter granting the extension, be attached to the final tax return and filed? A. Yes, that would be right in the letter. The taxpayer would be sent, I believe, two copies of the letter

(2180)

and indicated in that letter was a statement to the effect that a copy of this letter must accompany the final return

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VOLUME III

TRANSCRIPT OF RECORD

1322 23

Supreme Court of the United States

OCTOBER TERM, [redacted] 1957

No. [redacted] 9

HOWARD LAWN, PETITIONER,

vs.

UNITED STATES OF AMERICA

No. [redacted] 10

WILLIAM GIGLIO AND FRANK LIVORSI,
PETITIONERS,

vs.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

NO. 131 PETITION FOR CERTIORARI FILED JUNE 4, 1956
NO. 138 PETITION FOR CERTIORARI FILED JUNE 6, 1956
CERTIORARI GRANTED OCTOBER 15, 1956

Q. What kind of returns did partnerships have to file? A. Partnerships were required to file tax returns, information tax returns, on Form 1065.

Q. When? A. Similarly, two and a half months after the close of the year.

Q. Was there any requirement with regard to withholding of taxes in corporate salaries? A. Yes, sir.

Q. What was that requirement, generally, without detail? A. Well, generally, there is a table set forth, setting forth the minimum requirement for withholding based on the salary that was paid to any particular individual. That would also be true to offers of corporations. In other words, a corporation was obligated to withhold tax on the salary paid to any particular officer.

Q. In what year was a partner required to report his distributive share of partnership income? A. A partner would be required to file, to include in his individual return for the calendar year the partnership share of income from the fiscal year that ended within his calendar year. So, for example, if we had a partnership with the fiscal year ending

in 1946, or for that matter, ending on December 31, 1946, the income set forth in that partnership return would have to be reported in his calendar year return for the year 1946.

Q. Would it be correct to state that all the income of a partner from a partnership would be income to him in the year which was the last day of the partnership's year? A. Falling within his calendar year.

Q. Now, did you as a result of your work in connection with this case redetermine and redistribute certain net income and recompute taxes for various of the defendants? A. Yes, I did.

Q. And have you prepared a series of schedules and charts in connection with that work? A. Yes, I have.

Mr. Wessel: If your Honor please, there are a number of charts which I would like to bring out. This would be a good time to take our afternoon recess.

The Court: All right, don't discuss the case.

(Short recess.)

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Mr. Wessel: If your Honor please, there may be some mechanical difficulties——

The Court: Oh, we have had all kinds, we might as well have a few mechanical difficulties.

Mr. Wessel: I would like the large exhibit marked, and I would like to hand your Honor the typewritten original from which this blow-up was made, and also the defendants' photostatic copies so everybody can follow.

The Court: All right.

Mr. Wessel: But I think only the jury will be able to see this large one.

Mr. Stryker: I wonder, your Honor, if it could be arranged, whether I could sit where I could see it, or whether it could be in the back of the room where we could all see it.

The Court: I am going to put it where it is most convenient for the jury, but you can sit anywhere you want, Mr. Stryker, except in the jurybox.

Mr. Stryker: May I sit over here?

The Court: All right.

Mr. Stryker: There is no seat left in the jurybox. I would like to be there.

(Marked Government's Exhibit 141 for iden-

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tification.)

Theodore Present—By Government—Preliminary Cross

By Mr. Wessel:

Q. Do you have a copy, Mr. Present, of Exhibit 141 in front of you? A. Yes, I do.

Q. Would you, first of all, tell me what that exhibit represents?

The Court: I was just thinking, Mr. Wessel, wouldn't it be better to get our exhibits in before you—have you got 141 up there on the easel?

Mr. Wessel: Yes, I do.

The Court: I think we had better get it in before we discuss it. You can turn it the other way, if you want, before you get it in.

Q. Mr. Present, what is Exhibit 141? A. That is a schedule that I prepared, setting forth the net income shown on the tax return and the distribution as shown on the tax return filed, and the adjustments that have been made to the net income shown on the return and the corrected distribution of the net income.

Q. Well, now, did you assume that there were 140,000 in unreported corn syrup sales by Eatsum? A. Yes, I did.

Q. And the remaining portion of the exhibit was based

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upon your analysis of the various Eatsum books in evidence; that is, Exhibit 96? A. That's right, plus the testimony of some of the witnesses.

Q. Would that be the testimony of Mr. Loperfido—A. That's right, and Mr. Lubben and Mr. Roth.

Mr. Wessel: I offer Exhibit 141 in evidence.

Mr. Stryker: Just let me ask you a question.

Preliminary examination by Mr. Stryker:

Q. Mr. Present, here I see on this document—maybe if I'd come around, I could show it to you.

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Mr. Stryker: This is a copy, your Honor, of the big one that the Government is going to offer.

By Mr. Stryker:

Q. I see an item, David Lubben, $117,048.60. What's the foundation or basis of that? A. Well, that is based on——

Q. On what? A. That is based on my examination of the Eatsum general ledger, testimony of Mr. Lubben, and other records which are now in evidence.

Q. You couldn't have made that up without the testimony of Mr. Lubben; is that correct? A. Let me check

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my schedule, please.

Q. Sure, do that.

Mr. Wessel: Just to save trouble, there are four—there are five exhibits relating to Eatsum, one of which breaks down that particular item. Perhaps I should mark all of them at once.

Mr. Stryker: For identification. Do that and show them to him.

The Court: I think that may help.

Mr. Wessel, we don't have to identify those big charts, do we? Can't we discuss it from your small chart, and then if and when they are received, we'll mark the big chart some number connected with the small chart?

Mr. Wessel: All right.

I suggest you mark the small exhibits which I have handed to the Court——

The Court: Here, these are to be marked. Here, do you want this one?

Mr. Wessel: The first one, 141, and then 2, 3, 4, 5.

The Witness: Is there a question pending, Mr. Stryker?

Mr. Stryker: I think we are waiting to get a

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mark before it goes on.

(Marked Government's Exhibits 142 through 145 for identification.)

By Mr. Wessel:

Q. Now, Mr. Present, would you tell me what Exhibit 142 is? A. Yes. That is a schedule setting forth the salaries that were earned by Frank Loperfido, Ronald Stone and Roy Hankermeyer.

Q. And is that an analysis of the item "Salaries" on Exhibit 141? A. Yes, that is a breakdown of those figures.

Q. And from where did you obtain the information upon which you made the calculation in Exhibit 142? A. This is based on the analysis of the Eatsum general ledger and testimony of Frank Loperfido, and the testimony of David Lubben.

Q. The testimony of Louis Roth—— A. Oh, yes.

Q. Also? A. Louis Roth, excuse me.

Q. Now, Exhibit 143 for identification, would you describe what that is, please? A. Yes. That is a computation of the distributive share of David Lubben, and that is based on an analysis of the Eatsum general ledger, testimony of Mr. Roth and Mr. Lubben.

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Q. And is that an analysis of the distribution of the net income figure on Exhibit 141? A. Yes, it is.

Q. Exhibit 144, sir, would you say what that is? A. Yes. That is a computation of the value of the plant that was turned over to Mr. Lubben.

Q. And is that an analysis of part of Exhibit 143, which is a distribution to David Lubben? A. That's right.

Q. What did you base that document upon, your analysis in that document? A. That is based upon the analysis of the Eatsum general ledger for the fiscal year ended May 31, 1946, of the Eatsum general ledger for the single proprietorship for the period ended May 31, 1945.

I believe that would cover it.

Q. Testimony of David Lubben? A. And testimony of Mr. Lubben and Mr. Roth.

Q. Now, Exhibit 145, would you state what that is, sir? A. Yes. That is an analysis of the drawing accounts, of the David G. Lubben special account and the David G. Lubben drawing account as it appears on the Eatsum general ledger for the fiscal year ended May 31, (2188)

1946.

Q. And that is based solely upon Exhibit—upon the general ledger which is Exhibit 96? A. That's right, and ties in with the distribution made to David Lubben in this other schedule, 143.

Mr. Wessel: Then I offer in evidence Exhibits 141 through 145.

Mr. Stryker: May I ask a question or two?

Preliminary Examination by Mr. Stryker:

Q. Do you have copies before you? A. Yes, sir, I do. I believe this is yours, Mr. Stryker.

Mr. Stryker: Do you have some more copies?

Mr. Wessel: Yes.

The Court: You left one of yours up here, Mr. Stryker.

Mr. Stryker: I had better stay there? I think I had.

The Court: No. I say you left your copy, one copy, 141, I think.

Mr. Stryker: Oh, did I? I am sorry. What's that?

The Witness: That is your copy.

Mr. Stryker: My copy?

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The Court: 141.

The Witness: Yes, sir, you left it right here.

Mr. Stryker: Just a question or two.

By Mr. Stryker:

Q. As I count it—I have been wrong several times in my count—there are five documents there that you are seeking to offer; is that correct, five documents? A. I believe that is correct, sir, yes sir.

Q. Now, I think you said that all but one of those documents, in part, at least, are predicated or based on the testimony of Mr. Lubben, and Mr. Roth; is that right? A. Yes, sir.

Q. I think there was one you said wasn't? A. That is correct.

Q. Which one was that? A. That is—I don't have them numbered, sir—I believe the last one, 145? That would be 145, sir.

Q. 145 is based entirely on the general ledger of Eatsum, isn't it—wasn't it? A. That's right, sir.

Q. All right. Did I interrupt you? A. Yes, sir. I

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believe I could answer your question a little better on some of these items.

Q. All right, we will come to that. But I mean in general my questions are clear, and your answers are correct? A. Yes, sir.

Mr. Wessel: If counsel has an objection, I know my question is not proper in form, and I should bring out the details of the assumptions, and I will do so.

Mr. Stryker: This is just to determine whether I will object or not; that is all.

By Mr. Stryker:

Q. Well, it would follow, wouldn't it, from what you have said, that if the testimony of Roth or Lubben were false in any respect, that would throw out the charts that you have made other than the last chart, 145; that would be correct, wouldn't it? A. Well, only in part, sir.

Q. But it would at least in part? A. Yes, sir.

Q. So part of these exhibits is based on the veracity of Lubben and Roth; is that right, part? A. Yes, sir, except that some of them are drawn from the books and agree with the testimony of Mr. Lubben and Mr. Roth, or Mr.

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Lubben or Mr. Roth.

Q. Well, is my question still correct: If any of the testimony on which you predicated these exhibits, that given by Lubben, Roth, were false, that would affect, necessarily, all of the exhibits except one, would it not? A. Well, I don't know if it would affect the whole exhibit, sir.

Q. It would affect it to some extent? A. Well, in some cases, it might only affect part of it, sir.

Q. In some cases part, and other cases all? A. That's right.

The Court: What you are trying to say is that on some of these exhibits the oral testimony simply confirms what you find in the books.

The Witness: That's right, sir, and some of these are based—for example, one computation is based on the books and the testimony of Mr. Loperfido.

The Court: That is what Mr. Stryker, I think, is trying to get at.

By Mr. Stryker:

Q. Would you be good enough to tell me when these documents, these exhibits that you prepared, were prepared; when were they, about, I don't want the exact hour or day, (2192) but just—— A. Well, I would say that the bulk of them were prepared a couple of months ago.

Q. So they were all prepared well in advance of the trial; right? A. Yes, sir.

Q. So, then, in so far as Lubben, Roth are concerned, they are not predicated on the testimony, direct and cross, which they gave at this trial; that would follow, wouldn't it? A. Yes, sir.

Mr. Stryker: I object to these documents.

Mr. Wessel: It is a good objection. I will lay the foundation.

Mr. Stryker: Are these mine, or whose are they?

Mr. Wessel: I think those are the original exhibits.

Mr. Stryker: Those are yours, all right.

By Mr. Wessel:

Q. Now, Mr. Present, on Exhibit 141, did you assume that there was $140,000 in unreported corn syrup sales by Eatsum Food Products Company? A. Yes, sir.

Q. Did you further assume that the entries in Exhibit 96 and 96A, which are the Eatsum general ledger, were cor-

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rect? A. Yes, sir.

Q. Did you further assume that the entries in the 1945 fiscal Eatsum general ledger were correct? A. Yes, sir.

Q. Did you further assume that—I won't take the exhibit out at the moment—the Eatsum partnership return for fiscal 1946 was filed? A. Yes, sir.

Q. Did you assume that it was filed by the persons who signed it, Mr. Giglio—Mr. Giglio? A. Yes, sir.

Q. Did you assume that Mr. Ronald Stone invested $2,200 in capital to Eatsum? A. Yes, sir.

Q. Would your calculations of the distributive shares of Mr. Giglio and Mr. Livorsi change in any way if Mr. Ronald Stone had invested some figure other than $2,000? A. No, sir, it would not affect Mr. Giglio or Mr. Livorsi's distributive share at all.

Q. Would it affect the distributive share of Mr. Lubben? A. Yes, sir.

Q. Did you further assume that Mr. Roy Hankermeyer had made no capital investment? A. Yes, sir.

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Q. If Mr. Roy Hankermeyer had made some capital investment, would it have changed the distributive shares of Mr. Giglio and Mr. Livorsi? A. No, sir.

Q. Would it have changed the distributive share of Mr. Lubben? A. Yes, sir.

Q. Did you further assume that Mr. and Mrs. Giglio and Mr. and Mrs. Livorsi were equal partners in whatever share in Eatsum Food Products Company? A. Yes, sir.

Q. Did you make any other assumptions with regard to Exhibit 141? Did you assume that Eatsum Food Products Co., Ltd. was a partnership composed of William Giglio

and Frank Livorsi as general partners, and limited partners being Margherita Giglio, Dorina Livorsi——

Mr. Wessel: Strike that question.

Q. Did you assume that William Giglio and David Lubben were general partners in Eatsum Food Products Co., Ltd. from June 12, 1945, until March 9, 1946, and that during that period, Margherita Giglio, Dorina Livorsi, Frank Livorsi, Roy Hankermeyer, Frank Loperfido and Ronald Stone were limited partners? A. Yes, sir, as of June 1st,

(2195)

rather than June 12th.

Q. Did you make any other assumptions? A. Not that I know of, sir.

Q. Now, with regard to Exhibit 141, did you assume that Mr. Frank Loperfido had invested $3,350 in Eatsum Food Products Co., Ltd.? A. Yes, sir, but I believe you are referring to 142.

Q. Excuse me, 142.

But that same assumption would have been made with regard to Exhibit 141, would it not? A. Yes, sir.

The Court: Mr. Wessel, if you are going to ask these questions about each one, I think I am ready to act on 141 now; if you want to proceed as you originally started.

I just tell you that. You just proceed any way you want.

Mr. Wessel: The only reason I do that, your Honor, is I am not sure I got all the assumptions. These are all supporting schedules for 141.

By Mr. Wessel:

Q. On Exhibit 143——

Mr. Wessel: Strike that.

(2196)

By Mr. Wessel:

Q. On Exhibit 144, did you assume that Eastum Food Products Company used a 10 per cent annual depreciation rate on plant and office equipment? A. Yes, sir—that is plant equipment.

Q. Plant equipment? A. Yes, sir.

Q. And did you assume that that was a reasonable rate? A. That is correct.

Q. Is it a reasonable rate? A. Yes, sir.

Mr. Wessel: Now I offer in evidence Exhibits 141 through 145.

Mr. Stryker: I wasn't quite sure I caught your Honor's statement, but I thought I heard you say you were going to let these in.

The Court: No, I said I was ready to act. In other words, I wanted to know if he wanted to present them one by one or go ahead and present them in a group.

Mr. Stryker: Oh, I see.

The Court: He preferred to offer them in a group.

Mr. Stryker: On the ground of the objections previously stated, which I have stated, I press my

objection.

Mr. Wessel: I want to be sure if there is an objection to form. I can correct it. Am I correct that the objection is as to substance as distinguished from form, because if it is form, I think I am entitled to a specific objection.

Mr. Stryker: I think the objection I made was that there was no foundation to the documents, and based on assumptions not established by proof.

The Court: Well, on that ground I will overrule it and receive them.

Mr. Stryker: All right, exception.

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(Government's Exhibits 141 through 145 for identification received in evidence.)

By Mr. Wessel:

Q. Perhaps it would be easier for you to explain Exhibit 141 if you would go up to the exhibit and point out. A. Would you rather I did that?

Q. I think it would be more clear to the jury if you were to do that.

(Witness leaves stand and goes to exhibit.)

I wish you would explain, Mr. Present, what Exhibit 141 is, in total; indicate the various things that you assumed; explain your calculations and your conclusions. A. This is the schedule setting forth the net income as shown on the Form 1065 partnership information tax return that was filed by the Eatsum Food Products Company limited partnership, for the fiscal year ended May 31, 1946. It sets forth the net income shown by that return, the adjustments that I have made to that net income, the net income as I find it to be corrected, the distribution of net income as set forth in the partnership tax return filed and the corrected distributive share of the three partners as I adjusted.

Q. Well, now, you found a total corrected net income for Eatsum Food Products Company, Ltd. for the period of

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the partnership of $573,625.76; is that correct? A. That's right, sir.

Q. And that is an increase of how much over the income per the return? A. Roughly, $92,000—$91,600.

Q. Did you find that Mr. Lubben had a greater net income from Eatsum than even the return shows? A. Yes, sir.

Q. How much more did you charge him with than the return shows? A. About $17,400 more than the return charged him with.

Mr. Stryker: Where is that? Will you show it to me?

The Witness: The return charged Mr. Lubben with $99,620.88. I charge him with $117,048.60.

Mr. Stryker: All right.

Q. Now, am I correct that the return signed by Mr. Giglio has a return of $100,000-odd next to William and Margherita Giglio as the distributive share of the Eatsum partnership profits which Mr. Giglio got? A. Yes, sir.

Q. I should ask you—I think I neglected that—on what did you base your assumption that Margherita Giglio and Dorina Livorsi did not obtain any or were not entitled to any share of Eatsum distributive profits? A. Well, that

(2200)

would be based primarily on the individual returns of Mr. Giglio and Mr. Livorsi, in which they themselves did not recognize that Mrs. Giglio and Mrs. Livorsi were partners, but included the entire distributive share on their own personal tax return.

Q. Now, I notice you calculated the receipts of Ronald Stone, Frank Loperfido and Roy Hankermeyer rather than as distribution, but as salaries to those men; would it make any difference whether those receipts by those three gentlemen were salaries or partnership distribution? A. No, sir; it would not affect the distributive share of Mr. Giglio or Mr. Livorsi in any way. The only change would be in the net income corrected. The net income corrected, if they

were to be shown as partners, would be $622,000. We would then show these three items of $48,000 among the partners' distributions. But as far as the distributive shares of Mr. Giglio and Mr. Livorsi, it is immaterial whether they show them as salaries or as distributions.

Q. In other words, for the purpose of this exhibit, you assumed that Mr. Stone, Mr. Loperfido and Mr. Hankermeyer were his employees rather than partners? A. That's right.

Q. That is correct? A. That's right.

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Q. However, if they were limited partners rather than employees, it would not change in any respect the distributive shares of Mr. Giglio or Mr. Livorsi? A. That's right, or their own distributive shares, for that matter.

Q. Now, is Exhibit 142 your calculation of the salaries of Mr. Stone, Mr. Loperfido and Mr. Hankermeyer? A. That's right.

Q. Will you state where you got those figures first, please? A. Well, in the case of Mr. Loperfido, the salary checks were obtained from the Eatsum general ledger. These two payments in March and April 1946 are from the general ledger. This credit for the advance represents the $3,350 which Mr. Loperfido is set forth as having invested in the partnership agreement. Giving him credit for the $3,350 against the $26,000 which the general ledger shows he drew, he has a net drawing of salary of $22,650.

Q. What about Mr. Stone's share? A. Mr. Stone is shown as having received salary checks of $5,700 in the Eatsum general ledger. He received a payment which was charged to the capital account on the partnership books of $10,000, giving him a total of $15,700. The $2,200 represents credit for his advance or investment.

(2202)

leaving him with a net income or net distributive share or salary, whichever you want to call it, of $13,500.

Q. I recall testimony, Mr. Present, both that Mr. Stone advanced $2200, and other evidence that he advanced $10,000. What effect would it be if in fact he had advanced $10,000? A. Well, if he had advanced $10,000, it would decrease distributive share of Ronald Stone and increase that of David Lubben. It would not in any way affect distributive share of Mr. Giglio and Mr. Livorsi. It would merely be a switch between Mr. Lubben and Mr. Stone.

Q. Would you answer the same question with regard to Mr. Hankermeyer, please? A. It is exactly the same situation that prevailed with regard to Mr. Hankermeyer. It would not in any way affect the distributive share of Mr. Giglio or Mr. Livorsi.

Q. The salary checks that you got on the Exhibit 142 were all from Exhibit 96, the general ledger? A. That's right, sir.

Q. Let's go back for a moment, Mr. Present, to Exhibit 141. Did you assume that $140,000 was not included in the partnership return, information return of income for the year 1946? A. That's right.

(2203)

Q. In doing that, did you attempt to determine for yourself whether or not that $140,000 was in the gross receipts figure in the partnership information return? A. Yes, sir; the books—the gross receipts, as set forth in the books, agree with the gross receipts as set forth in tax return.

Q. When you say "the books", are you referring to Exhibit 58, which is one of the financial statements for Eatsum? A. Yes, sir; that ties in with the Eatsum general ledger; since the adjusting and closing entries were not

posted to the Eatsum general ledger, but are reflected in the statement, the audit report prepared by Mr. Roth, we can tie the two in with the general ledger and the tax return.

Q. Now, will the report that you just referred to, Exhibit 58, be—— A. Yes, sir; that ties in exactly with the tax return as filed.

Q. Would you indicate how those two tie in together? A. Yes. The tax return sets forth gross receipts of $4,794,795.09. The statement sets forth gross income from sales, which would be sales less discounts and returns and allowances of $4,794,795.09. It is exactly the same amount.

Q. And the Exhibit 58-B is taken from the general

(2204)

ledger; is that correct? A. Yes, sir.

Q. And it agrees with the general ledger? A. Yes, sir; with the exception of some small adjusting and closing entries that were not posted in the general ledger.

Q. Correct. Now, Mr. Present, I show you Exhibit 143, which is your calculation of the distribution of $117,000 to Mr. Lubben; would you explain how you calculated that? A. Yes. This figure of capital investment was taken right from the general ledger. Now this, Mr. Lubben's share, Mr. Lubben and his associate's share, was $33,500. Giving Mr. Stone credit for $2,200, would result in a credit to Mr. Lubben for his capital investment of $31,300. There was set up on Mr. Lubben's proprietorship and taken over by the partnership a reserve for Mr. Lubben's personal income tax of $37,000, which should be credited to Mr. Lubben. There is also an excess investment, which is half the month's profit for the month of May, of $13,485.31. All these figures are taken from the Eatsum general ledger. So that there would be a total credit of $81,785.31 for Mr. Lubben. Against that there were charges. Mr. Lubben paid through the partnership personal income taxes of $33,316.03, which

has just been charged to him. He had a net drawing account of $15,738.67. (2205)

There was a David Lubben special drawing account, which charged him with $45,523.37. He drew salary checks totaling $23,500, and then the plant, the value of the plant, as I computed it, using the Eatsum general ledger for the partnership and the Eatsum general ledger for the single proprietorship, was $80,755.84.

So that we have total charges to Mr. Lubben of $198,833.91. His total charges less his total investment results in a total distribution to Mr. Lubben of $117,048.60.

Q. Mr. Present, as I recall the testimony of Mr. Roth, he said that Mr. Lubben had a total net income of about $124,000 from Eatsum. Do you know wherein the difference of about $7,000 arises? A. Yes. Mr. Roth did not take into consideration depreciation on the plant, and he did give Mr. Lubben credit for certain reserves, which I did not give him credit for.

Q. I see. Would you explain, Mr. Present, from Exhibit 145, how you computed the value of the plant which Mr. Lubben——

The Court: I think it is 144.

Mr. Wessel: It is 145, if your Honor please.

The Court: Computation of value of plant is 144. (2206)

Q. Would you explain how you computed the value of the plant which Mr. Lubben received, on Exhibit 144? A. Yes. The basis of the plant on June 1, 1945, was $47,421.74. Now, in order to find that, you have to make reference to the general ledger of the single proprietorship, because in carrying forward the value of the plant from the single

proprietorship to the partnership, they failed to split the two different assets.

There was an asset on the single proprietorship known as office furniture, and in carrying forward the amount from the single proprietorship to the partnership they did not split that amount, so that whereas in the general ledger of the partnership the value of the plant appears to be greater, actually the plant itself on June 1, 1945, carried over from the single proprietorship, had a basis of $47,421.74. Against that there was a reserve for depreciation of $3,747.90. This reserve likewise is only on the plant, not taking into consideration the office furniture.

Q. You had to calculate that; is that correct? A. Yes, sir. That left a net value for the plant at June 1, after depreciation, of $43,673.84.

During the life of the partnership there were assets (2207)

acquired by the partnership for the plant of $42,221.95, giving a total value for the plant before depreciation of $85,895.79. There was depreciation allowable from the period June 1st to March 31st, 1946, of $5,139.95, making a net basis for the plant of $80,755.84.

Q. Finally, Mr. Present, would you explain your analysis of the various drawing accounts for Mr. Luben on Eatsum partnership books, which is Exhibit 145? A. Do you know what schedule this is, what exhibit this is?

Q. That is 143. A. Exhibit 143, among the charges I showed David Lubben drawing account for $15,738.67. Actually, in the transcript of the account, as appears on the general ledger Mr. Lubben drew and was charged in that account with $84,894.40. However, there was an excess investment made by Mr. Lubben, which was carried over from his single proprietorship, and which the partnership

owed to him, subject to adjustments to the asset accounts, the accounts receivable and the valuation of the plant, ultimately there was a journal entry made, charging, reducing Mr. Lubben's excess investment and crediting his drawing account with $66,000, so that whereas this account actually shows that Mr. Luben drew $81,894.40, there could

(2208)

only be charged to him $15,738.67 because of these credits.

The same thing is true of the David G. Lubben special account, in which there was an adjustment of credits, $5.78, so that whereas he actually drew $5.78 more than the amount shown here, there was that credited and this schedule sets forth the debits and credits, so that we can arrive at net charge to Mr. Luben.

Q. That $66,000-odd entry on November 30th, is the journal entry about which there was some testimony this morning? A. Yes, sir; that was the journal entry.

Q. Now, does that conclude all your computations with regard to the net income of——

Mr. Wessel: Strike that.

Q. With regard to the distributive shares of Messrs. Giglio and Livorsi in the Eatsum Food Products Company for the fiscal year ending May 31, '46. A. Yes, sir.

Q. And will you point out those two figures again and state for the record the sum, the amount of the distributive share of those two men for that year? A. The corrected distributive share of William Giglio is $228,288.58, as opposed to the $101,123.88 shown on the tax return; and

(2209)

for Mr. Livorsi the corrected distributive share was $228,288.58, as opposed to the $101,123.88 shown on the tax return filed.

Q. And those figures, that is, the corrected figures you carried forward into a later exhibit, which is the net income of the two gentlemen in their own personal tax returns? A. That is correct.

The Court: Mr. Wessel, I don't know whether it would be helpful, if you are going to go on to another group of exhibits now, to have Mr. Fraiman hold the 141 and then show the jury how the figures that you have in your subordinate schedule get into 141.

Now, I don't want to labor this. I couldn't see exactly what was going on, on this side of the bench, but I notice that whereas I keep my exhibits before me as you talk, you take theirs down each time. I don't know whether they can see how the subordinate schedules are supposed to be tied into 141.

By Mr. Wessel:

Q. Would you do that, please, Mr. Present?

Mr. Wessel: I have to put the numbers on the exhibits.

The Court: Do you want the originals for the numbers?

(2210)

Mr. Wessel: I have them on my own copies.

The Court: All right.

Q. Will you, Mr. Present, explain with reference to Exhibit 141, which I hold, how the other exhibits tie into it? A. On Exhibit 142 we have the computation of the $22,650 allowance for salary for Frank Loperfido. On Exhibit 142 we also have the computation of the salary allowance for Ronald Stone of $13,500. We also have on Exhibit 142 the computation of the salary allowance to Roy

Hankermeyer of $12,250. That makes a total salary allowance of $48,400, as shown by this exhibit.

Q. Exhitbit 143? A. Exhibit 143 is the computation of distributive share of David Lubben, which winds up with a total net distribution of Mr. Lubben of $117,048.60, which tied in with the corrected distribution shown in Exhibit 141.

Q. I think you had better leave 143 up and take the other two which tie into 143

The Court: In passing on that, Mr. Present, where you have charges and credits, credits is what Mr. Lubben got and credits is what he put in.

The Witness: Yes, sir; credits represent his investments.

(2211)

The Court: And charges is what he took out.

The Witness: That is right.

A. (Continuing) Exhibit 145 is the computation of the value of the plant of $80,755.84, which is set forth in Exhibit 143 as one of the charges to Mr. Lubben, since he took the plant out.

Exhibit 144 is a transcript of the David Lubben special account and the David Lubben drawing account, showing the computation of the new drawings of $45,523.37, which he is charged with in Exhibit 143, and $15,738.67, which he is likewise charged with in Exhibit 143.

The Court: Mr. Present, I think your exhibit—everything that you said is all right, but your exhibit numbers, I think, were switched. That last exhibit that you were using on the schedule of Lubben's drawing account on the original is marked 145. Now I think you referred to that as 144. That is the one you have got in your right hand.

The Witness: That is this one, sir. It was marked 144. He has corrected it. It is now 145.

The Court: All right.

Mr. Wessel: I ask that these documents be given the next exhibit numbers.

(2212)

(Marked Government's Exhibits 146 to 148 for identification.)

Q. Mr. Present, I show you Exhibits 146 through 148, and ask you if you can tell me first what Exhibit 146 is?

Mr. Wessel: The witness said to me "We skipped one," which I did.

A. 146, 147 and 148, represents a schedule that I prepared, dealing with the Tavern Fruit Juice Company. It sets forth the net income shown by the tax return, the net income corrected, the distribution of that income set forth in the tax return, and the corrected distribution. 147 is a subsidiary schedule tying in some of the adjustments made in 146. 148 likewise is a subsidiary schedule tying into some of the adjustments made in 146.

(2213)

Q. Now, Mr. Present, on Exhibit 146, would you state what assumptions you made in making the calculations in that exhibit? A. Yes. I assumed that there was a closing inventory not shown in the tax return of $72,321.17; that there were experimental and research expenses——

By the Court:

Q. Excuse me, I just would like, before we get into this next group of exhibits, I still have one question as to the former one.

Now, I am talking about 141. When you computed the corrected distributive shares, is that simply—do you just

take the 500—you found net income corrected by your estimate of $573,625.76? That's right.

Q. Now, you just—you divided—how do you get the corrected distributive share from there? A. Well, first I computed Mr. Lubben's distributive share.

Q. Would that be 50 per cent of that 573? A. No, sir, that would be the amount, that amount is $117,048.60, and that is shown by this other schedule.

Q. That other schedule, that's right. A. And the balance of that is divided equally between Mr. Giglio and

(2214)

Mr. Livorsi.

Q. All right; you deduct Lubben from the $573,000 amount and divide the other equally? A. Yes, sir, divide equally.

The Court: I am sorry to be so slow.

The Witness: That is quite all right.

By Mr. Wessel:

Q. Well, now, first on Exhibit 146, did you assume a tax return for the Tavern Fruit Juice Company for the period ending March 31, 1946, in the same form file as Exhibit 7? A. Yes, sir.

Q. Now, would you proceed with your assumptions? A. Yes, sir. I assumed that there was a closing inventory of $72,321.17, which was not disclosed by that tax return.

I further assumed that there was a deduction claimed in that amount of $32,780.93, for experimental and research expense, which was not a proper deduction.

I further assumed that there were purchases which were made by the Tavern partnership, but which were not claimed as an expense, in the amount of $9,229.65,

I further assumed that there was a proper deduction for legal expense, in the amount of $15,000, which was not

claimed as a deduction, and arrived at a corrected net income,

(2215)

based on those assumptions.

Q. Did you also assume that Mrs. Livorsi and Mrs. Giglio were not entitled to any distributive share? A. Yes, sir, I further assumed that.

Q. What assumptions did you make with regard to Exhibit 147? A. Well, Exhibit 147 is a schedule tying into Exhibit 146, and showing my computation of the closing inventory as set forth in Exhibit 146.

Q. And did you make your calculations in that based upon assumptions that the invoices and ledger sheets of the Nulomoline Company, the National Sugar Refining Company, the Holloway Corporation, Sunhill Products Corporation, the Bayonne Barrel Company, the Hexter & Son Company and Stein, Hall & Co., Inc., were correct? A. Yes, sir.

Q. And you used those various—the figures in those invoices in calculating Exhibit 147? A. Yes. The exhibits in this case.

Q. And Exhibit 148, was that based upon the exhibits of the Nulomoline Company which are in evidence? A. Yes, sir.

Mr. Wessel: I offer Exhibit 146 through 8 in evidence.

Mr. Stryker: Just a minute, please.

(2216)

Same objection as made with regard to the other documents.

The Court: All right, Mr. Stryker, overruled.

Mr. Stryker: Exception.

(Government's Exhibits 146 through 148 for identification received in evidence.)

By Mr. Wessel:

Q. Now, Mr. Present, would you explain to the jury how you arrived at the final figures in Exhibit 146, referring to whatever exhibits you wish, and I hand you Exhibit 7, the tax return, and Exhibit 58A, the Tavern financial statement? A. The net income set forth in the tax return is taken from Exhibit 7, which is the Form 1065 partnership information tax return for the fiscal year ended March 31, 1946, for the Tavern Fruit Juice Company.

The net income set forth in that tax return agrees with Exhibit 58A, with the exception of the $15,000 legal expense item, which was shown as a partnership expense in Exhibit 58A, but was not claimed as a deduction in the partnership tax return, Exhibit 7.

(2217)

Starting with the net income set forth in the partnership tax return of $140,726.32 and adding the closing inventory of $72,321.17, adding, also, the deduction for experimental and research expenses of $32,780.93, we have —and allowing purchases, which should have been claimed as a deduction but were not claimed as a deduction by the partnership of $9,229.65, and allowing a deduction for legal expense in the amount of $15,000, which was not claimed as a deduction, we arrive at a corrected net income of $221,598.77, as opposed to the net income shown on the tax return of $140,726.23.

I then distributed the corrected net income of $221,598.77 equally between Mr. Giglio and Mr. Livorsi, which is the actual distribution percentage as shown in their personal returns, which was filed for the year, in their own returns for the year 1946.

Despite the fact that the partnership return sets forth distributions for Margherita and Dorina, in their own personal returns, they, themselves, show themselves to be 50

per cent partners in the partnership, in the Eatsum partnership, and I have likewise divided that income as they have divided it in their own personal returns.

(2218)

Q. Mr. Present, I am going to hold up Exhibit 147, and ask you if that is the computation of closing inventory which is the second item in Exhibit 146? A. Yes, this shows the computation of the closing inventory of $72,321.17. It is made up of sugar, totaling $54,691.92; barrels, totaling $7,899.25; and chemicals, totaling $9,730. That is a total of $72,321.17.

These totals for the sugar and the chemicals are further broken down, at the top of the exhibit, the sugar being broken down between the various sugar companies, the Nulomoline Company, National Sugar Refining Company, Holloway Corporation and Sunhill Products Company.

That total of 54,000 is carried forward in this schedule in arriving at the total inventory.

All of the barrels were purchased from Bayonne Barrel. Similarly, in the case of the chemicals, we have the breakdown between H. Hexter & Son and Stein, Hall, totaling $9,730, which is carried forward to this summary, arriving at the $72,321.17, which is carried forward here.

Mr. Wessel: Can I ask one more question before

(2219)

we recess, if your Honor please?

The Court: Yes.

By Mr. Wessel:

Q. Mr. Roth testified, as I recall, that the closing inventory not included in the tax return was something over $80,000.

Can you explain the difference between your figure of $72,000 and Mr. Roth's figure? A. Yes. I believe

that Mr. Roth took into consideration certain purchases of sugar which I found to actually have been made prior to the date of the last sale, and I did not take those into consideration in computing the inventory.

The Court: I think the next exhibit will be very brief. Can't we complete it?

Mr. Wessel: We can, but there is some more on Exhibit 146, your Honor.

The Court: Oh, there is?

Mr. Wessel: Yes. There will be five or six minutes more on the total exhibits, three exhibits.

The Court: All right, in order to save time if we can get it done now, or, at least, show them where the other exhibit is supposed to tie in.

(2220)

By Mr. Wessel:

Q. Will you show how Exhibit 148 ties in to Exhibit—— A. Yes, Exhibit 148 is a computation of the purchases, of the deductions for purchases that were made during the partnership, and should have been claimed as a deduction on the partnership, but were not claimed as a deduction. That total is $9,229.65, and is shown here as a deduction of $9,229.65.

Q. You now say "purchases not claimed." Not claimed by Tavern, is that what you are referring to? A. That is right.

Q. Were they claimed by some other company? A. They were claimed by a successive corporation, American Brands Corporation, which was not in existence on the date that these purchases were made.

Q. Did you assume from the incorporation papers of American Brands that it was incorporated on January 6, 1946? A. I believe it is January 8th or 7th.

Q. January 8th. In any event, in January—— A. It was prior, in any event, it was prior to these purchases being made.

Q. Upon what did you base your assumption that Tavern did not have any sales after November 23, 1946?

(2221)

A. On the accounts receivable ledger of Tavern which agrees with the tax return.

Q. Is that also based on the testimony of Mr. Roth? A. Yes, sir.

The Court: All right, Mr. Wessel, we will suspend now and you can pick up with this one tomorrow.

10:15 tomorrow, and don't discuss the case.

(Adjournment taken at 4:05 p. m. to February 8, 1955; at 10:15 a. m.)

(2222)

New York, February 8, 1955.
10:20 o'clock a.m.

Trial resumed.

(Jury in box.)

THEODORE PRESENT, resumed the stand.

Direct Examination by Mr. Wessel (Continued):

Q. Mr. Present, if you would step up again to the exhibits, I want to refer back to Eatsum for a few moments.

(Witness leaves stand and goes to charts.)

You will recall some testimony yesterday with regard to the Eatsum loans and exchange account. Would you

find that in Exhibit 96-A, which is the Eatsum general ledger? Now, do you know what was done with the net amount in that account at the end of Eatsum's fiscal period, May 31, 1946? A. Yes, that amount was closed into the cost of goods sold. In other words, the balance of that amount, $113,750.17, was claimed as an expense in computing the net profits for the period.

Q. And in the partnership tax return, the net income, which is set forth as the first figure on Exhibit 141, was

(2223)

this $113,000-odd deducted as an expense? A. Yes, it was.

Q. Assuming, Mr. Present—and there is no evidence on this that I know of—but assuming that Mr. Lubben had received that $113,000 personally, would it make any difference whatsoever in the distributive shares of Mr. Giglio and Mr. Livorsi? A. No, it would make no difference at all. The only effect it would have would be to increase the net income shown by the return and increase the distributive share of David Lubben. It would not affect the distributive share of Mr. Giglio or Mr. Livorsi in any way.

Q. Let me ask you this question. This would be a strictly hypothetical question. Assume that Mr. Lubben took out of Eatsum Food Products Company one hundred million dollars, which was charged to goods sold or some other expense account, would that in any way affect the distributive shares, either per return or as corrected by you in the Eatsum tax return? A. No, no such amount could affect this distributive share. They would merely serve to increase the amount that Mr. Lubben received.

Mr. Wessel: If I may correct what I believe

(2224)

to be a typographical error at page 2144 of the

transcript, I believe there was a comment by your Honor in connection with this loans and exchange account. It reads:

"The Court: I made an erroneous statement. There is no proof that they relate to Eatsum."

I believe that should read: "I made an erroneous statement that there is no proof they relate to Eatsum."

The Court: In other words, the testimony has shown that the sheets I was talking about had Eatsum right on the sheets.

Mr. Wessel: Yes, your Honor.

Q. Yesterday you were asked some questions on voir dire at page 2190 in regard to the testimony upon which you based your calculations in Exhibit 141, and I would like to inquire into that for just a moment. Am I correct that the $140,000, the second figure on Exhibit 141, represents the proceeds of the corn syrup cash box, about which there is testimony? That is correct; yes sir.

Q. In adding that into Eatsum Food Products, did you rely upon the testimony of Mr. Lubben and Mr. Roth that Mr. Lubben received no part of that cash box? A. Not in

(2225)

adding it back, no, sir. This one hundred and forty assumes only that there was $140,000 left in that cash box, regardless of how it was distributed.

Q. In other words, as long as there was $140,000 in the cash box, it would make no difference whether it went to Lubben or Giglio or Livorsi or John Jones, it should have been included in Eatsum's net income; is that correct? A. That is correct, yes, sir.

Q. And upon what did you base your assumption that this $140,000 cash box was part of Eatsum's business?

A. Well, this was an overage growing out of a sale which was reflected in the Eatsum records. The purchasers or the cost of the—invoice cost on these same purchases was likewise reflected in the records. This merely represents an additional overage over and above the invoice price that was reflected in the books, and since it was all part of one transaction, it all should have been reflected in the books and therefore in the tax return.

Q. Assuming that the cash box contents of $140,000 were properly part of Eatsum's business, did you take into consideration the statements of Mr. Lubben and Mr. Roth and Mr. Bercu that that was part of Eatsum's business?

(2226)

A. Yes, sir.

Q. And did you take into consideration the statement of Mr. Loperfido that he was told by Mr. Giglio and Mr. Lubben that he was not entitled to a share in that? A. Yes, sir; that is taken into consideration.

Q. If I understand you correctly, Mr. Present, your net income corrected of $622,025.76, before you deducted salaries, is a figure which should have been on the Eatsum information return irrespective of the distribution which is another computation entirely? A. That is correct, yes, sir.

Q. Now in computing Mr. Lubben's $117,000, did you assume that Mr. Lubben had not received any part of the $140,000 in the cash box? A. Yes, sir.

(2227)

Q. On what did you base that assumption? A. That is based on Mr. Lubben's testimony that he received no portion of that cash box.

Q. And Mr. Roth's testimony? A. And Mr. Roth's testimony, yes, sir.

Q. Now, in correcting the distribution, which is the bottom portion of Exhibit 141, as I understand it, did you rely upon certain exhibits? A. Yes, I did.

Q. Let me ask you before I bring out any exhibits, Mr. Present: As I understood the testimony of Mr. Lubben, he was a 50 per cent partner in Eatsum. Why didn't you then charge him with 50 per cent of the profits of Eatsum? A. Well, this tax return was filed for the fiscal year ended May 31, 1946. By that time, Mr. Lubben and all of the other alleged partners, Mr. Stone, Mr. Loperfido and Mr. Hankermeyer, had long since left the partnership, and their distributive shares or any amount that they would have been entitled to receive out of that partnership had long since been fixed.

Therefore, what I did was compute, in lieu of the percentage which they might have been entitled to receive, I

(2228)

computed the amount that each one actually received, set forth that amount in this schedule, and then deducted that amount from the total income that was earned, and distributed the balance between the two remaining partners, Mr. Giglio and Mr. Livorsi.

Q. In other words—and I think I am just rephrasing or reframing what you said—schedule 141 relates to the entire period from the beginning of the partnership, in either May or June of 1945, to May 31, 1946? A. That is correct.

Q. Is that correct? A. Yes, sir.

Q. And all partners except Mr. Giglio and Mr. Livorsi had left before that time? A. That's right.

Q. Now, are Exhibits 45, 46 and 47 documents upon which you based your assumption that Mr. Loperfido had left before the end of 1945? A. Yes, sir.

Q. So that your conclusion that Mr. Loperfido was not a partner for the entire fiscal year was based upon not only the testimony of Mr. Roth and Mr. Lubben, but also upon the signed agreement between Mr. Giglio and Mr. Loperfido, the testimony of Mr. Loperfido, and the signed affidavits of Mr. Giglio and Mr. Roth? A. That is correct, yes,

(2229)

sir.

Q. Now, your conclusion as to Mr. Hankermeyer was based upon what? A. Well, that is based on the Eatsum general ledger, which shows the actual amount paid to Mr. Hankermeyer, and the agreement between Mr. Lubben and Mr. Giglio under which Mr. Hankermeyer left at the same time. Even though he is not shown separately in that agreement, he did leave at the same time that Mr. Lubben did; Mr. Hankermeyer being Mr. Lubben's uncle, and also the testimony of Mr. Roth and Mr. Lubben, about the amounts actually received by Mr. Hankermeyer.

Q. Now, I take it—and as to Mr. Stone? A. Well, in the case of Mr. Stone, it would be the Eatsum general ledger, setting forth the amount actually received by Mr. Stone, the testimony of Mr. Lubben, and the testimony of Mr. Roth.

Q. Now, upon what did you base your assumption that Mr. Lubben was not a partner for the entire year? A. Well, the agreement dated March 6th—or 9th?

Q. Are you referring to Exhibit 31, which is the March 6th letter agreement between Mr. Giglio and Mr. Lubben? A. Yes, sir, the Eatsum general ledger, the final bill of

(2230)

sale between the Eatsum partnership and the General Confections Corporation, the testimony of Mr. Roth and the testimony of Mr. Lubben.

Q. Well, now, Mr. Present, in addition to the testimony you referred to, are Exhibits 31, the letter agreement of March 6th, Exhibit 32, the dissolution agreement, Exhibit 33, the bill of sale from Mr.—from Eatsum to Mr. Lubben, 34, the bill of sale from Lubben to General Confections, 35, the dissolution agreement, 36, the dissolution certificate on file in the County Clerk's office, and 37 and 38, the invoices relating to the sale of certain inventory, the exhibits upon which you based your conclusion that Mr. Lubben was not a partner throughout the entire fiscal year of Eatsum? A. That's right, and those exhibits were also used in making the computation of the distributive share due to Mr. Lubben.

Q. And are those exhibits also the exhibits upon which you based your conclusion that Mr. Lubben was not entitled to anything more than the $117,000 and specifically not entitled to any part of the cash box? A. That is correct, yes, sir.

(2231)

Q. And also not entitled to any part of the other net income of Eatsum? A. That's right. The final agreement sets forth exactly what Mr. Lubben was to receive and did receive.

Q. Before we go to Tavern, Mr. Present, one other question about Eatsum.

You heard the testimony of Mr. Bercu. Did you receive any documents from Mr. Bercu's secretary? A. Yes, sir, I did.

Q. Will you describe what those documents were? A. They were photostatic copies.

Mr. Stryker: Pardon me, are those documents in evidence?

Mr. Wessel: No, they are not.

Mr. Stryker: I object to discussion of papers not in evidence.

Mr. Wessel: I am merely asking what documents he received from Mr. Bereu's secretary.

Mr. Stryker: It is immaterial what he did. I don't know, they are not here in evidence. I haven't seen them.

The Court: It would seem to me—this is the last few days or——

Mr. Wessel: No, I am merely asking the witness—if your Honor recalls, Mr. Bereu testified that he turned certain documents over to either Mr. Twohig and/or Mr. Cordes.

(2232)

The Court: Yes.

Mr. Wessel: This relates to that subject.

The Court: All right, I will take it. Don't tell us what were in the documents, just describe them.

By Mr. Wessel:

Q. Don't describe the contents, just tell what they were, what they looked like.

Mr. Stryker: I except.

A. They were photostats of work sheets dealing with the Eatsum partnership.

The Court: All right.

Q. Did you also, Mr. Present, examine the Eatsum general ledger to determine the cost of the 19 Rector Street office which was charged to Eatsum? A. Yes, sir, I did.

Q. What was that figure? A. $10,000.

Q. And did you also determine from the American Brands books or the Tavern books the cost of that office

which was charged to Tavern? A. Well, that would have
(2233)
to be computed from the amount, from the value of the assets that were transferred from Tavern to the American Brands Corporation books.

Q. Did you make that computation? A. Yes, I did. May I check the American Brands books? I can give that to you very quickly.

Q. All right. Can we have the American Brands—what is that, the journal? A. American Brands' journal. Yes, $19,818.18.

Q. In other words, between Tavern and Eatsum, between them, they were charged with just under $30,000 for the Rector Street offices? A. That is correct, yes, sir.

Q. Do you know what the other companies were charged for those offices? A. No, I don't.

Q. One last question about Eatsum: Mr. Present, with reference to Exhibit 144, which is your computation of the value of the plant, that is based, I take it, upon cost? A. That is correct, yes, sir.

Q. Supposing the plant actually was worth a great deal more, say, $500,000, would that in any way change your computation of the distributive shares of Mr. Giglio and
(2234)
Mr. Livorsi? A. No, sir, it would not. It would not affect their distributive shares at all.

Q. But it would change Mr. Lubben's distributive share? A. It might. It might have some effect on Mr. Lubben's share, yes, sir.

Q. Depending on what the value was when it was put in the partnership, is that what you mean? A. There would be a number of computations to be made. It could not affect in any way the distributive share of Mr. Giglio or Mr. Livorsi.

Q. Now, yesterday, when we recessed, you had explained 146 generally, Exhibit 147, and Exhibit 148, which are schedules relating to Tavern.

Now, would you now, Mr. Present, just very briefly review how those three schedules tie in together. A. The Tavern schedule shows an addition to net income for a closing inventory in the amount of $72,321.17.

Exhibit 147 is a breakdown, showing the computation of that closing inventory. It shows the breakdown with respect to the various ingredients that went in to make up the value of that inventory.

There is a total for sugar of $54,691.92; a total value

(2235)

of barrels of $7,899.25; and a total value for chemicals of $9,730, making up the total of $72,321.17, which is carried forward here as the closing inventory, which is added to income, Exhibit 146.

Exhibit 148 is a computation of the purchases not claimed, which was allowed as a deduction in arriving at the corrected net income in Exhibit 146.

This schedule sets forth the invoice numbers, the dates, and the amounts of the invoices, arriving at the total of $9,229.65, which is the item allowed in Exhibit 146 as an additional deduction, not previously claimed.

Q. Let's take the inventory item, Mr. Present, which is the second item in 146, closing inventory, $72,000.

In computing that, you had before you the Tavern accounts receivable-accounts payable ledger; correct, sir? A. That is correct, yes, sir.

Q. And you found from that that the last sale was on November 23, 1946, 1945? A. 1945, yes, sir.

Q. There were purchases thereafter? A. That is correct.

(2236)

Q. How did you know that the amount of the sales up to November 23, 1945, and no more, was included in the tax return of Tavern? A. Well, I added the sales shown by the accounts receivable ledger, and compared that were the sales shown in the statement prepared by Mr. Roth, and also compared it with the tax return as filed, and found that the items agree, therefore there were no sales included in the tax return for the period after November 23, 1945, other than those which were shown in the accounts receivable ledger as having been made prior to and including November 23rd.

Q. If I may rephrase it just a bit: In other words, you determined that the tax return showed the same sales which the accounts receivable-accounts payable ledger showed? A. That is correct, accounts receivable ledger.

Q. And no sales except up to November 23rd were included in the Tavern tax return? A. That is correct, yes, sir.

Q. How did you determine the——

Mr. Wessel: Strike that.

Q. Now, in examining the ledger, you also found purchases after the date of the last sale? A. That is correct

(2237)

Q. How did you determine that those purchases were taken as a deduction in the Tavern tax return? A. Well, in the accounts payable ledger we find the posting from the purchase account.

I also reconstructed the purchase book, using the accounts payable ledger, and tied in the purchases for sugar barrels, etc., which appear in the tax return, with the purchase book, as I reconstructed it, and found that these items which were claimed as purchases, as having been

made after November 23rd, actually were claimed as purchases in the tax return filed for the fiscal year ended 3/31/46.

(2238)

Q. If I understand you correctly, the work that you are now describing was to show, to establish that the tax return of Tavern was based upon the accounts receivable, accounts payable ledger of Tavern? A. That is correct.

Q. And you had no other books of Tavern to go by; am I correct?. A. That is correct. That was the only book we had available.

Q. Did you use, however, in your calculations, Exhibits 58-A, which is the Tavern financial statement as of March 31, 1946? A. Yes, sir; I did use that.

Q. Now, did you find—and we will come back to this later, Mr. Present—but did you find that these various expenses——

Mr. Wessel: Strike that.

Q. —that these various sales, which were not reflected in Tavern books, were reflected in the books of some other company? A. Yes, sir. Examination of the American Brands Corporation's books show that all of this inventory was sold by the successor corporation, American Brands Corporation, in the first couple of days of its existence, prior to the acquisition of any substantial amount of inventory, so that we find in the first few days of the American Brands Corporation a very substantial amount of sales and

(2239)

no purchases, which would indicate that the inventory which we set up as having been in existence on the last date of operations of the partnership, actually was in existence and was sold through the successor corporation, American Brands Corporation.

Q. Let me see if I can go into that in a little detail. Exhibit 39 is the certificate of incorporation of American Brands Corporation which you used in establishing that that company was incorporated on January 8, 1946; correct? A. That is correct, yes, sir.

Q. Did you also examine the minute book and stock ledger of American Brands Corporation to substantiate that fact? A. I did, yes, sir.

Q. In examining the American Brands Corporation books, did you find that there were sales in January of 1946, before the books showed any purchases? A. That is correct, yes, sir.

Q. And did you correlate those sales with the inventory which you have described here in Tavern? A. Yes, sir; they would indicate an inventory greater than the amount which we have been able to establish as having been in existence, so that this figure of $72,000 would be a minimum

(2240)

figure for the inventory having been in existence on that day.

Q. If I understand your testimony, Mr. Present, what you are saying is that the closing inventory of Tavern was in fact transferred over to American Brands Corporation. A. (Witness nods assent.)

Q. Yes that "yes"? A. Yes, sir; it was.

Q. Would you describe what the effect of that was, tax-wise? A. Well, tax-wise, the corporation would pick up the profit on the sale of that inventory at a tax rate of 38 per cent. The individuals who should have reflected that profit were somewhere in the 90 or 91 per cent bracket, so that there would have been a tax saving of roughly 45 to 50 per cent of the $72,000 figure which we have found, by not reflecting the inventory in the partnership, but then selling it through the corporation.

Q. Everything goes back into detail in Exhibit 147. Did you base your conclusion of sugar closing inventory from the new Nulomoline inventory from the testimony of Samuel Gartner on February 3rd? A. That is correct.

Q. And did you also base it upon Exhibit 118 in evidence, which are invoices of that company? A. Yes,

(2241)

sir; these invoices would add up to the total shown here of $33,950.72, to the Nulomoline Company.

Q. And you made that addition? A. Yes, sir; I did.

Q. Now, the National Sugar Refining Company, you base that upon the testimony of Joseph Cody and Edgar R. Roth on February 3rd? A. Yes, sir.

Q. Did you also base it upon Exhibits 117 and 119, which are invoices and ledger sheet of that company? A. Yes, sir; the total of these invoices for the National Sugar Refining Company would be $10,362.95.

Q. Now, on the Holloway Corporation, did you base your conclusion of the amount of inventory at $9,000 upon the testimony of Oscar Spiegelhalder on February 3rd? A. Yes, sir.

Q. Did you also in that connection use Exhibits 12[illegible] and 123, which are copies of invoices and ledger sheets for that company? A. Yes, sir; these invoices totaled $9,077.08.

Q. Now, on the Sun Hill Products Company, did you base your conclusion of the value of that inventory upon the testimony of Mr. Spiegelhalder on February 3rd? A.

(2242)

Yes, sir.

Q. And also upon Exhibit 124, which is the ledger sheet for that company? A. Yes, sir; that ledger sheet indicates a sale to the Tavern Fruit Juice Company by Sun Hill Products of $1,301.17.

Q. As to the figure for the Bayonne Barrel Company, did you base your computation upon the testimony of Dante Lodico on February 3rd? A. Yes, sir.

Q. Is it also based upon Exhibits 115 and 116, which are invoices and the ledger sheet? A. Yes, sir; these invoices would total the $7,899.25, as set forth in this exhibit.

Q. With regard to H. Hexter, did you base your computation upon Mr. Hexter's testimony yesterday? A. Yes, sir.

Q. And also upon Exhibits 138 and 139, which are ledger sheets of the Hexter Company? A. Yes, sir; these two exhibits indicate total sales to the Tavern partnership after November 23rd of $1,750.

Q. Finally, as to the Stein Hall Company, did you base your computation upon the testimony of Mr. F. Richard Bauer on February 3rd? A. Yes, sir.

(2243

Q. And also upon Exhibits 126, which are invoices, and 129, which is a ledger sheet? A. Yes, sir; these invoices and ledger sheets indicate that the Stein Hall Company made sales to the Tavern Fruit Juice Company of chemicals in the total amount of $7,980.

Q. Referring over to Exhibit 148, you have listed there certain invoice numbers and dates and amounts; did you obtain those from Exhibit 148 and also from the American Brands Corporation books? A. Yes, sir.

Q. Would you state what you did—excuse me. A. Exhibit 148 includes purchases made by the Tavern Company, which are included in the $33,950.72, set forth under the Nulomoline Company. Of that $33,000, $9,229.65 was not claimed as a purchase by the Tavern Company, but was claimed as a purchase by the successor corporation, the American Brands Corporation. These six invoices, totaling $9,229.65, were actually paid by the Tavern Company,

are included here as a purchase by the Tavern Company, included in their inventory, and therefore an allowance has been made for the additional cost to the Tavern Company, and is set forth here in Exhibit 146 as a deduction for pur-

(2244)

chases not claimed.

Q. Let me ask you this, Mr. Present: would you arrive at the same over-all result, tax-wise, if instead of computing Tavern's closing inventory at $72,000-odd, and deducting purchases not claimed in the amount of $9,000-odd, you had just taken a net closing inventory figure of about $63,000-odd? A. The net effect would be exactly the same, yes.

Q. The only reason you did it this way was because it would follow normal standard accounting practices? A. Yes, these purchases were made by Tavern and therefore should have been paid by them and included in their Tavern inventory.

Q. From the tax liability point of view, it wouldn't make any difference whether you had charged Tavern with a net closing inventory of about $63,000-odd or done it as you did, which is to charge them with seventy-two and credit them with nine-odd thousand dollars? A. That is correct; it would make no difference.

Q. There has been some testimony about the use of the Tavern bank account by American Brands Corporation for a period of some time before American Brands got its own bank account; could you explain how that would affect the

(2245)

picture you have discussed in connection with Tavern's closing inventory? A. That would have no effect at all. The corporation merely used the bank account in the name of the Tavern partnership, but all of the transactions during the period of the existence of the corporation were properly

reflected on the corporate books, merely charging the partnership bank account for the deposits that were made in that account and setting up a liability for payments made out of that account on behalf of the corporation. At the end of the period of operations an entry was made, setting up the net balance, which turned out to be due to the partnership as a result of all these transactions, involving the use of the partnership bank account by the corporation, but that was all clearly reflected on the corporations books and has no effect at all upon this computation of the inventory. It is entirely a matter aside from it.

Q. Let me see if I understand it, Mr. Present: if American Brands Corporation purchased goods in the name of Tavern and took those purchases as expenses on its own books, that is, American Brands' books, it wouldn't have any effect, tax-wise, on Tavern; is that correct? A. That (2246)

is correct.

Q. And what you are talking about here in Exhibits 145, 147 and 148 is where Tavern——

Mr. Wessel: I think I had better rephrase all my questions. Strike the last question.

Q. If Tavern purchased goods and took as a deduction the cost of the purchase and then sold the goods, that would be a perfectly proper and normal transaction. A. Yes.

Q. If it purchased goods and didn't sell them, it then should have an asset at the end of its fiscal year; correct? A. Which also should be used to reduce its costs.

Q. That is the picture in 146, '47 and '48. A. That is what did not happen. The cost of this inventory was charged with an expense in computing the profit shown by the partnership tax return, improperly, inasmuch as this cost was not reflected in the sales shown for the year, inas-

much as these items were still on hand at the end of the year and should have been used to reduce the total cost for the year, so that by not reflecting this inventory we have an overstatement by the Tavern partnership of the net cost of the merchandise sold for the year.

(2247)

Q. But as far as the use of Tavern's bank account by A. B. C. was concerned, or even purchases by A. B. C. in Tavern's name, that wouldn't affect Tavern's tax picture or A. B. C.'s tax picture, since A. B. C., American Brands Corporation, took those expenses on its own books; is that correct? A. That is correct, and properly reflected its liability and the asset due from the Tavern partnership.

Q. Turning to the second item on Exhibit 146, which is the experimental and research expense addition to net income, 32-odd thousand dollars; where did you get that figure from? A. That is the amount set forth in Exhibit 58-A as having been paid to C. Goldenberg, the engineer.

Q. Well, now, where is that figure on the Tavern tax return? A. That is reflected in item 24, the other deductions, a schedule for which is attached to the tax return, and the schedule in the tax return sets forth the total deduction of $74,382.05 for laboratory, research and engineer's expenses.

Q. But it doesn't break it down in any way, the tax return? A. No, sir; the breakdown was not gotten from the statement of assets and liabilities on the profit and loss

(2248)

statement prepared by Mr. Roth, which is Exhibit 58-A.

Q. And that was prepared by Mr. Roth at the time of Tavern's and A. B. C.'s existence, and not recently; is that correct? A. I believe Mr. Roth said they were prepared in either October of 1946—somewhere about that time.

Q. Now this 32-odd thousand dollars represented alleged salary payments to Mr. Goldenberg; am I correct? A. That is correct, yes, sir.

Q. Upon what did you base your assumption that that was not a proper Tavern expense deduction? A. Well, that would be based upon the testimony of Mr. Roth and also in part the testimony of Mr. Goldenberg.

Q. What do you mean by "in part"? A. Well, there seems to be a difference of opinion about this, how much Mr. Goldenberg received. Mr. Roth, I believe, testified that he received somewhere in the neighborhood of $8,000—$7,500 or $8,500. Mr. Goldenberg, I believe, testified that he received somewhere in the neighborhood of twelve to thirteen thousand dollars.

Q. Well, now——

Mr. Stryker: One moment. I object to that.

(2249)

I think it is an incorrect paraphrase of the testimony.

Mr. Wessel: Of course, if it is, the assumption will have to be——

Mr. Stryker: I submit we shouldn't have to go along with incorrect assumptions based on an incorrect statement of the testimony.

Mr. Wessel: Let me rephrase it. Strike the last comment and I will ask another question.

Mr. Stryker: Will you strike that out?

Q. Assume, Mr. Present, and assume only, that Mr. Roth testified that Mr. Goldenberg received a salary from Tavern of between $7,500 and $8,500—would you make that assumption? A. Yes, sir.

Q. And would you further make the assumption that Mr. Goldenberg testified that he received a salary from

Tavern in the amount of approximately twelve or $13,000. Would you make that assumption also? A. Yes, sir.

Q. Why did you take the figure of $32,000 on Exhibit 58 and on Exhibit 146, which is your computation, as being entirely improper salary expense to Mr. Goldenberg? A. Well, this computation is based upon the assumption that the salary paid to Mr. Goldenberg was charged to the cost of labor and supplies in item 2 of the tax return, in the total

(2250)

amount of $82,266.95.

Q. In other words, you assumed, if I understand you correctly, that there were two account on the Tavern books which related to salary payments to Mr. Goldenberg, one, the figure in laboratory and research expense of $32,000 odd, and two, a payroll account in the regular form? A. Yes, sir.

Q. Now I show you Exhibit 59-A, which are the Social Security returns of Tavern, and ask you if that assumption was based in part upon Exhibit 59-A? A. Yes, sir; these schedules show that the salary paid to Mr. Goldenberg was reflected in salaries paid by the partnership.

Q. Secondly, as to this discrepancy between Mr. Roth's recollection of the amount of money Tavern paid to Mr. Goldenberg and Mr. Goldenberg's recollection of the amount of money he received, did you take into consideration Exhibit 59-B, which is the American Brands social security return, reflecting payments by American Brands Corporation to Mr. Goldenberg? A. Yes, sir, that was considered too also in the examination of the American Brands books.

Q. Which showed what? A. Showed salary payments

(2251)

to Mr. Goldenberg by the American Brands Corporation.

Q. And did you further assume that Mr. Goldenberg was not entirely clear as to what company paid his salary,

but knew that he had received it from Mr. Giglio? A. Yes, sir.

Q. That was also an assumption upon which you based your computation of the $32,000-odd; am I correct? A. Yes, sir.

Q. Now, with the two figures we have just discussed, that is, the $32,000-odd, $72,000-odd added net income, you come to a total net income of $245,000-odd, which is on your schedule; is that correct? A. Yes, sir.

Q. And the next figure on purchases not claimed is Exhibit 148. A. Yes, sir.

Q. Where did you get the figure of $15,000 as a legal expense? A. That represents the payment to Mr. Lawn which was shown as an expense in Exhibit 58-A, which was the statement originally prepared by Mr. Roth, but not claimed as a deduction in the partnership tax return for the fiscal year, and the testimony of Mr. Roth that that item represented a proper deduction and should have been claimed as an expense by the Tavern Fruit Juice Company,

(2252)

and therefore I allowed it as an expense.

Q. We will go over that a little differently, Mr. Present. Tavern tax return, which is Exhibit 7 in evidence, was filed on September 15, 1947. A. That is correct.

Q. And that was something over a year after the close of Tavern's fiscal year? A. Well, it was close to eighteen months.

Q. And that reflects a loan in the amount of $15,000? A. That is correct, yes, sir.

Q. Now, the Exhibit 58-A in your hand, which is the financial statement and income profit and loss statement of Tavern, reflects a legal expense of $15,000; is that correct? A. That is correct, yes, sir.

(2253)

Q. And that document was made about how long after the close of the fiscal period of Tavern? A. About six months, I would estimate.

Q. So, in other words, Exhibit 58A was made about a year before the partnership return was filed? A. That is correct.

Q. Did you also base your conclusion that that was a proper legal expense rather than a loan upon Exhibits 61A and 61B, as testified to in the testimony of Mr. Roth? A. Yes, sir.

Q. Let me ask you this: What effect does your allowing this legal expense have on the Tavern tax picture? A. By allowing this, we reduce the distributive share chargeable to Mr. Giglio and Mr. Livorsi by $15,000.

If this item were not allowed, we would have to increase the distributive shares of Mr. Giglio and Mr. Livorsi, and thereby increase their own personal tax.

Q. If I understand you correctly, if you had not allowed this legal expense, they would be chargeable with more tax? A. Yes, $7,500 more each, in net income, and the tax on that.

Q. So this allowance of legal expense actually is a

benefit taxwise to Mr. Giglio and Mr. Livorsi? A. That is correct, yes, sir.

Q. Now, coming to the distribution of net income, that is the distribution of this $221,000 figure that you calculated to be Tavern's—— A. Yes, sir.

Q. —net income. And is the figure—are the group of figures on the left which show return based upon Schedule I of Exhibit 7, the Tavern tax return? A. Yes, sir. And that distributes the net income as shown by the tax return.

Q. Now, upon what did you base your conclusion that Mrs. Livorsi and Mrs. Giglio were not entitled to any dis-

tributive share of Tavern's net income? A. Well, primarily upon the individual returns, Exhibit 2 and Exhibit 4, filed by Mr. Giglio and Mr. Livorsi, in which they did not recognize that Mrs. Giglio and Mrs. Livorsi were partners. Also upon the testimony of Mr. Roth.

Q. Mr. Giglio and Mr. Livorsi picked up the entire $140,000 in the Tavern partnership information return themselves? A. Is that correct.

Q. No part of it was allocated to their wives? A. That (2255)

is correct. The wives did not file returns.

Q. Oh, yes, Mr. Present, coming back for a moment to this experimental and research expense figure of 32-odd thousand dollars, Mr. Goldenberg testified that he made certain purchases which he recalled as being between 30 and $40,000 in connection with construction work.

Would that, if it were true, in any way affect your calculation? A. No, sir. Those items—could I have the tax return, please, and the statement.

The figure will have to be picked up from the American Brands books.

Q. Do you have the general journal now? A. Yes, sir, I am looking at the general journal of American Brands Corporation, Exhibit 71A. The general journal indicates that there were machinery and equipment taken over from the Tavern partnership which were set up as an asset on the Tavern partnership in the amount of $18,099.41 which, I assume, would be the amounts that Mr. Goldenberg expended in behalf of the partnership in acquiring assets.

Q. Or part of those amounts? A. Or part of those (2256)

amounts, yes, sir. There might have been other amounts which were set up at the same time.

Q. Well, now, under the schedule experimental and research expense in 58A, I note the figure, for example, of research laboratory expenses of $29,016.60. Do you know what that figure was? A. No, sir, but part of the money that Mr. Goldenberg indicated that he spent could very well have been included in that $29,000. This amount which is shown under "C. Goldenberg, Engineer," appears to me to be clearly indicative of the amount that he personally was to receive as compensation——

Q. And that was based upon—— A. —rather than money spent.

Q. And that is based upon your——

Mr. Stryker: Just a moment.

A. That is based upon my own——

Mr. Stryker: I object to that. There is no evidence whatever to support that conclusion. It is a clear hypothesis of the witness based on nothing, and I submit it is not evidence, and therefore is not material or relevant to this case.

Mr. Wessel: Allow me to ask one more question.

(2257)

By Mr. Wessel:

Q. Is that based upon the testimony of Mr. Roth, that this $32,000 figure represents salary expense to Mr. Goldenberg? A. Yes, sir.

Q. And that other expenses were distributed to proper expense accounts? A. Yes, sir.

Q. And is it also based upon your own experience and background as an accountant in reading balance sheets, income statements and books? A. Yes, sir.

Q. Now, this figure for Giglio of $110,000-odd, and Mr. Livorsi of $110,000-odd, was brought, carried over by you to a latter exhibit, which reflects their own personal tax; is that correct? A. Yes, sir.

Q. Not to be picayune about it, but you split an odd figure and gave a penny more to one of the gentlemen arbitrarily; is that correct? A. Yes, sir, that is just— —

The Court: Before you leave this exhibit Mr. Wessel, I would like to ask you, Mr. Present, just so I can follow.

The Witness: Yes, sir.

(2258)

By the Court:

Q. On the experimental and research expense item, on 146, would you tell me as simply as you can how that was carried on the Tavern books and how it was handled in their income tax as distinguished from how you handled it here? In other words, as I followed your testimony there seemed to be two accounts, one, experimental and research expense, two, labor expense.

Now, where do you get the $32,000 figure? Is that the entire amount of the experimental and research expense account? I may have missed something as you went along.

A. That figure, sir, comes from Exhibit 58A (handed), which is a breakdown of the $74,382.05 experimental and research expense shown in the tax return.

Q. I am going to give this back to you (handed).

Let's start again. The $32,000 figure, from 58A, and what is 58A? A. 58A is the profit and loss and balance sheet statement of the Tavern Fruit Juice Co., Ltd. partnership prepared by Mr. Roth from the Tavern boo[illegible]

Q. All right. And how do you get the $32,000 figure from 58A? A. 58A contains a subsidiary schedule breaking

(2259)

ing down the total item of experimental and research expense of 74,382.05, and amount that it shows an item of $32,780.93 for C. Goldenberg, Engineer.

Q. In other words, the $32,000 is the entire amount attributed to Goldenberg in the experimental and research expense account? A. That is correct, yes, sir.

Q. All right. And you have allowed as an expense the payments attributed to Goldenberg in the labor account on the payroll account? A. On the assumption, sir, that that amount was shown in a separate account.

The Court: Very good. All right.

(Marked Government's Exhibits 149, 150, 151, 152, 153 and 154 for identification.)

By Mr. Wessel:

Q. Mr. Present, I show you Exhibit 149 for identification and ask you if you can tell me what that is, please? A. Yes, this is a schedule setting forth the additional income received by Mr. Giglio and Mr. Livorsi on the sale of the additional cars of corn syrup that were left over at the time of the termination of the Eatsum partnership, which Mr. Lubben testified he sold for the partnership.

(2260)

Q. Now, was that based upon the testimony of Mr. Lubben and Mr. Roth in connection with these sales? A. Yes, sir.

Q. Was it also based upon Exhibits 29-1 through 29-6, which are drafts relating to the sales of corn syrup? A. Yes, sir.

Q. Was it also based upon Exhibit 30-1, which is a page out of Mr. Lubben's black book, large black book, I should say? A. Yes, sir.

Q. Did you assume——

Mr. Wessel: Strike that.

Q. Was one of the assumptions upon which you based Exhibit 149, which are your calculations, that the testimony of Mr. Roth and Mr. Lubben as to the amounts received on account of additional cars of corn syrup sold after the Eatsum partnership with Mr. Lubben terminated was true? A. Yes, sir. I also used the amount shown in Exhibit——

Mr. Stryker: Pardon me, I don't recall any such testimony. I don't think there is any.

Mr. Wessel: If there isn't, I have certainly made——

Mr. Stryker: If the assumption is based on

(2261)

that, I think we ought to clear that up.

Mr. Wessel: I am positive there is.

The Court: We can clear it up at the recess.

A. I also used the amount set forth in Exhibit 30-1.

Mr. Wessel: I offer Exhibit 149.

The Court: All right, show it to Mr. Stryker.

Mr. Stryker: Pardon me a moment, your Honor.

Mr. Wessel: The testimony to which I referred appears at pages 212 and 213 of the transcript, 222 through 231 of the transcript, 1040 through 1043, 1047 and 1684 through 1686.

Mr. Stryker: Will you hold that. I can't do two or three things at once.

I object to 149 on the ground that there is no foundation for it.

The Court: All right, overruled. I will receive it.

Mr. Wessel: In referring to the testimony of Mr. Roth and Mr. Lubben, the pages that I referred to in my statement just a minute ago is the testimony that I was talking about.

The Court: Yes.

(2262)

(Government's Exhibit 149 for identification received in evidence.)

Mr. Stryker: I won't stop now to examine it. If you will give me those pages again I will look at it.

The Court: If you find there is any error, why, you let me know.

By Mr. Wessel:

Q. Mr. Present, would you step up again, please, to the chart, and describe what Exhibit 149 is. A. Exhibit 149 is a schedule setting forth the income received on the —on five cars of corn syrup that were sold through Mr. Lubben for the benefit of Mr. Giglio and Mr. Livorsi.

The schedule sets forth the car number as obtained from the duplicate copy of the draft, the weight as obtained from the duplicate copy of the draft.

The premium price was determined from Mr. Lubben's testimony, and from a notation on Exhibit 30-1.

May I read it?

Q. Yes, certainly. A. The notation dated June 1st states as follows:

"Received from Mike Cohen as a deposit on overage account for some corn syrup we are selling

him. We have to pay 8¾ cents a pound to Lou (2263)
Roth"—"to L. Roth," excuse me.

Mr. Stryker: Just tell me what you are reading from.

The Witness: Yes, sir, Exhibit 30-1.

Mr. Stryker: What is that, Lubben's book?

The Witness: Yes, sir.

By Mr. Wessel:

Q. You said it was based upon the testimony of Mr. Lubben. It was also based upon the testimony of Mr. Roth? A. Yes, sir, and the exhibit.

Q. And the paper? A. This is the 8¾ cents a pound, and this is the weight, the premium price, which computed the overage.

Now, in this particular case, Exhibit 30-1, on June 18th there was a notation as follows:

"Paid to L. Roth on corn syrup, TATX24401, $8,230.16,"

so that in the case of the car of corn syrup for which there was documentary evidence as to the actual amount paid, rather than use the premium price as set forth of 8¾ cents a pound, I used the actual amount which is indicated to have been paid; it is slightly less than the figure at 8¾ cents a pound.

(2264)

At 8¾ cents a pound the amount would have been $8,281. In the one case where we had a record of the actual amount paid, I used that smaller amount.

Q. In other words, you took the lesser of the two amounts as to which there was testimony in charging

income for these cars of syrup which were sold? A. Yes, sir. That schedule shows that there was total payment or overage of $41,560.66 on the basis of the previous testimony and assumptions that Mr. Giglio and Mr. Livorsi were equal partners, that $41,560.66 was divided equally between Mr. Giglio and Mr. Livorsi, and these two amounts are carried forward to a later schedule.

Q. I notice the term "corrected" up in the upper right-hand corner. What does that mean? A. There were two charts made originally, based upon the assumption that there would be testimony relating to either five cars sold or six cars sold.

I find that one car for 94,160 pounds, car No. GATX2147, was actually dated January 24, 1947, and should not have been included in this schedule; therefore the corrected schedule which does not include that one car, which is dated in 1947.

(2265)

Q. Let me see if I understand that correctly. When you prepared the indictment, or when you prepared the figures which went into the indictment, you thought there would be evidence at this trial showing that six cars of corn syrup were sold during 1946 and the proceeds were attributable to Mr. Giglio and Mr. Livorsi; is that correct? A. That is correct, yes, sir.

Q. And in the course of this trial you found that one of those cars, in fact, was in 1947, and not 1946? A. That is correct.

Q. So it could not be attributable as 1946 income to them? A. That is correct.

Q. This represents a change based upon the testimony as it has gone into evidence at this trial; am I correct? A. Yes, sir.

Q. And this represents a change from the figures in the indictment to some extent; is that correct? A. Yes, sir. These figures are about $8,000 less or $8,300 less than the figures in the indictment.

Q. Now, I notice that you split this equally between Mr. Giglio and Mr. Livorsi. Upon what did you base that conclusion? A. Based upon the previous assumptions and

(2266)

testimony that Mr. Giglio and Mr. Livorsi were equal partners.

Q. And these figures of $20,000-odd were carried forward into the personal tax returns as corrected by you? A. Yes, sir.

Q. In other words, each of them in the indictment is chargeable with about $4,000 more net income than you actually found to have been proved at this trial; am I correct? A. That is correct, yes, sir.

Q. And that the tax liability in the indictment is about $2,000 or $3,000 apiece greater than the proof at this trial is; is that correct? A. Yes, sir, that is correct.

Q. And what percentage variance would that be, sir; do you have any idea? A. Oh, I imagine about 2 or 3 per cent.

Q. Is it that much? A. I don't recall now offhand. I would have to check the figures, sir.

Q. Well, when we come to the next exhibits. A. If you are speaking in totals, it probably is a lot less than that.

(2267)

Q. I hand you, Mr. Present, Exhibit 150 for identification, and ask you if you can tell me what that document represents? A. Yes. This is a schedule that I prepared, setting forth the net income shown by the tax return Form 1040 filed by the taxpayer, carrying forward the corrected distributive shares of net income from the other exhibits.

giving credit for the net income as disclosed by the tax return, picking up the additional income from those cars of corn syrup as set forth in that exhibit, giving the taxpayer a credit for the item of miscellaneous or other income reported by him on his tax return, and setting forth the net income as I corrected it.

Q. Well, is Exhibit 150 based upon any more assumptions than you based the prior exhibits, 141 through 149? A. No, sir. This ties into all the other exhibits.

Q. And it is just a recalculation of the various figures in Exhibits 141 through 149, tied into Mr. Giglio's tax return? A. That is correct, with one other computation, and that is the corrected tax due on the corrected net income as I computed it, the tax shown by the tax return, and the deficiency.

(2268)

Q. And in that calculation you used the tax rates for 1946? A. Yes, sir.

Mr. Wessel: I offer Exhibit 150 in evidence.

Mr. Stryker: Do I have a copy?

Mr. Wessel: Yes.

Mr. Stryker: Same objection.

The Court: Overruled. Received.

Mr. Stryker: Exception.

(Government's Exhibit 150 for identification received in evidence.)

Mr. Wessel: Would you come up, Mr. Present, please.

(At chart.)

By Mr. Wessel:

Q. I wonder if you would explain 150 to the jury, and also tie in the other exhibits we talked about yesterday afternoon and this morning. A. Yes, sir.

Q. You now have four exhibits in front of you, Exhibits 141, 146, 149 and 150. A. Yes, sir. 150 is the computation as it affects the taxpayer, William Giglio.

The net income shown on the return of $286,690.01 comes from the Exhibit 2, which is the tax return for the

(2269)

individual, William Giglio, for the year 1946.

The Eatsum distribution corrected of $228,288.58 comes from Exhibit 141.

The net income from Eatsum further tax return of $101,123.88 comes from the Form 1040, the individual tax return filed by Mr. Giglio.

The difference between those two amounts represents additional income from the Eatsum partnership in the amount of $127,164.70.

The Tavern distribution corrected comes from Exhibit 146, and shows that the corrected distributable income of Mr. Giglio was $110,799.39.

Further tax return comes from Exhibit 2, which shows the distributive share of income from Tavern of $70,363.16, which would be shown here, the combined figure for Mr. and Mrs. Giglio, and the item shown in the return for the corrected distribution results in additional income from the Tavern partnership of $40,436.23.

The share of the five cars of corn syrup sold for $20,780.33 comes from Exhibit 149.

Adding the net income further return, plus the additions, which come from the various exhibits, we arrive

(2270)

at a total of $475,071.27.

From that I subtracted the item of $50,000 of other income which was reported in Exhibit 2, the individual return for Mr. Giglio, which is not otherwise identified, and arrive at a net income corrected of $425,071.27.

On that net income, using the tax rates that were in effect for the year 1946, and giving effect to the number of exemptions which were claimed on the individual return, there was a tax due of $340,959.62.

Further return there was a tax indicated of $232,978.73, so that we have a deficiency on William Giglio's 1946 individual return, based on these figures, of $107,980.89.

Q. And this is corrected and takes into consideration the fact that that one car of corn syrup was sold in 1947 and not in 1946? A. Yes, sir. That is so indicated in the schedule. This is a corrected schedule, taking into consideration that only five cars were——

Q. Now, assume, Mr. Present, that in fact some part of corn syrup sales was included in this $50,000 other income figure in the tax return, how would that change, if at all, your computation as to Mr. Giglio's tax? A. It

(2271)

would not change it at all, inasmuch as after finding my additions for the various sources that we have established, I deducted from that amount the $50,000 other income not identified, and which under your assumption would represent income from the corn syrup cars. After making that deduction as it has been made here now, there would be no change in his net income corrected or his tax due, based on your assumption.

The Court: Is this a good point to take the mid-morning recess?

Mr. Wessel: Yes.

The Court: All right, we will take a ten-minute recess. Don't discuss the case.

(Short recess.)

(2272)

(Jury in box.)

Mr. Wessel: Would you step back, Mr. Present, please.

(Witness leaves stand and goes to charts.)

By Mr. Wessel:

Q. With regard to these various additions to Mr. Giglio's net income, as shown in his return, did you check to see whether any of those amounts were included in any of the other returns in evidence in this case, such as the corporation returns, American Brands or Wholesale, or the other American corporations, or any other returns in evidence here? A. No, sir; none of these amounts were included in the income of any other return.

Q. I am specifically referring to this share of proceeds of five cars of syrup sold, of $20,000-odd. Specifically, was that figure included in any of the American corporations? A. Not to my knowledge, no, sir.

Q. If I may just go into some of these figures in a little detail. The first figure of $296,000 comes from Mr. Giglio's own tax return. A. That is correct.

Q. The corrected additional income from Eatsum con-

(2273)

sists of half of the corn syrup cash box; is that correct, and the redistribution based upon your consideration of the various partners in Eatsum? A. Yes, sir.

Q. So it is those two factors? A. That's right; yes, sir.

Q. Now, on the Tavern additional income, that is based upon your disallowance of certain parts of the experimental and research expense for Mr. Goldenberg, and your addition of the closing inventory less the legal fee you found. A. Yes.

Q. And those are the only items that go to make up the corrected additional income of Tavern? A. That is correct, yes, sir.

Q. And the proceeds for five cars, you just referred to, on Exhibit 149? A. Yes, sir.

Q. Incidentally, why didn't you include the five cars reflected on Exhibit 149 on the Eatsum information corrected return, Exhibit 141? A. Well, the income on all these cars were all received after the close of the Eatsum partnership year, January 31st. These were all received June or later of 1946, so that they would not be included in the Eatsum partnership tax return.

(2274)

Q. Were they included in the Eatsum 1947 general ledger? A. No, sir.

Q. And you checked that? A. Yes, sir.

Q. That is Exhibit—— A. Not as income, sir.

Q. We are not taking it as sales in that general ledger. A. That is correct.

Q. And that is Exhibit 70-A? A. Yes, sir.

Q. Well, now, what is Exhibit 151, Mr. Present, which I will hand you in just a moment? A. It is——

Q. Is that the same thing for Mr. Livorsi? A. Exactly, yes, sir.

Q. And your testimony as to the assumptions you made would be the same as for Exhibit 150? A. It was prepared exactly the same way as the one for Mr. Giglio.

Mr. Wessel: I offer 151 in evidence.

Mr. Stryker: Same objection.

The Court: Overruled.

(Government's Exhibit 151 for identification received in evidence.)

Q. Will you discuss 151, Mr. Present, showing particularly whatever differences there are between that and the Giglio corrected figures, Exhibit 150? A. Well, the net

(2275)

income per the return is set forth in Exhibit 4, which is the individual tax return for the year 1946, for Frank Livorsi. The net amount is $289,515. It is slightly larger than the net income per return of William Giglio, as a result of the inclusion in income of his salary earned from Eleanor Post Dresses, Inc., a company with which Mr. Giglio apparently was not connected. The Eatsum distribution——

Q. Just a minute. As far as the Eleanor Post Dresses, you don't know whether or not Mr. Giglio was connected with that company? A. No, sir. The only thing I know is that Mr. Livorsi reported salary from that company.

Q. That is in Exhibit 4. A. Yes, sir.

Q. Plus the testimony of Mr. Puth as to that company and Mr. Livorsi's connection. A. Yes, sir.

The Eatsum distribution corrected of $228,288.58, is exactly the same for Mr. Livorsi as for Mr. Giglio, representing a fifty per cent split of the remainder of the Eatsum income after subtracting Mr. Lubben's share, and since Mr. Giglio and Mr. Livorsi were fifty per cent partners, Mr. Livorsi's distributive share is exactly the same as it was in the case of Mr. Giglio, and the distribution corrected is

(2276)

$228,288.58. For the tax return he reported a distributive share of $101,123.88, which is also the same amount set forth in the Eatsum information tax return, filed on behalf of the Eatsum partnership; and it is also the amount set forth in the individual return for the year 1946 of Mr. Livorsi. The difference between those two represents additional income from the Eatsum partnership in the total amount of $127,164.70.

The Tavern distribution corrected is $110,799.38, which comes from Exhibit 146. Further tax return is $70,363.16, which is the total of these two, and is also the amount set forth in the individual tax return of Mr. Livorsi for the year 1946. The difference between the amount shown in the tax return and the corrected distribution represents additional income from the Tavern partnership of $40,436.22.

The next item is Mr. Livorsi's share of the proceeds of the five cars of syrup sold, that is set forth in Exhibit 149, and that amounts to $20,780.33.

Then giving him credit for an item of miscellaneous income of $50,000, which was reported by Mr. Livorsi in his 1946 individual tax return and was not further identified, giving him credit for that $50,000, we have a net income

(2277)

corrected of $427,896.25, as opposed to the net income reported of $289,515.

The corrected tax on the $427,896.25, taking into consideration the surtax rates for the year 1946, and giving consideration to the exemptions claimed by Mr. Livorsi as set forth in his individual return for the year 1946, there is a corrected tax due on this net income of $343,834.06.

Mr. Livorsi reported a tax liability of $236,003.65, which results in a deficiency of $107,830.41 to Mr. Livorsi, for his individual tax return for the year 1946.

Q. This again is the corrected chart? A. Yes, sir; this is based on the proceeds of only five cars of syrup.

Q. And if that sixth car, which was referred to, were in '46, there would be about $4,000 additional net income and about $3,000 or some additional tax deficiency? A. Yes, sir.

Q. Incidentally what is the approximate corrected——

Mr. Wessel: Strike that.

Q. About how much did you increase Mr. Giglio's and Mr. Livorsi's net incomes? I notice you have a deficiency in tax, but you don't have any figure for the change in the

(2278)

net income you found. A. That would be about $137,000.

Q. For each of them? A. Yes, sir; $138,000. I guess it would be over $138,000 for each.

Q. And this, and Mr. Livorsi's corrected net income and corrected tax, is based upon the same facts upon which you based Mr. Giglio's, that is, the cash box, the change in Eatsum partnership distribution, the closing inventory which was found, disallowance of certain experimental expenses, Goldberg's salary, an additional legal expense, as a Tavern deduction, plus the share of his proceeds in the five cars of corn syrup. A. Yes, sir.

Q. Turning to another exhibit, Mr. Present, I show you Exhibit 152 for identification, and ask you if you can identify what that is? A. This is a schedule that I prepared, which sets forth the net income of the various American corporations and the Lawn International Corporation as it appeared in the consolidated tax return filed on behalf of those corporations. The schedule also set forth the corrected net income for each one of those corporations as an individual entity. The schedule sets for the corporate tax liability shown by the consolidated tax return filed, the

(2279)

corporate tax liability based upon separate returns that was due, if they had filed separate returns, and a schedule setting forth the totals, in order to arrive at a deficiency, which results from the filing of the consolidated tax return, as opposed to the filing of separate returns.

Q. Is Exhibit 152 based first upon your assumption that the various American corporations and the American Brands Corporation consolidated return were not properly consolidated? A. Yes, sir.

Q. And was that assumption based upon—I won't give you all the numbers at this time—all the books of the various American companies which are in evidence here? A. Yes sir.

Q. And upon the tentative tax returns in evidence, the final tax returns in evidence, and the draft tax returns in evidence? A. Yes, sir.

Q. Was it also based upon the papers of incorporation which are in evidence? A. Yes, sir.

Q. And the financial statements which are in evidence in Exhibit 58? A. Yes, sir.

Mr. Wessel: I offer Exhibit 152 in evidence.

A. (Continuing) I think it is also based on one other.

(2280)

Q. Excuse me. A. It is also based upon the testimony of Mr. Roth about the ownership of the various corporations.

Mr. Wessel: Thank you.

Mr. Stryker: Same objection.

The Court: All right, overruled.

Mr. Wessel: I understand that the objection is not as to form, and that I haven't enumerated numbers of the various exhibits; is that correct?

Mr. Stryker: Simply foundation.

(Government's Exhibit 152 for identification received in evidence.)

Q. Would you explain 152 to the jury, please, Mr. Present? A. This is a schedule setting forth the individual net incomes of the corporations as they appeared in the consolidated tax return that was filed, in order to arrive at a consolidated net income in the tax return filed, of

$261,753.36. The items that are circled represents losses as opposed to the profits which are not circled. The corrected figures represent the corrected net incomes, individually, for the six corporations, as I have corrected them. The only one on which there is a change is in the American Brands Corporation, in which case the net income as I show it is reduced from that shown by the net

(2281)

income as set forth in the consolidated tax return. That results from the allowance of the opening inventory as a deduction, which was carried over from the Tavern partnership and which was not claimed as a deduction in the American Brands Corporation. It also represents adjustment for these purchases, totaling $9,229.65, which has been claimed as a deduction in the corporation, but which I found were a proper deduction in the partnership, were allowed as a deduction in the partnership, and therefore not allowed as a deduction in the American Brands Corporation; with the exception that the closing inventory of the Tavern partnership is carried forward into the corporation, and the net figure is allowed as a deduction.

Q. In other words, you found that Tavern's income was understated and American Brands Corporation was overstated, and this represents your decrease of American Brands income? A. Yes, that is correct; that is exactly it. The tax due, inasmuch as there was only one return filed for the consolidated group, the tax liability shown by that tax return was $104,701.35. Whereas under my computations the three corporations which showed net income

(2282)

based on my corrected net income, which is a reduction, the net income shown by the returns filed should have paid a total tax for the three of them on their separate returns

of $171,098.79. So that we have a tax deficiency resulting from the use of the consolidation of $66,397.44.

Q. Now, is Exhibit 8 the consolidated tax return which is referred to in the $104,000, the tax return figure? A. And it is also referred to here under consolidated income.

Q. I notice that the affiliation schedule attached to Exhibit 8 does not include the name Lawn International Corporation as one of the affiliated American corporations, and yet you have it included in your Exhibit 150; would you explain that, please? A. Yes, sir. Even though the affiliation schedule does indicate that the loss of the Lawn International Corporation was used in arriving at the consolidated net income as shown by the tax return, actual examination shows that that loss was used in arriving at the $261,000 net income shown by the consolidated tax return, even though the amount is not shown in the affiliation schedule.

Q. And in working out your Exhibit 152, did you in-

(2283)

clude the $6,109.19 loss in Exhibit 10, which is the Lawn International Corporation tax return? A. Yes, the Lawn International Corporation filed a separate return for the year 1946, setting forth that $6,109.19 loss in its own return for that year.

Q. Incidentally, Mr. Present, in any of these schedules that have been here in evidence, did you include any part of the $250 to $350 income, weekly, Mr. Lawn had from Tavern? A. No, sir, those items were allowed as deductions.

Q. They were allowed as deduction? A. Yes, sir.

Q. Would it be correct to state that Lawn International actually resulted in two different deductions—not deductions, but tax returns, one its own return and secondly, a deduction in the Exhibit 8, American Brands consolidated

return? A. Yes, the loss of the Lawn International Corporation was used in the consolidated return as an offset against the income of the three profit corporations, in addition to the filing of a return in its own behalf. I might point out one other thing, that this deficiency of $66,000 actually would be greater if it were not for the fact that I reduced the American Brands Corporation income as corrected

(2284)

and computed the tax in this schedule based on the smaller income.

Q. Do you know whether or not—and when I say "do you know whether or not," I am referring to any evidence in the trial so far—do you know whether or not the apparent mistake, which I think Mr. Roth testified to, including Lawn International in the consolidation, was ever corrected at a later time? A. Yes, sir. In computing this consolidation loss for the 1947 return, which was filed at a later date, they added back to income the $6,109.19 for the year 1947, and reduced the loss shown by that return by that amount.

Q. So that appears, in other words, just a mistake. A. Yes, sir. I would say that the inclusion in 1946 was an error.

Q. Well, by "an error," an inadvertent error, in other words. A. Yes, sir.

Q. Now, Mr. Present, upon what did you base your conclusion that these various companies were not properly consolidated for 1946? A. Well, I prepared an analysis of the ownership, the stock ownership, as set forth in the corporate records. I also considered the records, the corporate records and books of general account, as well

(2285)

as the stock books, minute books, stock transfer ledgers and such, which indicate the ownership of the various cor-

porations, and I also took into consideration the testimony of Mr. Roth.

Q. That analysis that you just referred to is Exhibit 153, am I correct, the next analysis of the stock book, stock ledgers, and so forth? A. I think it is 154, sir.

Q. 153. A. Yes, sir; that is it.

Q. Did you also take into consideration the fact that tentative returns were filed, Exhibits 11, 13 and 15, on an independent and not consolidated basis? A. Yes, sir; except that the filing of such tentative returns on an individual basis would not preclude the filing of a consolidated return at a later date, if in fact the corporations were entitled to consolidate.

Q. These tentative returns, however, were filed after the close of the fiscal year for which the final return was filed? A. Yes, sir.

Q. Did you also take into consideration the draft final returns, Exhibits 64, 65—strike that—65, 66, 67, 68, and 69-A, which were prepared on a non-consolidated basis? A. Yes, sir.

(2286)

Q. And are the various figures for the separate corporations on Exhibit 152 per return the same as the figures on Exhibits 65 through 69-A? A. Yes, sir.

Q. Which was the final draft, final returns which were not filed? A. Yes, sir; the individual figures shown by that return are the same as the individual figures that were used in the consolidated return.

Q. You found an over-all deficiency, tax deficiency, for American Brands and related corporations, and that would be American Brands Corporation, American Brands wholesale, American Trucking, American Agar? A. Well, these are all loss corporations, Agar and Sweets would be loss

corporations, and there would be no tax for them. The tax would be for the three profit corporations.

Q. And the over-all tax deficiency for the three profit corporations would be $66,000-odd? A. Yes, sir.

Q. I show you Exhibit 153, Mr. Present, and ask you if you will identify that, please, and state upon what assumptions that was based? A. Yes, sir. This is a schedule that I prepared, setting forth the extracts and data that were taken from the minute books, the stock books, the

(2287)

stock books and the stock and transfer ledgers of the various corporations.

Q. Isn't it based upon those books and no testimony; am I correct? A. That's right; this is based exactly on data that was taken from the books of the various corporations.

Mr. Wessel: I offer Exhibit 153 in evidence.

Mr. Stryker: You have offered it, have you, Mr. Wessel?

Mr. Wessel: Yes.

Mr. Stryker: Same objection.

The Court: Overruled.

(Government's Exhibit 153 for identification received in evidence.)

Q. Would you state what Exhibit 153 is and describe it, please, Mr. Present? A. Yes, this is a schedule setting forth the data taken from the minute books, the stock books, and the stock and transfer ledgers of the various corporations; the stockholders' further stock certificate books of the corporations that were used in the consolidated return, not considering Lawn International, which we assume, the figures of which we assume were inadvertently included,

(2288)

but using the other five corporations, the stock certificate books indicate stock ownership in these various corporations, as set forth in the schedule.

In the American Brands Corporation there were a thousand shares issued, 500 to Mr. Giglio, 250 to Margherita Giglio, 250 to Howard Lawn.

The American Brands Wholesale Corporation, 500 shares to William Giglio, 250 shares to Margherita Giglio, 250 shares to Howard Lawn.

The American Agar Corporation, 700 shares for William Giglio, 300 shares for Howard Lawn.

The American Sweets Corporation, the stock certificate book does not indicate that there were ever any certificates in that corporation issued.

In the American Trucking and Forwarding Corporation, the stock certificate book indicates 500 shares issued to Mr. William Giglio, 250 to Margherita Giglio, 250 shares issued to Howard Lawn.

Q. Stopping right there, that further stock certificate book would indicate no consolidation; is that correct, under Section 141? A. That is right, there was no parent company.

Q. Continue. I am sorry. A. The stock and transfer ledger which should indicate any transfers of stock or change

(2289)

of ownership in these various shares that were issued, indicates that there were no transfers of stock made for each one of these corporations. The authorized capital stock in shares, in other words, the total amount of shares that could have been outstanding in each one of these corporations, was 1000 shares. The stock certificate book indicates that all the stock that could have been issued was actually issued, as indicated here. The dates of incorporations of the various corporations indicate as follows. The American

Brands Corporation was organized on January 8, 1946.

The American Brands Wholesale Corporation was organized on March 23, 1946.

The American Agar Corporation was organized on October 25, '45. That would have been—well, two months prior to the organization of the American Brands Corporation, which is indicated as having been the parent company.

The American Sweets Corporation was organized on March 23, 1946.

The American Trucking and Forwarding Corporation was organized also on March 23, 1946.

Q. If I may interrupt for just a moment, Mr. Present. (2290) Wouldn't it be impossible without some stock transfers being in existence, for a company which was organized first to be in the subsidiary of a company organized at a later time? A. Yes, sir.

Q. All right, continue, please. A. All of the corporations were organized in the State of New Jersey. The bottom footnotes are extracts taken from the minute books. The minute boo' shows an assignment of six shares of stock from the original incorporators to Frank Livorsi on January 21, 1946. I think the original incorporators were, as I recall it, nominees of the attorney's office.

Q. This is American Brands Corporation you are referring to? A. American Brands Corporation minute book, yes, sir. The minute book also refers to the following shareholders and the shares held:

Frank Livorsi, 250;
Dorina Livorsi, 249;
William Giglio, 250:
Margherita Giglio, 249.

Howard M. Lawn, 1;
Louis J. Roth, 1.

Q. You said that the minute books show that the in-
(2291)
corporators were nominees in the lawyer's office; you don't know that? A. No, sir.

Mr. Wessel: Well, I move that that particular part of the testimony be stricken.

The Court: All right.

A. (Continuing) The American Brands Wholesale Corporation minute book shows that there was assignment of three shares of stock from the original incorporators to Louis J. Roth on March 26, 1946.

The American Sweets Corporation minute book shows an assignment of three shares of stock from the original incorporators to Louis J. Roth on March 26, 1946.

The American Trucking and Forwarding Corporation minute book shows assignment of three shares of stock from the original incorporators to Louis J. Roth on March 26, 1946.

Q. If I understand correctly, in other words the minute books reflect somewhat different shareholdings than in the stock certificate books; is that correct? A. Yes, sir; they do.

Q. But neither one reflects the shareholding—reflects shareholding required by Section 141. A. That is correct.
(2292)

Q. And the stock ledger does not indicate any such transfer to come within 141? A. That's right, these are the only references in the minute books to any stock ownership.

Q. Am I correct that Exhibit 8, which is the tax return as filed, which is signed, I believe, by both Mr. Giglio and Mr. Roth, in the affiliation schedule, indicates that all of the stock in each of the companies other than American Brands, is owned by the parent company, American Brands? A. Yes, sir.

Q. And that is the required relationship under 141; am I correct? A. Yes, sir. I think that schedule, the affiliation schedule, form No. 851, is signed only by Mr. Roth as secretary of the corporation.

Q. I see. You are pointing to the tax return itself, which is signed by both Mr. Giglio and Mr. Roth. A. Mr. Roth signed that as the auditor who prepared the return.

Q. Now, I noticed on Exhibit 9, I believe that this tax liability of American Brands Corporation in the amount of $104,000, as adjusted, but as reported in the amount of $104,000, was abated on April 1, 1954; do you know what that is? A. Yes, sir, I do.

Q. Would you explain to the jury what it means when

(2293)

this tax was abated? A. Yes, sir. This would indicate that the tax liability of $104,701.35 had not been paid to this Collector's Office. At the time of the abatement the statute of limitations was tolling. In other words, there is a period of time within which the Collector can enforce collection of the $104,701.35. In this particular instance, the Collector chose not to proceed with a civil suit for the collection of $104,701.35 in as much as this was an outstanding balance on his books on that date, in other words, to wipe it off he would have to abate it.

Q. And was this criminal prosecution pending at the time the civil liability was abated? A. Yes, sir; it was.

Q. Now, do any of the books indicate Mr. Lawn is an officer of any of the American Brands Corporations, and

if so, in what capacity? A. Yes, sir. I have another schedule that I prepared. We don't have a chart for it, but I can——

Q. Will you testify as to what you found from the books in that connection? A. Yes, sir. (Resuming the stand.) The officers of the corporation, as set forth by the books, are as follows—excuse me—did you want just Mr.

(2294)

Lawn, or did you want them all?

Q. Would you mind listing the names of all the officers of the various American corporations? A. In the case of the American Brands Corporation, the president was William J. Giglio; the vice president was Howard M. Lawn; the secretary was Louis J. Roth; the treasurer was William J. Giglio; the auditor was Louis J. Roth.

In the American Brands Wholesale Corporation the officers were not recorded in the minute book.

In the case of the American Agar Corporation the president was William J. Giglio; the vice president was Howard M. Lawn; the secretary was R. W. Giglio, that is, Raymond Giglio, and the treasurer was William Giglio.

The officers of American Sweets Corporation and American Trucking and Forwarding Corporation were not recorded in the minute books.

Q. I neglected to ask you on Exhibit 153 and 152, whether you didn't take into consideration the testimony of Mr. Roth than Mr. Lawn had a 25 per cent interest in American Agar and not in any other company? A. Yes, sir, that was taken into consideration.

Q. And that testimony differs somewhat from the

(2295)

stockholdings as shown in the various minute and stock books that you referred to? A. Yes, sir. There was one other officer in the American Agar Corporation. There

was the title of Director of Research, held by John C. Van Dyk.

Q. Did you prepare a schedule of drawings of money from the various companies, American Brands companies by Mr. Giglio, Mr. Livorsi, Mr. Lawn and Mr. Roth, for the period from January of 1947 to the end of their books on November 20, 1947? A. Yes, sir; I did.

Q. Did that eliminate all intercorporate and interpersonal transactions, and by that I mean money taken out of one company by some person and put into a second, and all that kind of thing? A. Yes, sir.

Q. This is the net drawings by each person out of each of the companies during the period I have mentioned; am I correct? A. Yes, sir; from the 1st of January 1947 to the end of the corporation.

(2296)

Q. Would you first give the total of the drawings by those persons, whether by loan, salary or any other way, for that period; that is, the whole of 1947 through November 20th? A. There was a total withdrawal of $174,292.25.

Q. Now, would you break that down for the four persons I have mentioned? A. Excuse me, did you want that just for the four individuals?

Q. You also have Lawn International, Inc., there? A. Yes, sir.

Q. I should have included that in my question. Would you break it down for those four individuals, and the one company, Lawn International? A. Right. Well, that also includes, my schedule also includes payments to Louis Roth & Company.

Q. All right. A. And withdrawals of cash which are not identified on the books, as to what particular individual the withdrawal was given to.

Q. Would you state what your schedule shows in that connection and indicate at each point exactly what it is you are talking about? A. Yes. The total withdrawals for the period from January 1, 1947, through the end of the corporate existence, that would have been in 1947, was a

(2297)

total of $174,292.25.

The net withdrawal, giving effect to all withdrawals and repayments by William Giglio, amounted to $42,758.34.

By Howard Lawn, the net withdrawal was $10,196.87.

The net withdrawal by Frank Livorsi amounted to $57,058.33.

The net withdrawals by Louis Roth amounted to $19,950.

The net withdrawals on behalf of the Lawn International Corporation amounted to $18,840.56.

There was a withdrawal for payments to Louis Roth & Company of $3,246.60.

There was a net withdrawal of currency, cash, checks to cash, not otherwise identified, of $22,241.55.

Q. Now, as to that last item, as I understand it, some of the checks to cash in the various corporations might have been for a payroll account, for other things like it. A. Yes, sir.

Q. But the checks you are referring to to cash are not identified in the books as relating to any particular expense account? A. Well, there was usually an entry made to

(2298)

charge them either to selling expense or to one of the other entertaining expenses.

Q. Well, did you find that these were in any standard amount? A. Well, yes, sir, they used to withdraw a certain amount weekly.

Q. Do you have a schedule showing that? A. Yes, sir.

Q. Would you tell the jury what the drawings of this cash amount were weekly through the year 1947? A. Well, in the American Brands Corporation, in the early part of 1947, the weekly drawings were $990 a week.

Q. In cash? A. These were checks to cash.

Q. Now, for what period was that; just cover the time? A. The first seven weeks. For the next three weeks after that it was $400 a week, and for the next ten weeks it was $300 a week, except that one of those weeks the amount was increased to $550. For the following week it was $400.

Q. When you say this round figure, you are giving the exact figures on the books; am I correct? A. Yes, sir. This is the amount of the check to cash.

(2299)

The week after that it was $300; the week after that it was $225, and that continued for four weeks.

For the following weeks there was $175. The week after that, which would have been the week of August 8th—on August 8th there was a $200 withdrawal;

On August 18th there was a $1,000 withdrawal;
On September 4th there was a $170 withdrawal;
On September 8th there was a $200 withdrawal;
On September 12th there was a $150 withdrawal;
On September 17th there was a $250 withdrawal;
Another withdrawal on September 17th of $350;
A withdrawal on September 19th of $50;
A withdrawal on September 22nd of $450;
On September 23rd, $300;
On September 25th, $100;
On September 25th, $150;

On September 26th, $130;
On October 1st, $500;
On October 10th, $150;
On October 10th, $100;
On October 10th, $480;
On October 15th, $106.55;

(2300)

On October 15th, $410;
On October 22nd, $300;
On October 21, $250;
On November 5th, $150;
On November 20th, $400.

There was also a repayment on October 28th, 1947, of $1,000.

Q. Does it indicate who the repayment was by? A. No, sir, it was simply cash against, I assume against the cash that was withdrawn.

Q. And that is the only repayment you found of that kind? A. Of that kind, against that account, yes, sir, in that company.

Q. And you did not disallow any of these items, am I correct? A. No, sir. These were all in the year 1947, sir. There were similar withdrawals in the year 1946, though. None of those were disallowed.

Q. Now, on what date was the American Brands——

Mr. Wessel: Strike that.

Q. At what time? A. Excuse me, sir, did you want me to go on to the other companies; that only dealt with the one company?

Q. As far as these cash withdrawls are concerned? A. Yes. There may be others in the other companies.

(2301)

Q. Please do. A. In the American Brands Corporation-Michigan, on March 11, 1947, there was a $500 withdrawal; on March 21, 1947, there was a $250 withdrawal.

Mr. Stryker: One moment, if your Honor please. I can't see the chart, I am sorry.

These items, as I understand the testimony, are none of them in the indictment or in the bill of particulars, and the items, as I have heard the witness, are not disallowed, if I have heard it correctly.

Therefore, it would seem to me that they are quite immaterial to the issues here.

Mr. Wessel: It is very material to the concealment of assets in the American Brands Corporation in so far as the tax liability was not paid.

The Court: All right, I will overrule the objection.

Mr. Stryker: Well, if that is the point, I have the added objection that they are not stated in the indictment or the bill of particulars, and that no added bill of particulars was given us apprising us of any of these matters.

The Court: I will overrule that objection.

(2302)

Mr. Stryker: Exeeption.

By Mr. Wessel:

Q. Let me ask this question of you, Mr. Present: These calculations that you are now referring to were all based upon the books of the various American Corporations? A. Yes, sir, this is a summary made from the books of the corporations.

Q. And have those books been available for some time to the defendants for their examination? A. Yes, sir.

Q. And did the defendants produce those corporation books? A. I believe that they were subpoenaed from the receiver, sir.

Q. Would you continue, now, with your discussion. A. In the American Brands Wholesale Corporation, there was a cash withdrawal on March 13, 1947, of $1,000;

Another withdrawal—excuse me, that first one should have been March 13th—there was a withdrawal on March 17, 1947, of $1,000;

There was a withdrawal on May 8, 1947, of $300, and one on September 5, 1947, of $25.

In the American Sweets Corporation, there were cash withdrawals on August 7, 1947, of $420; August 15, 1947,

(2303)

$500, and September 5, 1947, of $100.

Q. Now, all of these corporations were on a calendar year basis as far as tax returns were concerned; is that correct? A. Yes, sir.

Q. And that means that their tax returns would normally have been due on March 15, 1947, for the year 1946; is that correct? A. Yes, sir.

Q. Have you prepared a schedule showing drawings from March 15, 1947, on? A. Yes, sir; March 16th.

Q. March 16, 1947, on? A. Yes, sir.

Q. Would you please state the total drawings from March 16th on to the end of the year and then break it down for the various individuals, and cash, and so forth? A. The total drawings for the various——

Mr. Stryker: I have the same objection. I presume your Honor's ruling is the same.

The Court: Overruled.

Mr. Stryker: Exception.

A. The total drawings for the various individuals, including the Lawn International Corporation, from the period from March 16, 1947, through November 20, 1947, which was the date of the last withdrawal, was $131,106.49.

(2304)

That was broken up as follows:

There was a withdrawal by William Giglio of $60,758.34;

Howard Lawn drew $6,646.87;

Frank Livorsi had drawings of $30,058.33;

Louis Roth had drawings of $11,400;

Lawn International received $5,970;

There were payments to Louis Roth & Company of $2,031.40;

And there were cash, total cash payments of $14,241.55.

Q. Now, I notice that the tentative tax returns filed had attached to them papers being extensions of time to file final returns to May 15, 1947.

Did you prepare a schedule from May 15, 1947, to the end of the year, or did I tell you by mistake it was from June 15th to the end of the year? A. I believe it is from June 15th, sir.

Q. Would you give me your figures from June 15th on, please; that is, the total drawings, and then broken down. A. I will have to add them together. It is not complete. I see it is; that wasn't computed. It would only take a minute to do.

Q. All right, go ahead. A. The total from June 16th

(2305)

through November 20, 1947, would be, the total amount drawn would be $26,028.42:

William Giglio, $8,550;
Howard Lawn, $3,396.87;
Frank Livorsi, $500;
Louis Roth, $4,350;
Lawn International, $1,200;
Louis Roth & Company, $965;
And cash, $7,066.55.

Q. Now, finally, the returns were filed on September 15, 1947. Did you prepare a schedule from September 16th to the end of the year 1947? A. Yes, sir.

Q. Would you give the figures for that, please? A. From the period between September 16, 1947, and November 20, 1947, there were total drawings of $8,216.42:

William Giglio, $1,850;
Howard Lawn, $1,046.87;
Louis Roth, $500;
Lawn International, $500;
Louis Roth & Company, $593;
Cash, $3,726.55.

(2306)

Q. Now, part of the drawings that you have been referring to for the last few minutes were corporate salaries; is that correct? A. Yes, sir.

Q. Were any withholding taxes paid or withheld with regard to those salaries? A. No, sir.

Q. Have you prepared a schedule showing the cost of the work which American Agar Corporation did at the building 101 Fairmont Avenue in New Jersey? A. Yes, sir.

Q. What is the cost of that work as you computed it? A. I can give it to you roughly without the schedule. It

was a little in excess of $200,000, about $210,000 or $212,000.

Q. Now, Mr. Roth testified at pages 174 and -5 of the transcript that the Tavern Company ceased business in Noveniber of 1945. You have analyzed the Tavern books, that is, the accounts receivable ledger; is that correct? A. Yes, sir.

Q. And also the various sales, invoices which are in evidence from other companies? A. Yes, sir.

Q. Based upon your experience as an accountant, would it be correct to say that Tavern ceased business in Novem-

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ber of 1945? A. No, sir. It did not cease business. It ceased making sales; but it continued to manufacture jelly and acquire inventory.

Q. I show you, Mr. Present, Exhibit 154 for identification, and ask you if you can tell me what that document is? A. Yes, sir. This is a schedule that I prepared, setting forth the income shown by the various tax returns filed by the individuals, William Giglio and Frank Livorsi, and the net income set forth in the consolidated tax return filed by the various corporations. The schedule also sets forth the tax liabilities disclosed by those returns, and also sets forth the amount of tax that was actually paid for the various returns that were filed.

Q. Now, is that based upon Mr. Giglio's tax return which is Exhibit 2 in evidence, Mr. Livorsi's tax return, which is Exhibit 4, the Form 899s submitted by the various collectors' offices, which are Exhibits 1, 3, 18, 20, for Mr. Giglio, and 5 and 19 for Mr. Livorsi? Is that correct? A. Right; and the tentative returns for the corporations.

(2308)

Q. And the tentative returns for the corporations, yes. A. And the Form 899s in that connection.

Q. Is there any other document in evidence, or testimony, upon which you base this exhibit, except for those documents now in evidence that you just referred to? A. I don't know if we enumerated the 899 dealing with the payment of the corporation's tax, but that was used, too; but, in any event, this document is based entirely upon the tax returns and the 899s in evidence.

Q. And the 899s for the corporations are Exhibits 12, 16 and 14.

Mr. Wessel: I offer that exhibit in evidence.
Mr. Stryker: Same objection, your Honor.
The Court: Overruled.

(Government's Exhibit 154 for identification received in evidence.)

By Mr. Wessel:

Q. Mr. Present, would you please step up and explain to the jury what Exhibit 154 is? A. This is a schedule that was prepared from the tax returns, the individual tax returns of Mr. Giglio, Mr. Livorsi, and the consolidated

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tax return of the American Brands Corporation, as filed by the two individuals and the corporation.

This schedule indicates that there was a total net income reported in the 1946 tax returns of the two individuals and the consolidated tax return of the corporation, taking into consideration the losses claimed in the consolidated tax returns of the various corporations. This schedule indicates there was a total net income reported of $835,633.37.

This schedule further shows that, as a result of these returns that were filed, there was reported a tax liability shown by those returns of $573,683.73. There was paid on account of that tax liability the total of $16,735.95.

Q. Let me see if I have this correct, Mr. Present: You prepared this Exhibit 154 based solely, as far as income was concerned, upon the returns as filed by Mr. Giglio and Mr. Livorsi and American Brands Corporation? A. Yes, sir.

Q. You made no corrections of any kind in net income or in any other part of the returns; is that correct? A. That is correct.

Q. And you computed the amount paid, which is over

(2310)

in the right-hand corner of the document for the three taxpayers, strictly based upon the amount shown as being paid on the tax returns on the Form 899s? A. That is right.

Q. This, in other words, is based strictly upon what the taxpayers themselves have said? A. That is correct.

Q. And you found, if I understand you correctly, that they admitted they owed a total of $573,000-odd in tax, and paid $16,000? A. That is right, yes, sir.

Mr. Wessel: I have no further questions of this witness.

The Court: I think it is a good time to stop now. We will come back at 2:05. We will have an extra two minutes. Don't discuss the case.

(Jury out.)

(At the bench:)

Mr. Stryker: Again, if anything, with greater emphasis, I claim surprise on this whole latter line of testimony with regard to the amounts paid and amounts withdrawn from these various——

Mr. Wolfram: On the question of concealment.

Mr. Stryker: —on the question of concealment,

(2311)

and I say to you, in all sincerity, not having been apprised of what this charge would be, it is quite impossible for me to prepare to meet it here in the middle of the trial unless a continuance were granted to enable me to prepare myself with respect to what I think should have been furnished to us in a bill of particulars.

Therefore, in view of the lack of the bill of particulars. I ask for a continuance of sufficient time to enable me to prepare to meet the charges which have caused surprise.

The Court: Well, I have listened to the testimony as it has been developed, and I haven't heard any item which a thorough lawyer would not have investigated, having examined the corporate books, and I know Mr. Stryker and his associates to be thorough lawyers.

Mr. Wessel: May I state for the record that these books, of course, were produced by the defendants; they have been available to their accountants since, I believe, the end of October.

On one occasion, I specifically recall, on a Saturday, there were six accountants downstairs working on these books. I don't know what they were doing,

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of course; they were working on them not only during that time, but even from the trial they have been working on the books in the witness room inside, and accordingly I state that these facts have been available to them as to us, if not more so.

The Court: What is before me now?

Mr. Stryker: The motion for a continuance.

The Court: I will deny that application, Mr. Stryker.

Mr. Stryker: All right, sir, exception.

(Adjourned at 12:45 p.m. to 2:05 p.m.)

(2313)

AFTERNOON SESSION (2:10 p.m.)

(Jury in box.)

THEODORE PRESENT, resumed the stand.

Cross Examination by Mr. Stryker:

Q. Mr. Present, let me for a moment step out of the realm of assumptions into facts. Would you be good enough to tell me when you began your work on this case? A. It was in the latter part of 1948.

Q. Well, I don't expect you to be too precise, but could you perhaps give me the month? A. About October, August, September or October. I think October would be about right.

Q. '48? A. I could check the records if you want me.

Q. I will take October. If you want to change it, it is no matter. I mean, if you find you are in error as to the exact date. Now, in what capacity did you come into the case? A. I was the revenue agent.

Q. Would you give me an idea of what a revenue agent's duties are? I don't believe I know. A. Well, primarily, I would be responsible for audit features of the investigation.

Q. The audit features? A. Yes, sir.

Q. And the audit features would be the features of

(2314)

examining the books and records and making your own analysis of them, and the conclusions you might draw? A. Yes, sir; or whatever other records were produced.

Q. I tried to state here the other day what an audit was. I doubt if I gave a very good definition, although

somebody said I did. Would you just give me your definition of an audit? A. Well, I don't think that my definition of an audit—I was present when you gave the other one.

Q. Was I wrong? A. As a revenue agent, sir, we have a different, or would perform a different type of audit, or might perform a different type of audit.

Q. Let me hear what a revenue agent does. A. I doubt if I could set forth any general idea, sir. It would vary by cases, by taxpayer, and the type of return under audit.

Q. Well, would the audit include examining every paper or document that you could find that bore on the question under consideration? A. Yes, sir.

Q. And would it involve studying the history of the transactions, as far as you could ascertain them from any records you could obtain? A. Yes, sir.

Q. And would it involve a study of all the books of

(2315)

account that were available to you, books, of course, I mean pertaining to the subject-matter? A. Yes, sir. But before we get into it, Mr. Stryker, could I just enlarge on it a little bit?

Q. Yes, by all means. A. Depending on the nature of the investigation, we would limit—that would guide us in the detail, the amount of detail that would be involved in that particular investigation. We have all types of examinations, sir.

Q. Well, I don't think I am interested, I don't believe it is any of my business to inquire into your other audits, of course. I am interested in this one. A. If I could confine it to this one?

Q. Let's confine it to that. A. Yes.

Q. In this one, when you came into it in October, if your recollection is correct, which I am ready to accept unless you find you want to change it, what books were

available to you and of what companies? A. I would say that initially, the only—initially there were no records of any of these companies available.

Q. That is when you first came into it? A. Yes, sir; with the exception of the general ledger and records of the single proprietorship of David Lubben.

(2316)

Q. So in October that is all you had. A. Yes, sir.

Q. The books and records of the proprietorship of David Lubben, that is all you had when you started? A. Well, let me go back and correct that, Mr. Stryker.

Q. Sure, go ahead. A. You are speaking now of books and records?

Q. Yes. A. We had the tax returns; we had information reports from banks, and other records that we had obtained from third parties, other than the records now of the taxpayers themselves.

Q. All right. Well, now, with that correction, would that include all the records, papers that you had, when you began your investigation as an agent in October 1948? A. I believe so, sir. It is quite difficult to——

Q. No, but that would be your best recollection? A. That is my best recollection now.

Q. When you came into it, Mr. Twohig had been working on this case a long time, had he not? A. I know he had been working on the case. I wouldn't know for how long he had been on it.

Q. Well, I presume you talked with Mr. Twohig a

(2317)

great many times in the course of your work here, from 1948 on? Wouldn't that be a correct assumption? A. Yes, sir.

Q. And did you learn when and whom he began to investigate when he came into it?

Mr. Wessel: I object as hearsay.

The Court: Sustained.

Mr. Stryker: Of course, in this man's investigation your Honor, what he learned and what is the basis of his testimony, I should think that would be proper. Am I wrong?

The Court: I don't see how that ties in with his testimony, but I will sustain it at this time.

Q. At all events, you did talk at innumerable times with Mr. Twohig, did you not? A. Yes, sir.

Q. And without asking you the exact conversation, did he not in general tell you what he had been doing, and approximately when? A. Well, he made available to me all the documents and other evidence that he had relating to these particular taxpayers and everyone else who was concerned in the investigation at that time.

(2318)

Q. Well, you told us that the books that you had at the start were the Eatsum proprietorship. I think I understood you to say that, did I not? A. You are speaking of formal books now, sir?

Q. That is what I am talking about, yes. A. I might make one correction, sir.

Q. Go ahead. A. When I was initially assigned to the investigation, Mr. Twohig had assigned to me the individual tax returns of Mr. Giglio, Mr. Livorsi, as I recall it, the tax return of the Tavern Fruit Juice Company, and the tax return of the Eatsum partnership.

He had had those apparently in his possession prior to my being assigned to the investigation.

Q. But all the books he had were the Eatsum proprietorship; is that correct? A. I believe that is correct, if you are speaking of formal books.

Q. I am taking your definition.

And did you learn from him, when those books were turned over to you, that he had been investigating that proprietorship, David Lubben's? A. My impression, sir—that would be based entirely on the returns that were trans-

(2319)

mitted to me through channels by Mr. Twohig—is that everyone who was connected with the various enterprises was under investigation.

Q. Well, maybe my question isn't clear. What I am trying to find out—and I think your answer is only because my question may have been faulty; it is not your fault—when he turned over to you the Eatsum proprietorship books, the Lubben books, weren't you made aware of the fact that he had been investigating the Lubben proprietorship and Lubben's transactions in taxes? A. That isn't my recollection, sir, that we were specifically directing our investigation to Mr. Lubben. The only thing that I was told—and I am not too sure that the books did not come in shortly thereafter—was that these returns and these various companies for which the returns I had were under investigation, and at a subsequent date, or at that date, sir, I naturally would ask him what records were available for examination and naturally at that time he would tell me exactly what records we had that were available for my examination.

Q. Well, Mr. Present, I don't want to labor the point.

(2320)

If you could tell me; if my question is clear, I would be glad to have it, whether, when he turned over to you, for your examination, the Eatsum proprietorship books, you did not learn that it was the proprietor of that business, namely, Lubben, that he had been investigating; isn't that correct? A. I would say, sir, as far as I can recall, all these were turned over to me at once.

Q. My question was, didn't you learn at or about that time that that is what he had been investigating?

Mr. Wessel: I object to the question. It has been answered.

Mr. Stryker: I don't think it has been, otherwise I wouldn't ask it again.

The Court: Well, just to save time, Mr. Stryker, you say that is what he had been investigating. My understanding is that the testimony was that all of the persons involved in these business enterprises were under investigation, and when you say that Mr. Lubben was under investigation, and that is what was under investigation, he can't answer yes to that if there were more than one.

Mr. Stryker: Your Honor, there is the diffi-

(2321)

culty. There came a time, of course, when all of these things were investigated, naturally. We have had a whole trial about that.

I am trying to learn from this gentleman, if he remembers—if not, I will pass on—whether, when the Eatsum proprietorship books were turned over, he did not learn that Mr. Twohig, up to that time, had been investigating the proprietorship.

Mr. Wessel: That is the question I say has been answered.

The Court: In other words, you want to know whether Mr. Twohig had only been investigating the Eatsum proprietorship up to that time.

Mr. Stryker: I want to find the period when that was the case and I can only do it that way. Sometime I want to find out if that was the fact.

The Court: This may not be the time, but, Mr. Present, can you give us that?

The Witness: At the time I came into this investigation, Mr. Stryker, the only thing I can tell you is that all of these returns were turned over to me at one time, as I recall it, with the exception of the American Corporation returns, which I believe I got at a later date. All these people were turned over to me for investigation at one time.

(2322)

The Court: All right.

By Mr. Stryker:

Q. Now, I would presume that as a man seeking the truth, you would turn everywhere you could to ascertain it, wouldn't you? A. Well, I would use whatever records I could get, sir.

Q. That is what I mean. As an accountant—and I am not questioning at all your capacity; I am only just trying to get the facts—would it be fair for me to assume that you would turn in every direction available to you to aid you in every investigation? A. That is a fair assumption, sir.

Q. Yes. Well, now, did you learn that all of these companies, these American companies, were in a receivership in New Jersey? A. I believe I did, yes, sir.

I don't know that I learned that in the first conversation, but shortly, within a limited space of time.

Q. I don't want to pin you to the first conversation. But you learned it shortly after you came in, did you? A. Yes.

Q. Well, learning that they were in a receivership in

(2323)

New Jersey, did you not procure or examine the records of that receivership? After all, it involved these companies that you were asked to look into, isn't that so? A. Yes, sir. We did obtain a copy of the receiver's report.

Q. Well, didn't you do more than that? A. Yes, sir. I think that, the special agents——

Q. Did what? A. —served a subpoena, I believe, on the receiver, or the accountant for the receiver, and obtained the corporate books.

Q. Books. A. Books of the corporation, yes, sir.

Q. Well, you learned that from Mr. Twohig? A. No, sir. I think I learned that from Mr. Mahon.

Q. Mr. Mahon. Can you give me approximately the time when that happened? A. I believe it was in 1949, sir.

Q. 1949? A. These are a matter of record, sir. I can get the exact records for you if you would like.

Q. You could? A. I believe we could, yes, sir.

Q. Could you get the receipt that Mr. Mahon, if that

(2324)

was the gentleman, gave to the receiver? A. I believe it is available, yes, sir. A copy of it would be available, sir.

Q. I won't stop now. All right.

Now, did you learn that those books, those American books, were taken from the receiver by an agent after an order of the New Jersey court had been made directing their return to the owners; did you learn that? A. No, sir.

Q. What? A. No, sir.

Q. At all events, there came a time when the American books, the ledgers, and so forth, were turned over to you; is that right? A. They were made available to me for examination, sir, yes, sir.

Q. And you were told how they got them? A. I believe I was told where they got them, sir, yes, sir.

Q. What were you told?

Mr. Wessel: Objection, if your Honor please. This is all hearsay.

The Court: Sustained.

By Mr. Stryker:

Q. It is part of your investigation. Can't you tell me what you learned about that?

(2325)

The Court: This man's investigation, Mr. Stryker, as I understand it, concerned the audit of these matters. If you want to find out how he got the books, then I think you will have to ask the person who got them, if that is what you are interested in.

What this man was told as to where the books came from doesn't affect their content so far as he is concerned.

Mr. Stryker: That is quite true.

The Court: That is my tentative analysis of this problem, and I think my rulings will follow that line pretty much.

Mr. Stryker: If you will hear my position, maybe your Honor might possibly feel differently.

The Court: Yes, I propose, as well as I am able, to learn all I can from this gentleman about the full extent of his investigation and audit, and it relates to that.

I would suppose I was entitled to that. I hope your Honor will agree.

The Court: No, I am not going to go into an unlimited extent as to the investigation.

Mr. Stryker: I don't want to. Just let me ask

(2326)

a question or two.

The Court: At this point we will sustain the objection. Now you go ahead with the next question.

Mr. Stryker: You sustain that now?

The Court: I sustained the objection to the question where you asked him what he was told.

Mr. Stryker: All right. I will see if I can pass on to something else.

By Mr. Stryker:

Q. Now, at this particular date, whenever it was, what books were turned over to you, will you tell me? A. Yes, sir. That would have been all the books of the American Brands Corporation, the American Brands Wholesale Corporation, the American Agar Corporation, the American Sweets Corporation, and the American Trucking & Forwarding Corporation.

That would not include the corporate kit, in other words, the minute book, the stock book, stock transfer ledgers, and it did not include cancelled checks from the various corporations.

Q. Did you mention Agar among those books? A. Yes, sir. There was also turned over, if my recollection is correct, the accounts receivable and accounts payable

(2327)

ledger of the Tavern Fruit Juice Company.

Q. Is that the book we have had here in court? A. Yes, sir, that is the one in evidence and the one I testified from.

Q. Did that book come to you at the same time that the books of the corporations came to you or at a different time? A. My recollection is that it came on the same date, sir. It was included among those records.

Q. Did you learn where that was gotten from? A. The same place, sir.

Q. Where?

Mr. Wessel: Same objection.

The Court: Sustained.

Mr. Stryker: Respectfully except.

By Mr. Stryker:

Q. Well, now, then, you began your investigation of these companies and of these gentlemen sometime in October or so of 1948; is that right? A. Yes, sir.

Q. Did you ask them to come and see you and make a statement? A. Yes, sir.

Q. When was that? A. It would have been shortly (2328) after I was assigned to the examination, I called Mr. Roth, who was the accountant of record.

Q. That is the gentlemen we have seen here in court? A. Yes, sir. The only address that I had for each of these companies, for the Eatsum Company, if I recall correctly, the Tavern Company, I am not sure now, was care of Mr. Roth.

I called his office, and asked for an appointment. Mr. Roth never contacted me, sir. (2329)

Q. Is that the extent of your effort to communicate with these gentlemen? A. So far as I know. I didn't know where to locate anybody else, sir.

Q. That was the extent of your effort? A. Yes, sir.

Q. Did you learn that somewhere in '48 Mr. Twohig had been to Mr. Lubben's house?

Mr. Wessel: Objection.

The Court: Sustained.

Mr. Stryker: Exception.

Q. In the course of your audit, investigation, I think you told me you read the receiver's report; is that right? A. Yes, sir.

Q. And you know, don't you, that that report was approved and adopted by the Vice Chancellor of New Jersey? A. No, sir; I don't know anything about that.

Q. You don't know that. Well, when you got the receiver's report, weren't you interested to find out whether what he reported was approved by the court that had jurisdiction out there? A. No, sir; as an accountant I merely used it as a basis of comparison for my own good.

Q. And you did do that? A. I did an audit, yes, sir.

(2330)

Q. Well, did you learn that the Government had filed a claim in that receivership——

Mr. Wessel: Objection.

Q. ——for back taxes?

The Court: Sustained.

Q. (Continuing) And that the——

The Court: Go ahead.

Q. And that it had been disallowed?

The Court: Sustained.

Mr. Stryker: I except.

Q. Did you learn that before the Government abated the taxes on the American Brands—I think you told us they did, didn't you, this morning? A. Yes, sir.

Q. Now, "abated" means give up, surrender, abandon, something like that, doesn't it? A. It means to write off.

Q. Write off. A. Simply like writing off a bad debt.

Q. Yes, sir. Now, did you learn whether or not before the statute of limitations had run the Government ever brought any action to enforce or try to enforce any claimed civil liability?

Mr. Wessel: Objection. I think counsel's ques-

(2331)

tions are objectionable.

Mr. Stryker: I don't like that statement.

The Court: Well, I think, Mr. Stryker, I have sustained about six of them when you have asked for hearsay. I am not going to let this man give hearsay about what other people did. He testified here, as I recall it, entirely as a professional witness who has just analyzed books of account in this case and has given us his conclusions based upon them and he has presented exhibits which he originally prepared upon the assumptions as to what these things would develop, and he has corrected these exhibits in the light of the actual testimony. That is his direct testimony as I recall it, and on that, I think, he stands open for any cross examination you wish to submit. But what other people in the Bureau did, that he doesn't know of his own knowledge, I am not going into through this witness.

Mr. Stryker: Would your Honor correct my memory if I am wrong? I thought I recalled that in his direct examination he had testified considerably, to a considerable extent, about what other people said to him. If my memory is wrong, your Honor's, I am sure, will be better. That is what I recall.

The Court: I don't recall that he has testified (2332)

to what other people in the Bureau told him.

Mr. Wessel: He testified to certain facts, and I will describe them, so we will be perfectly clear on them.

Mr. Stryker: I am not going to ask for any description.

Mr. Wessel: He has testified to the abatement of the tax——

The Court: Which is on the return in evidence.

Mr. Wessel: On the form in evidence. He testified to certain papers that he received from Mr. Bercu, not the conversations, and he testified as to his examination of certain yellow sheets. Apart from those factual subject-matters that I have covered, I believe all the rest of his testimony was expert testimony and not factual testimony.

Mr. Stryker: But the witness testified to the abatement. He brought it out.

Mr. Wessel: The abatement is a document in evidence. What abatement is is a question of accounting practice.

Mr. Stryker: Here is an accountant, your Honor——

The Court: No one objected to your questioning

(2333)

him as to what abatement meant, either. I think he has answered your question.

Mr. Stryker: I think that is right. Now, the abatement having been introduced as a fact here, would your Honor foreclose me from ascertaining the facts and circumstances about the document, about the fact which the Government itself has produced in its direct examination?

The Court: I will permit any examination as to this witness's own knowledge relating to that abatement.

Mr. Stryker: All right.

The Court: If you wished to object to a statement as to abatement as hearsay, you could have done that this morning.

Mr. Stryker: Well, I didn't, and your Honor allowed it.

The Court: That is right; I mean, telling you what an entry on a report meant, and he didn't go beyond.

Mr. Stryker: I hope I am within your Honor's ruling, if I am not, I know you will promptly tell me.

The Court: All right.

By Mr. Stryker:

Q. From your investigation, did you or did you not (2334) learn whether the Government had ever brought any civil action before the abatement that you talked about was made? A. Yes, sir; I knew about that abatement.

Q. Well, did you know that there had been no civil action? A. Well, I knew, sir, that there was a conference held about that.

Q. Well, did you know then from that that no civil action had been taken? A. Yes, sir; I was at that conference.

Q. That is what you learned at the conference? A. Well, there was a decision that was made at that conference, sir.

Q. All right. Now, are there any other books or records which you examined in your audit, which I have failed to ask you about, or which have not been mentioned by you this afternoon?

The Witness: Your Honor, I think that calls for an answer——

The Court: It calls for an answer yes or no. The witness, I think, said in substance, "I think that calls for an answer" and my answer to him was that it calls for a yes or no answer.

Mr. Stryker: Very well.

Q. Could you give me that?

(2335)

The Witness: Could I have the question again, please.

(Question read.)

A. Yes, sir.

Q. There were others? A. Yes, sir.

Q. What were they?

Mr. Wessel: I think before we go into that we should approach the bench, your Honor.

The Court: All right.

(The following took place at the bench not in the hearing of the jury:)

Mr. Wessel: If your Honor please, I haven't objected to this question and do not have an objection, but I know that the answer will call in part at least for testimony concerning the production of partnership records under grand jury subpoena. I have sworn before this court on two occasions, and so has Mr. Present on two occasions, that we will not reveal anything about that or discuss it in this case, except under order of the Court. I just want counsel and your Honor to know that this question calls for an answer which relates to these partnership documents, and that we should not reveal it except on order of your Honor.

Mr. Stryker: Well, that may be one object.

(2336)

There is no question, one. But your Honor knows that this question, through no fault of mine, was remitted from the motion judge in effect to the trial court. I would rather have not had it in the trial court, too, but I was overruled.

The Court: I think it has been disposed of by the motion judge.

Mr. Wessel: Let me say this, if I may?

The Court: Yes.

Mr. Wessel: There is no question but this witness did examine the partnership records. They are referred to in an affidavit before this court before Judge Palmieri. Specifically, as a result of his examination of those partnership records, certain things did happen. A part of the dismissed indictment was based on those records, and that part was deleted from the new indictment. If counsel elicits testimony now about those facts, there is going to be before this court evidence which Judge Goddard held improper. Now, even if counsel brings that out voluntarily, it might be error. If counsel wishes to examine into this field I think he should do it outside the presence of the jury, because it might be prejudicial error even if he voluntarily does it.

(2337)

Mr. Stryker: Let me get this straight: Mr. Wessel is right that there are affidavits before Judge Palmieri to the effect that no leads and clues, obtained from the illegally seized papers, were used by the grand jury that found this indictment. Now, if any witness is in error about that, since I have not been permitted to examine into this by motion, which I had supposed was the proper way, I have no other way, no other recourse, through no fault of mine, than to do it here.

Mr. Wessel: It presents a preliminary question as to the admissibility of evidence, as to the suppression of these leads and clues. That kind of a question is not for the jury; it is for the Court.

Mr. Stryker: No, but——

Mr. Wessel: I don't think the court considered that kind of evidence—and so Judge Palmieri found—acceptable, and as far as foundation is concerned, there is no further evidence here than there was before Judge Palmieri.

Mr. Stryker: I can't lay a foundation except start laying.

The Court: No, Judge Palmieri said there wasn't enough foundation to start laying one, or at least to take the time of this court to progress any

(2338)

further with it, and I think that is about the way I feel about it. I am not going into the subject on the basis of what we have had so far.

Mr. Wessel: Now, the question specifically presented to the witness was broad and includes partnership records illegally produced and partnership records legally obtained. There can't be objection to the second part, but the question is too broad.

Mr. Stryker: Well, I am not going to go into something halfway if I am precluded from doing what I would have thought was my duty to do. I bow to the Court, and that is that.

The Court: All right, I think that is the way I should rule.

Mr. Stryker: Then I respectfully except.

The Court: Very well.

(The following took place in the presence and hearing of the jury:)

By Mr. Stryker:

Q. Now, in the course of your——

Mr. Stryker: Strike that, please.

Q. You learned at once in the beginning of your investigation that you were investigating the affairs of a

(2339)

partnership; did you not? A. Among other things, yes, sir.

Q. Well, that certainly was one, wasn't it? A. Well, there were two partnerships, sir.

Q. Well, one of them was the Eatsum partnership, and that we are all so familiar with, that was formed between Mr. Lubben and others, and Mr. Giglio and others. That is the one I am referring to. A. Yes, sir.

Q. Now, the fundamental document between partners, defining their rights and liabilities, is a partnership agreement, isn't it? A. Yes, sir.

Q. Did you examine that in this case? A. I examined whatever partnership documents we did have, sir; yes, sir.

Q. Did you have a copy of the partnership agreement? A. I believe we had one, sir.

Q. I show you Defendants' Exhibit for identification UU. If my memory serves me right, the signatures have already been identified by another witness. Will you examine that and tell me whether or not that is not a—what shall I call it? A duplicate-original of the partnership agreement of this particular partnership that is involved in this lawsuit? A. I saw a document. If it is not a

(2340)

copy of this, it is very similar, sir.

Q. I think I know the one you mean.

Mr. Stryker: Let me have Exhibit 21.

Q. I show you Government's Exhibit 21 in evidence. Is that the other document that you had reference to? A. I know I saw this. I am not too sure that I didn't see a copy of that document, too, sir.

Q. Well, that is a notice of the formation of a limited partnership—and when I say "that", 21 Government is that —and your best recollection by looking at that then, by looking at our Exhibit UU, is that you did see the partnership agreement; wouldn't you look at it again? A. I would think, sir, that I did see it. I couldn't be positive, sir, but I wouldn't be too sure that I hadn't seen this.

Q. Did you attempt to figure the partners' distributive share of the partnership agreement, UU, or a copy of it? A. Well, I knew what the shares were as set forth in that agreement, sir.

Q. Where did you learn that from? A. Either from this agreement or the one you are holding in your hand.

Q. Well, this is the notice, not an agreement. Do you find there—— A. This document, in Article IX, sets forth

(2341)

the distributive share of the various partners, sir.

Q. Well, as I read it—maybe I have read it wrong—Article IX in this notice merely refers to the limited partners, or am I wrong? A. Yes, IX refers to the limited partners. Do you mind if I keep reading it? There may be something in connection with the general partners.

Q. Yes, please do it. I just want to get this point cleared up. A. I would say after reading this, sir, that I had seen it.

Q. Which is "this", Mr. Present? A. Exhibit 21, sir, Government's Exhibit 21.

Q. Go ahead. A. I would say, sir, after reading this, that I saw another document other than this one that set forth the investment by the general partners and the distributive share attributable to each.

Q. In other words, as I understand your testimony you saw a document other than 21, Government's, and would that not probably be the partnership agreement? You

would want to find out what their rights were under the partnership agreement, wouldn't you, before you started to allocate their rights and duties? A. Well, I wouldn't say all the others, sir. I recall seeing this one. I probably saw

(2342)

this one and another document, sir.

Q. What would be the document that would define their rights other than a partnership agreement itself, or a copy of it? A. Offhand, I couldn't say, sir. I assume it was a copy of the partnership agreement.

Q. Well, wouldn't you—if you care to look at it any more, don't let me interrupt you. Wouldn't it be fair to say that your best recollection is that you saw that particular document, Defendants' UU, or a copy of it, or another original of it? Wouldn't that be fair? A. Well, sir, I think it would be fairer to say that I saw a document setting forth the rights of the various parties and the distributive share.

Q. Could you tell me any other document that would define that, other than the partnership agreement? A. Not offhand, no, sir.

Q. Well, then, the only document you saw then defining the rights would be the agreement or a copy of it, wouldn't it?

Mr. Wessel: Objection.

The Court: Sustained.

Q. When you were examining into this question, particularly when you were preparing yourself to give testi-

(2343)

mony in this court, did you not, as an industrious and intelligent, honorable accountant, want to find out what the partnership agreement was and what the obligations and duties of the respective parties were with respect to each other, as

defined by their contract? You would want to look into that, wouldn't you, Mr. Present? A. Are you speaking originally, at the time I started the investigation?

Q. Originally. A. Yes, sir.

Q. Well, then, that being so, can't you tell me without—that this is the paper, or it is a copy of that that you saw, since you haven't been able to mention any other paper that would define that? Can't you? A. Mr. Stryker, I examined every piece of paper in the Government files that could possibly have had anything to do with this case, and I couldn't possibly say, sir, that it is a similar document to this, that it was exactly the same. I think I can say sir, that I did examine a document, if it were this or another one, that this set forth the rights of the various partners and the distributive shares.

Q. All right. A. That each one was entitled to.

Q. From whatever paper you looked at, will you state what those were, from what you learned? A. I would have

(2344)

to go back to the record, sir, and read that. I didn't make any attempt to memorize it. I am sure I knew it at the time, though, sir.

Mr. Stryker: At this point I offer again Defendants' Exhibit UU for identification, which has been identified, I think, as an original, or what shall I call it, a duplicate-original of the partnership agreement.

Mr. Wessel: It has only been identified by counsel as that. I object.

Mr. Stryker: Here it is. The signatures have been identified anyhow. They have been identified, I am sure.

Mr. Wessel: That is correct. The objection was sustained the other day.

Mr. Stryker: I know, with another witness.

The Court: This man hasn't added anything to what we had. I will sustain it.

Q. Well, will you tell the jury any other way that you could equip yourself to understand the right and duties of the partners, except for the partnership agreement? If you can, I will be glad to hear it. That would be the best evidence, would it not? A. Certainly, sir, except that you might—my audit is slightly different than an audit per-

(2345)

formed by an accountant, sir. These facts were, as we might say, an accomplished fact, years before I attempted to do this audit. By the time I got around to do this audit, I knew, sir, from other documents that I examined, exactly how much each party did have, or learned shortly thereafter.

Q. What that—— A. And the facts as set forth in that agreement might be meaningless after having examined other facts.

Q. Well, will you take—— A. So that, for example, sir, I knew that Mr. Loperfido had left the partnership, and regardless of what that agreement said, the amount that he received had already been fixed and determined.

Q. I lost the last thing you said. Regardless of what? I am sorry, it is my fault. A. Regardless of what this agreement sets forth as to what he was to receive, I knew what he had actually received.

Q. Yes, I know that. A. And this didn't have any too much significance any more.

Q. Well, in preparing for this trial, Mr. Present, didn't you try to ascertain what the distributive shares of each of the partners were? A. In preparing for this trial, Mr.

(2346)

Stryker, I determined what they were.

Q. From what? A. From the facts as I knew them.

Q. I am talking about the contract first. We will come to your allocation later.

Mr. Wessel: Object to the form of the question.

Q. Didn't you, preparatory to this trial, try to ascertain what the distributive shares of the partners were, as defined by the partnership arrangement or agreement? A. I would say, sir, that the agreement—I didn't consider the agreement at all, sir, because it wasn't lived up to in making the final distribution, and I did not distribute——

(2347)

Q. Well, for us to know whether you are correct in that, we would have to know what it was that wasn't lived up to, wouldn't we?

Mr. Wessel: I object to the form of the question.

By Mr. Stryker:

Q. Well, will you take——

Mr. Stryker: I will withdraw it.

Q. Will you take Govermeht's Exhibit—Defendants' Exhibit UU, please. Will you examine it.

Before I ask you that, you knew, did you not, that the distributive shares of the partners, what they were, was the real question in this lawsuit; you knew that, didn't you? A. Certainly, yes, sir.

Q. All right. Now, will you examine UU for identification. A. Mr. Stryker, might I also add that I also knew that under the terms of the law this partnership should have ended on the date that Mr. Lubben left the partnership, which was March 9th.

Q. Whether something must happen under the law depends, according to my meager knowledge, on what the facts are. The law is predicated on the facts. It just isn't abstract.

Will you look at that paper, please, and tell me if it

(2348)

does not refresh your recollection as to what you learned from whatever source regarding the distributive shares of the partners.

Mr. Wessel: Objection. I don't think his recollection needs refreshing. The testimony doesn't show it.

Mr. Stryker: I haven't yet had what he learned.

The Court: What is the ultimate question?

Mr. Wessel: In fact, may I object to the whole line of examination. There is no question that I know of in this lawsuit but that the Eatsum partnership return reflects the distributive shares of the partners per the original partnership agreement.

Mr. Stryker: How can we tell that without the agreement, your Honor?

Mr. Wessel: Mr. Roth has already testified to that, there is no question about that.

Mr. Stryker: Even if Mr. Roth testified, how do we know unless we have the paper, itself?

Mr. Wessel: And it is conceded, if counsel wishes it.

The only question is whether or not the original agreement was amended, and the tax return did not reflect the distributive shares as per the amended original agreement.

(2349)

Here we are dealing with a piece of paper which hasn't been identified by anybody.

Mr. Stryker: When you talk about an amendment, I should think the place to begin with is the thing that is supposed to have been amended; then we will take up the question of whether there was an amendment.

So the starting point would be the contract, wouldn't it, your Honor?

The Court: If you left it with me, I think the starting point would be what did they get out of it, not what they agreed—what did they get out of it and what tax did they pay on it, and we would work back on it only so far as it is relevant.

It seems to me this is beginning at the other end. We have the advantage of hindsight here. We don't have to start at the very beginning.

Mr. Wessel: My main objection is because this document has not, this afternoon or when it was presented before, been authenticated in any way. I don't know whether it is authentic or not. I have no doubt that it is, but I don't know.

The Court: I will sustain the objection.

(2350)

Mr. Stryker: Your Honor, I think a moment ago your statement, I would imagine, was inadvertent. If so, I hope you will correct it.

The Court: I have made many inadvertent statements. I will be glad to hear you.

Mr. Stryker: You said this case involved how much they paid. Of course, it doesn't involve that at all. It involves here the simple question of whether they knowingly and wilfully filed false returns.

The Court: That is a completely different question.

Mr. Stryker: Will you accept my——

Mr. Wessel: As amended by what your Honor said, it also does relate to what was filed.

The Court: There is an additional factor, of course, of whether it was done wilfully and knowingly, and I will labor that at great length, because even if they did pay the wrong amount, did they inadvertently, without knowledge and without intent, why——

Mr. Stryker: Would it be inappropriate that I will also labor it at great length?

The Court: Yes.

Mr. Stryker: Now let's see where we are here. (2351)

Also, if your Honor would pardon me, there was another statement, and it bears on this.

I want to quote you accurately. I think you said that the question depended on what they got, not what the partnership agreement shows. I am trying to develop a question, which I will come to, with this witness, and the first thing we determine, whether there was any wrong, is what was their agreement among themselves.

This gentleman, as I have heard his testimony, has in effect been endeavoring to rewrite on various assumptions the partnership arrangement. Now, that is my understanding of it, and I hope your Honor will agree with me.

Mr. Wessel: I understood your Honor to indicate that the tax picture depends upon what these men were entitled to get, which is so. However——

Mr. Stryker: How can we determine that except by the contract?

Mr. Wessel: —that document doesn't show that these men were entitled to get, because, in the first

place, it hasn't been authenticated in any way; in the second place, later documents, which are in

(2352)

evidence, rewrite the partnership agreement. Those documents are before this Court now.

Mr. Stryker: I don't see how I can possibly represent these gentlemen unless I have before this gentleman, this witness, before your Honor, before the jury, the actual partnership agreement.

All we have is the notice that the Government has of the filing which the witness has examined and says does not contain all the items in the partnership agreement.

Mr. Wessel: That isn't my fault. I don't have the document.

Mr. Stryker: I have got the document, and one of the witnesses here has identified the signatures as to it, what it was.

Mr. Wessel: He doesn't know whether those first pages are the same. Counsel says he has the document. I don't know whether counsel knows it or not.

The Court: I don't understand there is any ruling, Mr. Stryker, that you can't prove the agreement if and when you can, but this witness says he can't say that that is the partnership agreement, and somebody else was on here who said, "I recognize these signatures, but I can't say that is the

(2353)

partnership agreement."

Now, when you get somebody up here who swears it is, we will take it.

Mr. Stryker: Well, I had one of the partners on here—I didn't have him, but he was presented

to me—it was Mr. Lubben, and this paper has been identified. I don't know how else to offer a foundation, and I say to your Honor, with great deference, that in a lawsuit involving a partnership I would not have supposed that I would be precluded from presenting the partnership agreement, itself.

I am sorry to take so much time.

Mr. Wessel: Counsel did not show it to Mr. Lubben——

The Court: Wait a second now.

Mr. Wessel: ——as I recall it.

The Court: Let's keep this simple. Nobody has said, Mr. Stryker, that you are prevented from presenting the partnership agreement when we get some testimony that establishes it as such.

Now, let's get on with what we have got.

Mr. Stryker: I think it was Mr. Roth, not Mr. Lubben, who identified all these signatures.

(2354)

Now, what more could I do?

Mr. Wessel: Mr. Roth could not identify the pages. It may be that those first five pages were just tossed on there.

If Mr. Lubben testified that that was the partnership agreement, maybe it would be in evidence today and we wouldn't have this problem.

Mr. Stryker: If you are implying this is not an authentic document——

Mr. Wessel: I am not implying anything.

The Court: I am not implying anything. This is a court of law and we are going to proceed with testimony under oath. Let's quit this argument and get along.

Mr. Stryker: Pardon me, your Honor, I was not—although I was looking at you, I was not addressing you. I was replying to Mr. Wessel; please have that clear.

The Court: Well, the whole trouble is when we start talking about documents not in evidence we start implying a lot of things and that is where we waste a lot of time, because in the last analysis it is not what we imply, it is what we prove that counts here.

(2355)

Now, let's move on.

Mr. Stryker: Well, all right.

The Court: As a matter of fact, I think that this might be a good time to take the midafternoon recess which will last for 10 minutes, and don't discuss the case.

(Jury out.)

(Short recess.)

(The following discussion was had outside the presence of the jury.)

The Court: On this question that was raised at the bench, Mr. Stryker, I think the proper thing for me to do is to get briefs from both of you on what foundation you think there is.

We have a three-volume record now, and I have ruled on this on my recollection of it. I don't recall anything that could have been developed from improper records that has come before the jury yet, but I may be wrong on that, and I am just foolish not to take advantage of the better background that you both have, and I would like to have a memorandum on that from you, which will tell me what.

if anything, you think the foundation is for a hearing.

Mr. Stryker: I think I can do that and save (2356)

your time and strength.

I think that Mr. Roth, when he was on the stand, was shown that paper, and identified some or all of the signatures.

The Court: No. I don't mean the partnership agreement or this document here. I mean, what is there before this jury now—as I see it, Mr. Stryker, in your motion before Judge Palmieri——

Mr. Stryker: Oh, that.

The Court: —you were talking about the evidence that had come before the grand jury.

Mr. Stryker: That's right.

The Court: I think you wanted a hearing as a possible basis for dismissing the indictment.

Mr. Wessel: I can give you the foundation right now, if you wish it. I have it summarized.

The Court: One second.

Now, it seems to me that here I have the additional question of making sure there is nothing that has come before this jury, this trial jury, which could be attributed to improperly secured records.

Am I correct on that?

Mr. Wessel: Yes, your Honor.

The Court: That is what I want to be sure of. (2357)

Now, you wanted to have a hearing at this time outside the presence of the jury. Before I take that time, I would like to know what foundation there is for it, and I would like for both counsel to let me have it.

Mr. Stryker: I think we can both—we both understand it pretty well; we can do it orally. I suggest, if you are interested in that point, we adjourn early into your chambers and thrash it out. Is that all right?

The Court: Whichever way you want it, because I don't want to have the thing sort of keep creeping back into the trial, with an unhappily loose end. Let's dispose of it now.

Mr. Stryker: Let's do this: Let's adjourn at 3:30 and settle this point with you. How is that?

The Court: All right.

I don't like to keep pushing here, but I don't want the jury to get the idea that we quit too early. If we go along for a half hour now, do you think that would be all right?

Mr. Stryker: Yes.

The Court: All right, let's get the jury.

Mr. Stryker: Wait a minute.

(2358)

The Court: Just a minute.

Mr. Stryker: Hold it a minute. This is a good place——

The Court: Just a second.

Mr. Stryker: This is a good place to correct, if I can—well, it's probably my own fault, but your Honor did say something to the effect, as we wrote it down, I haven't the stenographer's minutes, "It doesn't matter what the distributive shares of the partners were under the agreement, but what the partners got is important."

The Court: No, it should be what their ultimate distributive share was, that is what was important. If I said what they got, I was inaccurate.

Mr. Wessel: I think what they got is the same as what their ultimate distributive shares were. But technically counsel is right; it is what they were entitled to get ultimately.

The Court: I don't think I meant to deviate from that.

Mr. Stryker: I don't think you did, either, but I think that is the way you did say it.

The Court: Do you want me to say anything

(2359)

about it, or do you want me to put it in the charge?

Mr. Stryker: It may have conveyed an impression to the jury that what they got was the issue here, which is not the issue.

The Court: If anything, it might be more favorable to the defendants.

Mr. Wessel: You were referring to it in the general context of conversation. I don't recall the exact words, but your Honor's reference was to the ultimate distributive shares.

The Court: That is what I meant. If I left any inaccuracy, and you want me to straighten it out, I will be glad to do so.

Mr. Stryker: What I want clear, then—I think your Honor will want it, too—is that there is a marked difference between a distributive share and what the partners actually did receive. There is that distinction.

The Court: Yes.

Mr. Wessel: I think that isn't—if counsel will just bear with me a moment—there might in some circumstances be a difference between distributive share and what they got. I think the evidence in this case shows, as of now, at least, that the distribu-

(2360)

tive shares they were finally entitled to get are precisely what they did get, so there isn't any difference now, in any event.

The Court: Conceivably in the sense of having money pass through their hands—I don't know; I am not saying it did happen—I could see where there could be—this word "got" is a very ambiguous word.

Mr. Stryker: The point is to just make it clear what the issue here is, and I think inadvertently your Honor——

The Court: I think we can fix that in two minutes so it won't add to the confusion anyhow.

Mr. Stryker: All right.

The Court: All right, bring them in.

(Jury present.)

The Court: Mr. Foreman, ladies and gentlemen, in the colloquy which I had with counsel a few minutes before the recess, at some point I think I used a very ambiguous word. I think I said "what they got."

Now, without repeating all of the things that I said at that time, the proper expression would have been "what their ultimate distributive share was," and I wish to correct the statement I made at that time, if it had any impression on you, and let me say now that my comments in the colloquy with

(2361)

counsel should have no impression on you at all.

When I want to tell you something I think you should listen to, I will direct my comments to you, and with some emphasis.

These comments back and forth between counsel and the bench, as I told you, are a help in decid-

ing certain preliminary questions, and it is really not for your benefit.

All right, Mr. Stryker.

By Mr. Stryker:

Q. Now let me ask you this: Will you tell his Honor and the jury—you said, I am sure, in your direct examination, that you knew what the distributive shares of the partners were in the beginning or at the partnership or something to that effect. Will you tell us what they were? A. Do you want me to do that from memory, sir, or do you want me to refer back to a document?

Q. I would like to have you refer to anything you want, including Defendants' Exhibit UU for identification, and you have told me the other document doesn't give you all the shares, but look at that or anything else you have got. Just tell me what—— A. Let's see that exhibit, please.

(2362)

Q. —what you say the distributive shares were when this partnership began.

Mr. Wessel: I am handing the witness the group of Government's exhibits.

By Mr. Stryker:

Q. Look at anything you wish.

Mr. Wessel: I think counsel's question is unclear, and I object to the form of it; distributive shares as of what time.

Mr. Stryker: At the beginning of the partnership, when it started. I think I made that clear.

The Court: While he is looking, Mr. Stryker, on the tentative plans that I had made to hear oral argument on a certain point, I think I'd rather have

the memorandum that I asked for. I would like to see the cases.

Mr. Stryker: You would? I was trying to avoid a little work.

The Court: Well, I will take a very sketchy memorandum. I will even take a copy of the one you probably prepared at an earlier date, or any way you can solve the problem by putting it together with patches or otherwise; it will be perfectly all right with me.

(2363)

Mr. Stryker: Your Honor can well imagine that I am pretty busy night and day.

The Court: I recognize that. I didn't want to add to it, but——

Mr. Stryker: I will do the best I can.

The Court: I would like to be refreshed on that before I hear it.

Mr. Stryker: You want it right away?

The Court: No, you tell me; you fix the time. Give it to me when you get it together.

Mr. Stryker: All right.

The Witness: May I have the question again, please.

(Record read.)

A. Mr. Stryker, based on Defendants' Exhibit UU for identification, you cannot tell from this document what the distributive share of each partner was to be, without an oral agreement between the various partners as to the salary to be paid to the general partners.

Q. You can tell what the shares were, can't you, from that document? A. Sir?

Q. You can tell what the shares of the partners were
(2364)
from that document? A. You can tell what the balance remaining—how the balance remaining was to be divided, sir, but there was to be——

Q. Go ahead. A. There was to be allowed a deduction for a salary to be paid to a general partner before computing the net profit to be divided to the remaining partners, including the general partners.

Q. Well—— A. That would be in paragraph 8, sir.

Q. This document defines the capital of the partnership, doesn't it, in 5? A. Yes, sir.

Mr. Wessel: I object.

The Court: I will sustain it. I was going to sustain an objection to the content of the document——

Mr. Stryker: He was doing it, himself.

The Court: I think he did it because he thought that is what you wanted to do, and perhaps the objection should have come one question earlier.

Mr. Wessel: I didn't think that was what the question called for.

The Court: All right.

By Mr. Stryker:

Q. Going back to what you called my attention to para-
(2365)
graph 8, that is one of some 16 paragraphs, isn't it?

Mr. Wessel: I object.

By Mr. Stryker:

Q. What was it you said about that?

Mr. Wessel: I object. I move to strike the testimony with regard to the legal meaning of that contract, which is not in evidence.

The Court: All right. I will grant your motion.

Q. Then my original question wasn't answered. I had hoped to get something else.

Will you tell me what the shares of the partnership, of the partners, were, general as well as special, at the time they entered into the partnership; do you know that? A. Yes, sir, but it would be subject to an interpretation.

Q. If you know it, would you state it? A. I couldn't answer it that way, sir.

Q. What were the shares of the partners, limited and general, according to the arrangements which they made when they started the partnership in June, 1945, do you know that?

Do you know that? A. Sir, the profits were to be (2366) divided on the basis of their capital investments after allowing salaries on the general partners, the amount of which is not determined, and therefore there is no way for me to establish just what their distributive share was to be.

Q. Give us the figures you spoke of, Mr. Present. A. Sir——

Mr. Wessel: Figures of what time? When the partnership started there wasn't any income.

By Mr. Stryker:

Q. What the figures were to be.

Mr. Wessel: How can you tell unless you know the income in advance?

Q. Well, I think you said something about "after allowing for salaries." Did you use that phrase? A. Yes, sir.

Q. In what connection did you just use it? My memory is getting a little tired. A. There could be no distribution to any partner until there had first been determined the amount of salary to be paid to the general partners, and that amount, sir, is not fixed.

The Court: Are you going back now to this Exhibit UU?

(2367)

The Witness: Yes, sir.

The Court: I think we had better keep away from the contents of that.

Mr. Stryker: I think he has refreshed his memory from it, your Honor. Isn't that what he said?

The Court: Do you have any independent recollection of that?

The Witness: No, sir.

The Court: Is this just what you recall from reading it?

The Witness: That's right.

Mr. Stryker: Which is it?

The Court: It is just what he recalls from reading that.

By Mr. Stryker:

Q. Does that refresh your recollection as to what it was? A. I would have to go back, sir, and check my original notes.

Q. Well, will you be good enough—I won't take any more time now—you have work sheets, I suppose. A. I should have, sir, yes, sir. I may have made notes or I may have just referred to the document.

Q. Will you be good enough—I won't detain the Court

(2368)

now—to do that, if it is not too much trouble, so I can ask you about that in the morning.

Now——

Mr. Wessel: Let me ask just one question.

Preliminary Examination by Mr. Wessel:

Q. Would that be much trouble, Mr. Present?

Mr. Wessel: I just don't want the witness overburdened.

A. It means going through the work papers to see if I can find something.

Q. Would it take 15 minutes, 20 minutes, a half hour?

A. It would take a couple of hours. I have several——

Mr. Stryker: Fifteen or 20 minutes of an agent's time is not too much when people's liberty is at stake.

The Court: It all depends on how you are going to do it. Fifteen or 20 minutes which would be determinative of an issue affecting the issues in this case I would agree with you, it would be well spent.

Mr. Wessel. The witness said a couple of hours.

The Court: Fifteen or 20 minutes or two hours

on something that I don't quite see myself——

Mr. Stryker: With all deference to your Honor I don't think you do because I haven't made it plain yet, and I can't do it all in one question. I assure you it is very relevant.

The Court: Maybe we can back down to it so that I will see the relevance by you showing me the links in between the issues in the case.

Mr. Wessel: Let me concede for the purpose of the record—if there is any relevance to this question, and I don't see it either—that the partnership dis-

tribution as shown on the Eatsum tax return is not question in this case in so far as it reflects the original distributive shares.

The only question in this case relates to the amended changes that came after the partnership was formed; in other words, the agreement, as far as Loperfido is concerned, the agreement, as far as Stone is concerned, Hankermeyer, Lubben, and the two wives; but the fact that the tax return reflects the original (in May or June of 1945) distributions isn't questioned, and if that is the point of this line of examination, I think it is irrelevant.

(2370)

By Mr. Stryker:

Q. Will you give it in line with the formula that Mr. Wessel outlines? A. Would I compute it?

Q. Yes.

The Court: In other words, taking the—all right.

Q. Taking the tax returns, compute it that way.

Mr. Stryker: I think your Honor used the phrase "backing into it." I don't know if that is it, but I will try it that way.

Q. Will you take a paper and do that, or does that take long? A. No, sir, I will be glad to do it if you will tell me the amount of salary that was fixed for each one of the general partners.

Q. Can't you take it from these figures? Can't you take it from the figures here on the Eatsum return, page 4, and I read it? A. Yes, sir.

Mr. Wessel: If I understand the question, it is to take the figures in the last page of the Eatsum

return and work out percentages of the share of the original partners as of May or June, 1945.

(2371)

The Witness: You mean the percentage that were actually used?

Mr. Wessel: I think that's it.

Mr. Stryker: That they used on the return.

Mr. Wessel: That is without regard to salaries, as I understand.

A. Would that be without regard to any salaries, Mr. Stryker?

Q. All right, do it without salaries at the moment.

A. Could I have a pad, please?

(Handed to witness.)

(2372)

The Court: Isn't there something that we could take up, drop this and let go and have this computation made and start tomorrow morning with it, rather than take everyone's time to start working backwards now?

Mr. Stryker: Yes, I think that would be a good idea. I think perhaps he is taking too much time.

Would you let me have Exhibit 58A, would you, please? It is there, Mr. Present, 58A.

Thank you.

I asked for A. It is my fault. Will you give me B.

By Mr. Stryker:

Q. Now, when you are doing this thing—I am sorry to interrupt you—will you be good enough when you are doing this computation to answer my question, to examine in connection with Government's Exhibit 58B? You asked

something a moment ago about partners' salaries. It says there, doesn't it, partners' salary 89 or 950, or something like that? A. Yes, sir, but that would be partners' salaries for all the partners, general and special, and those were not to be considered, sir, and also, that would not indicate the actual salary on which there was an agreement. In other words, there could have been a salary other than that.

(2373)

That merely reflects what the books show was paid. Could have been any amount other than that which had been agreed upon, and which was entered into this computation.

Q. Will you examine that in connection with the computation you are going to make?

Mr. Stryker: If your Honor please, I am going to ask the Government—I am sure they must have it—to take my UC, which I have offered for identification, and compare it any way they want, and let me have the partnership agreement. It is unthinkable that they haven't got it.

Mr. Wessel: Let me make this perfectly clear. I have looked for that partnership agreement for a long time. We have a document which has a substituted page in it. That document is not, and I have never seen, the full partnership agreement. It is not the true partnership agreement.

I would be very happy to know where the authentic one was.

Mr. Stryker: Would you look at mine and tell me whether it is correct or not?

Mr. Wessel: There would be no way that I know of short of seeing Mr. Lubben, who isn't here.

(2374)

that I know of.

Mr. Stryker: All right.

By Mr. Stryker:

Q. Mr. Present, to go into quite another subject: Government's Exhibit 141—have you it before you? Or if you haven't I will get it for you. A. Sir, is that one of the charts?

Q. That is one of your charts. I think it is the first one. A. Yes, sir; I have copy of it.

Q. Have you got it? A. I have a copy of it, yes, sir.

Q. I have got one if you don't find it. A. I have got it. I have it. Could I just check with you and make sure it is the right one? These aren't numbered.

Mr. Stryker: All right.

Mr. Wessel: In response to your question before, Mr. Stryker, I have in my hand a four-page document, which is the only one that I know of that the Government has had as to this partnership agreement. The first page is in typing of one kind. It does not have any partnership share in it.

Mr. Stryker: Would you let me see it?

Mr. Wessel: I will be very happy to let you

(2375)

see it. Let me have it marked.

Mr. Stryker: Let me go on.

(Government's Exhibit 155 marked for identification.)

By Mr. Stryker:

Q. You have got 141 before you, have you not, Mr. Present? A. Yes.

Q. That is the exhibit, the first one, the chart you made up for your testimony, isn't it? A. Yes, sir.

Q. Now, that is based, that document is based on several assumptions, I think you said in your direct examination:

is that right? Did you not say that, or am I wrong? A. I don't recall whether I said several. There are some assumptions, yes, sir.

Q. Well—— A. Yes, sir, there are assumptions, yes, sir.

Q. There are assumptions, all right. Is it based first on the assumption that Mr. Lubben did not receive $70,000 out of the corn box, that Mr. Giglio retained the full amount of $140,000 in that box? Is that one of them? A. Yes, sir.

Q. Were you here in court when Mr. Loperfido testified? A. Yes, sir.

(2376)

Q. Did you hear him testify that when he turned the corn box over to Mr. Giglio and Mr. Lubben there were 30—or 40,000 of Lubben's IOUs in that box? A. Yes, sir.

Q. Did you hear Mr. Lubben testify, Mr. Lubben, this time, that after he left the partnership he gave Mr. Giglio a $75,000 check for the inventory and a series of $2,500 notes, amounting to approximately $100,000? A. Yes, sir.

Q. You heard that? A. Yes, sir.

Q. Did you hear Mr. Lubben testify that he paid these notes to Mr. Giglio until there remained a balance of only $12,000? A. Yes, sir.

Q. Did you hear Mr. Lubben testify that he withheld the final $12,000 because of any indebtedness of Giglio to him? A. Yes, sir.

Q. What? A. Yes, sir.

Q. You heard him testify that he withheld the sum of only $12,000, did you not? A. Yes, sir.

Q. And you heard him testify that on March 22, 1949, he brought an action against Mr. Giglio for the sum of $25,000; you remember that, don't you? A. Yes, sir.

Q. Did you hear him testify that he claimed that time (2377) only that Mr. Giglio owed him $17,000 for U. S. taxes and $8,000 for New York State taxes?

Mr. Wessel: I object to the form of the question. He used the word "only."

The Court: Sustained.

Mr. Stryker: I think I have paraphrased the complaint, your Honor, that was here.

Mr. Wessel: I am sorry. The form is incorrect.

The Court: All right.

Q. Well, did you hear him testify that he claimed Mr. Giglio owed him $17,000 for U. S. taxes and $8,000 for New York State taxes, leaving out the word "only" for the moment? You did, did you not? A. I don't recall that he broke the $25,000 figure down at all, sir.

Q. What is that? A. I don't recall that he broke the figure down. You may be correct.

Q. Did you hear him testify that he, after he instituted suit against Mr. Giglio, he and Mr. Giglio met at Lubben's lawyer's office, that Mr. Giglio said, "Why don't you sue me for a hundred thousand dollars?" and Mr. Lubben testified that he told Mr. Giglio on that occasion, "You don't owe me a hundred thousand dollars." Do you re- (2378) member that? A. I don't recall that he said exactly that, sir, but there was testimony to that effect. I think that was one of your questions.

Q. I think that was an answer. A. I don't know, sir. I don't recall that.

Q. You know that Mr. Lubben never sued Mr. Giglio for this $70,000, don't you?

Mr. Wessel: I object to the form of the question. It assumes facts not in evidence.

The Court: Sustained.

Q. Did he ever sue him for $70,000, do you know? A. I don't know sir.

Q. What? A. I don't know.

Q. Well,—— A. Can I answer that question, sir?

Q. That is what I have asked you for. A. Well, sir, based on the agreement that he signed with Mr. Giglio, which set forth exactly what he was to get from the Eatsum partnership, I would assume that he had no right to sue for it.

Q. What agreement are you talking about, the partnership agreement? A. The dissolution agreement.

Q. Dissolution agreement? A. Yes, sir. I think it specifically sets forth what Mr. Lubben was to get, and that

(2379)

is what I followed in making the schedule.

Q. Well, does he claim $70,000 in that agreement? A. According to that agreement, sir, he was not to get $70,000.

Q. Well, it is not any agreement that he was to get that, is it?

Mr. Wessel: Objection, if your Honor please. Argument to the contents of an agreement which shows perfectly well what it shows.

The Court: That is right.

Q. Well, you have testified to it. A. I am sorry. I did not hear your question. Would you repeat it, sir?

The Court: I sustained objection to the contents of the agreement.

Mr. Stryker: Well, the contents of the agreement he has just already referred to. Well, all right, I will drop it for the moment.

Q. Did you hear Mr. Roth testify that he kept after Mr. Lubben to collect the notes which Lubben had given Mr. Giglio for the inventory? You heard him say that, did you not? A. Yes, sir.

Q. What? A. Yes, sir.

Q. Did you hear him testify that while Lubben was paying all these notes he never mentioned a claim to Roth that Giglio owed him $70,000? You heard of that?

(2380)

Mr. Wessel: Objection as to form. Lubben didn't owe him $70,000.

The Court: Sustained.

Mr. Stryker: I am reading from the testimony.

Mr. Wessel: I am sorry. If you will refer to the page I will check the testimony.

Mr. Stryker: 1884 to 6, but I don't want to have my cross-examination interrupted on that. I am asking him if he remembers. I think I am right.

Q. Isn't that your recollection, Mr. Present, that is what was testified to in this courtroom? A. I think, sir, that that was—that you are reading some of the questions you asked Mr. Roth, sir. I don't recall that.

Q. Well, regardless of whether I asked, or Mr. Wessel, I am asking you what he testified to? A. I am not sure that he——

Q. That would still be testimony, even though I asked the question.

Mr. Wessel: I don't see it on pages 1884 to 6.

(2381)

As I see it, Mr. Giglio did not owe Mr. Lubben any part of that cash box.

Mr. Stryker: I might have the wrong page.

Q. Well, did you hear Mr. Roth testify as follows in this court ——

Mr. Stryker: 1080, Mr. Wessel.

Q. "Q. Well, any time during that period of eight or ten months, or whatever the period was, when you were collecting—when you were collecting and he was paying those notes, did Mr. Lubben ever say that he was owed $70,000 on the corn box? A. Didn't mention anything to me. I have no recollection of that ever being mentioned to me by Mr. Lubben."

You heard that, didn't you? A. Yes, sir.

Q. Now then, Mr. Present, if you assume that Lubben did get $70,000 out of the corn box, then your figures on Exhibit 141 would be wrong, wouldn't they? A. They would be changed, sir.

Q. If Lubben received the $70,000 out of the corn box, then the share of the partnership must be increased and that of Mr. Giglio and Mr. Livorsi decreased? A. Yes, sir; that would follow.

Q. Now, among the assumptions that you made, Mr.

(2382)

Present, in connection with Exhibit 140—have you got it there before you? A. Yes, sir.

Q. — was that $32,000 for engineering and research was not spent by the partnership; did you make that assumption?

Mr. Wessel: Object to the form of the question.

Mr. Stryker: Why? I can't understand the objections, sir.

Mr. Wessel: That wasn't what the assumption was.

Mr. Stryker: He is giving assumptions that he has based his testimony on. Why can't I ask him?

Mr. Wessel: I don't mean to be picky about the assumption, but it was with respect to a salary to Mr. Goldenberg, not the question of whether it was an expense.

Q. Did you not make the assumption that $32,000 for engineering and research was not spent by the partnership?

The Court: If you made it, did you not assume that out of the items claimed by the partnership—that the items claimed for experimental and research expense were overstated by $32,000?

Mr. Stryker: That is a better question.

The Witness: That's right, sir. I assumed

(2383)

that that amount did not represent a proper deduction.

Mr. Stryker: All right.

Q. Did you hear Mr. Gordon testify concerning the nature and extent of the improvements he made? A. Yes, sir.

Q. Did you hear Mr. Gordon testify that he spent over $30,000 in connection with this project? A. Sir, I am not sure that Mr. Gordon identified the taxpayer he spent that money for.

Q. What is that? A. I am not sure whether Mr. Gordon identified the taxpayer he spent that money for.

Q. Well, on this project, regardless of who it was spent for, didn't he spend it on this building where they were making jams and jellies, the Tavern Fruit Juice Company, whatever company it was? He said that, didn't he? I don't know, sir, that he identified it in connection with Tavern. I know he testified that he spent money, yes, sir.

Q. Well, it was this project of fixing up or changing or renovating this place where they made jams and jellies,

wasn't that it? Did he say that? A. Well, sir, there were two places that jams were being made.

Q. All right, well, didn't he testify to the renovations

(2384)

and work that he did on those two places where jams and jellies were made by some one of Mr. Giglio's organization? A. Yes, sir; he testified about work that he did, sir.

Q. All right. A. Yes, sir.

Q. Now, these charts, all of them that you made, Mr. Present, were made before you heard the cross examination of Lubben and Roth; is that not correct? A. Yes, sir; also before I heard their direct examination.

Q. Then they were prepared without any consideration for the testimony of Loperfido and Gordon, both Government witnesses; that would be true, too, wouldn't it? A. It is only true as far as the testimony in this court is concerned, sir.

Q. That is all I am talking about. A. Yes, sir.

Q. It would be true, the answer——

Mr. Stryker: Read my question, please.

(Question read.)

A. If you limited that, sir, to the testimony in this court, it would be true.

Q. I expressly am limiting it to that. I thought my question did, but if it didn't, I of course limit it to that. The answer would be what? A. It would be true, sir.

(2385)

Q. All right. A Mr. Stryker—I am sorry, sir.

Q. Did you want to say something? A. No, sir.

Mr. Stryker: Your Honor, I got so tired on this one thing. It is two minutes of four. If I take

another thing I can't finish it. So would you let me stop now?

The Court: All right, we will recess now until ten-fifteen tomorrow morning. Don't discuss the case.

(Adjourned until Wednesday, February 9, 1955, at 10:15 a.m.)

(2386)

New York, February 9, 1955,
10.25 o'clock a. m.

Trial resumed.

(Jury present.)

THEODORE PRESENT, resumed.

Mr. Wessel: May I hand up to the Court, first, a tentative proposed request to charge, secondly, a memorandum dealing with the subject discussed yesterday, copies of which I hand counsel (handed).

The Court: All right.

Mr. Wessel: May I also request that the appearance of the gentleman inside the rail be noted.

Mr. Stryker: Yes. He may be associated with me as an accountant. I have asked him to come here this morning.

Mr. Wessel: I wondered if I might have his name, please, for the record.

Mr. Stryker: Martin M. Lore, L-o-r-e.

Mr. Wessel: Thank you.

(2387)

Cross Examination Continued by Mr. Stryker:

Q. Mr. Present, I know—A. Mr. Stryker, can I just clarify one answer that I gave you yesterday, sir.

Q. Why, certainly, by all means. A. I believe you asked me yesterday if I had ever made any attempt to contact any of the defendants.

Q. I think I did ask you that. A. Well, sir, I recall a conversation that I had with Mr. Giglio in 1952. I didn't think of that, sir, until last night.

Q. That is all right. But you had been working on the case at that time, before that, you had been working on the case for four years before that conversation? A. Yes, sir, on and off, sir.

Q. Mr. Present, I know that you are familiar with the provisions——

Mr. Stryker: Your Honor, I don't want to be where I can't see you.

The Court: I miss you, too, Mr. Stryker.

Mr. Stryker: It is no pleasure for you, but——

Q. I know that you are familiar with the provisions of the United States Internal Revenue Code, aren't you, generally? A. Generally, yes, sir.

(2388)

Q. And that would include, would it not, familiarity with Section 182 of the Internal Revenue Code, I think? A. I don't have it memorized, sir.

Q. I don't expect you to. I think maybe they have a copy. A. I have a copy here, sir.

Q. Have you? Good. All right. A. 182, did you say, sir?

Q. Yes, that is 182.

Now, let's see, maybe I can come up, if you can't find it, I can put my finger on what I want.

182, now let me see: there we are, 182.

Now that provides, does it not, that in computing the net income of each partner, he shall include, whether or not distribution is made to him, his distributive share, and the rest of it is not important. It so provides, doesn't it? A. Yes, sir.

Q. In other words, when you deal with a partnership return, the return has to show what each partner's distributive share is, entirely irrespective of whether or not, in fact, he get his distribution: is that right? A. Yes, sir.

Mr. Stryker: Can I get 141 out of this melee—I mean Mr. Wessel's charts that are so readable. (2389)

Maybe we can get that pointer.

Well, I don't want you to do it, Mr. Wessel.

(Handed.)

Thank you very much. All right.

By Mr. Stryker:

Q. There is, then, I take it, Mr. Present, a sharp distinction in the law between a distributive share of a partner and actual distribution; that is correct, isn't it? A. I think, sir, that we can make it a little clearer than that.

Q. Well, I have no doubt you can improve on mine, but isn't that in substance correct? A. I don't think it is—I know what you are driving at, sir, and I don't think it is quite clear. Can I just enlarge it, still staying within your definition?

Q. Well, I mean there are two things: There is the partner's distributive share that has to be declared on the income tax return of the partnership. A. Yes, sir, right.

Q. That is one thing. We have been over that. A. Yes, sir.

Q. Now, that is something else again from the actual distribution that the partner gets; that is right, isn't it?

(2390)

A. Well, sir, if you want to, I think rather than distribution, I think if we use the amount that he actually received, that would be a little clearer.

Q. That would be better? A. Yes, sir.

Q. Thank you. That is what I was trying to say. I didn't say it as well as you.

All right, now, but haven't you used the word "distribution" on all your charts? Take, for instance, 141. Have you got it there before you, Mr. Present? A. Yes, sir.

Q. Right there over "Return," you have used the word "distribution," haven't you? A. Yes, sir. I believe I used it correctly.

Q. Well, at all events, you used it? A. Yes, sir.

Mr. Wessel: Am I in your way here?

Mr. Stryker: Oh, no, it is kind of hard here with this. I hardly know where to put myself.

Do you see all right?

Mr. Wessel: Yes.

Mr. Stryker: All right.

By Mr. Stryker:

Q. Now, did you assume that the Eatsum Food Prod-

(2391)

ucts Company partnership terminated on June 8th or 9th of 1948 when Lubben left? A. March 8th or 9th, sir.

Q. What did I say? A. June 8th or 9th.

Q. I don't know why I do that. It is March, of course. March 8th or 9th is my note. That is right, isn't it? A. I think, sir, for the basis of these figures I used May 31st.

Q. Well, did you assume, irrespective of these figures, that the partnership terminated on March 8 or 9, 1946?

A. No, sir, the only assumption I made was that Mr. Lubben left as of that date, and that his share, that he was entitled to get, was fixed by the agreement dated either March 7th, 8th or 9th. I don't recall the date.

(2392)

Q. Well, now, you know, don't you, from your study, as a matter of fact, from all the testimony in this case, that Mr. Lubben did leave the partnership in fact on or about March 8th or 9th of 1946? You know that, don't you? A. Yes, sir.

Q. And he went up to the Bronx in his old place and continued to run his old company now under the name of the General Confections; you know that? A. Yes, sir.

Q. But you tell me, I think—correct me if I misquote you—that you, in your work here, you assumed that he left the partnership in June? A. No, sir, I didn't say that, sir.

Q. Didn't you? A. I assume Mr. Lubben left as of March 8th or 9th.

Q. Did you assume that the partnership ended in June; is that it? A. Can I explain that, sir?

Q. Yes, surely. A. The partnership had no income as far as sales were concerned after the date of Mr. Lubben's leaving. The only thing it did incur between the period of March 9th and May 31st were expenses, which served to reduce the partnership income. Now, it would have been entirely proper to cut off the period as of March 9th and not allow the expenses incurred by that partnership after

(2393)

that date, but it would have involved a lot of accounting interpretations. It would have involved a lot of accruals on my part for bills that were paid on that date. Rather than get involved in a lot of determinations and computations, I used the figures which were in favor or resulted in a benefit to the taxpayers here, and gave them the benefit

of the doubt, in order to avoid any difficulty in justifying these computations or in computing them, sir.

Q. All right. Well, the fact is that you did assume that the partnership ended in June of '46? A. May 31st, sir.

Q. May 31st? A. I assumed the partnership closed its books after May 31st, closed its fiscal year as of that date, and used those figures, yes, sir.

Q. What was the income of the Eatsum partnership on that date? A. Which date, sir.

Q. Well, the date. I think you said May 31st, didn't you? A. You are speaking of the net income as I corrected it, sir, or as it appears on the tax return?

Q. Well, as you corrected it. A. $573,625.76, after allowing the salaries to Mr. Stone, Loperfido and Hankermeyer. If you prefer to call those distributive shares

(2394)

rather than salaries, then the net income would have been $622,025.76.

Q. That is the figure you got here, $573,625.76. A. Yes, sir; or else the figure above that, before the salaries, depending on which interpretation you want to place on the three payments to Mr. Stone, Hankermeyer and Loperfido.

Q. What was the cash box profits on that date? A. $140,000 in that computation, sir.

Q. That is the figure you have here? A. Yes, sir.

Q. Adding the two figures together, you have the net income; is that correct? A. Yes, sir; unless you want to deduct the salary.

Q. Well, I said, that is the way you have added it; you come to $573,— A. Yes, sir, except in my computation I believe I showed a net income after the salary, sir.

Q. All right, I think you did. So you finally came to the figure of $573,625.76; is that right? A. Yes.

Q. Is that correct? A. It could be either one, though.

Q. That is the one you have. A. Yes, sir; in that chart, yes, sir.

(2395)

Q. Was Mr. Lubben a fifty per cent partner? A. As of what date?

Mr. Wessel: Object to the form of the question.

Q. What? A. As of what date.

Q. Well, as of the beginning of the partnership and on through to this point? A. Are you speaking, sir, now as the agreement sets forth, or Mr. Lubben's testimony, or what, Sir?

Q. Well, I am asking you. You have given—— A. Well, sir, if you want me to use the figures, to explain the figures that I used in the chart, I will be glad to do that.

Q. I am not asking that. I will come to some of that, but at the moment do you know what Mr. Lubben's percentage in the partnership was on the date, which I think we now have it as May 31, '46? Do you know? A. Yes, sir. On that date Mr. Lubben was no longer a partner.

Q. Well, what was his distributive share on March 8th, when he was still there in the business? A. His distributive share, sir, is fixed in the contract which is in evidence here.

Q. The partnership agreement you mean? A. No, sir; the contract of dissolution, or that informal letter. I have

(2396)

forgotten the number.

Q. I have, too, sir. A. (Continuing) Setting forth the agreement between Mr. Lubben, the terms under which he left that partnership, which, as I understand it, sir, was used to amend the original agreement.

Q. Let me have this, will you please, Mr. Present? A. Yes, sir.

Q. Either fixed by the agreement or by the Internal Revenue Code, what was Mr. Lubben's distributive share? A. Out of the partnership, $117,048.00.

Q. Well, I wanted the percentage. A. You want me to find the percentage, that is, of the total, sir?

Q. I want to know what his percentage of interest in the partnership was? A. Sir, I couldn't——

Q. On the date when he was last a partner? Mr. Lubben's distributive share under the law would have to be fixed by the agreement between the partners, wouldn't it? A. Yes, sir.

Q. All right. That is what the Internal Revenue Code provides? A. Yes, sir.

Q. Now what I want to know is, what was his distributive share, not the figure that you have set here, but what

was the percentage? A. Sir, his distributive share was not fixed in any percentage amount in that agreement. It called for him to receive the plant plus what he actually had taken out up to that date. If you want me to reduce that to percentage, I will be glad to do it, sir.

Q. No. I am asking you, in your study of the case, we start with the arrangement between the parties. They fix their rights as between themselves, not with the Government but between themselves; is that right? A. Yes, sir; except that—Mr. Stryker, can I just point out one thing—Mr. Lubben has testified, sir, that that partnership arrangement was not correct, in that it sets forth distributive shares for Mr. Hankermeyer and Mr. Stone, which they were not entitled to get.

Q. I understand that. Then if we take Mr. Lubben's testimony to that effect, then he is a half-partner in the concern, isn't that right?

Mr. Wessel: Objection. It depends on the time.

The Court: I will sustain the objection, and I am going to say now, Mr. Stryker, to save time, that until I have some basis for thinking the distributive shares were fixed other than by that March agreement, I am not going back into any discussion of pre-

(2398)

vious agreements which didn't control the situation.

Mr. Stryker: Pardon me a minute, your Honor. This is rather complicated.

The Court: Yes, sir.

Q. Well, isn't this a fact, Mr. Present, that the parties between themselves could not do anything to alter the obligations and provisions of the Internal Revenue Code?

The Court: I think, Mr. Stryker, I will find that for you judicially, that the code could only be altered by Congress.

Mr. Stryker: Thank you.

Mr. Wessel: If I may just say this, if your Honor please. Of course the parties may change the facts so that they come within the provisions of the code.

The Court: Certainly, the language of the code is going to stay the same until Congress changes it. That I think we can agree on.

Q. Now this is a partnership, isn't it, that began in 1946, by a partnership agreement? A. Began in 1945, yes, sir.

Q. 1945, by a partnership agreement. A. Yes, sir.

Q. Now that being so, as his Honor has just said, the

(2399)

parties in March '46, March 6, '46, could not by agreement

alter the distribution which is fixed by the code. That his Honor has said.

Mr. Wessel: Objection. Calling for a legal conclusion.

The Court: I will sustain it.

Mr. Stryker: I thought I was paraphrasing what your Honor said.

The Court: What I said was that the parties could not alter the language of the code, but I never said that the parties could not alter what the distributive shares of each would be.

Mr. Stryker: Well, you see—if you will pardon me a moment, let me go into that.

Q. What their distributive shares would be is fixed by the contract and by the code; is that right?

Mr. Stryker: I think his Honor permitted that.

The Court: No, Mr. Stryker. You are asking this man for a question of law, which I am not going to let him answer, whether there is any objection to it or not. I differ with you as to the law, and so I am not going to waste time going through a third person. If there is a question of law to be settled between us, why, I think you and I perhaps

(2400)

can get along faster by ourselves.

Mr. Stryker: Will you bear with me a moment? Of course, the general statement that you make is naturally correct, but to interpret these documents and the testimony of this witness, who is an expert and has knowledge of the Internal Revenue Code it is necessary for me to refer him to it to get his views.

The Court: I suggest you ask him what he did. Then you and I will settle what the law is, and if you show me, or if we come to a conclusion that the law is at variance with what he did, why, you can object.

Mr. Wessel: If I may state, in the very case in which Mr. Bercu was a defendant, referred to in this court, this question of an accountant considering questions of law was considered, and it was decided that an accountant should not do so.

Mr. Stryker: He testified on direct examination if your Honor will remember, concerning many provisions of the code. You remember that.

The Court: Mr. Stryker, if it will help you proceeding to some elementary question of the code, I won't stop you, but when you start saying does the code plus the contract do this and do that, why then I think I will leave that for a lawyers' organi-

(2401)

zation to decide.

Mr. Stryker: I respectfully except.

By Mr. Stryker:

Q. I think you had told me that by adding the $140,000, the corn box, to the $482,000-odd, and subtracting the $18,000-odd, you come to $573,625.76. I had gotten that far, had I not? A. Yes, sir.

Q. Is this figure opposite David Lubben of $117,048.60, his actual distributive—distribution, the amount that he got, or is it something else? A. In this case, sir, it is both. It is the distribution that he received and his distributive share. I think that that was the definition that you wanted before, sir.

Q. Now on what did you base, or on what do you base your statement that that was his distributive share? A. On the contract of dissolution, sir, dated March 6th or 8th or 9th, whatever it is, setting forth what he was to get.

(2402)

Q. All right. Is it your testimony that the parties on March 6, 1946, could by agreement alter the distributive share which is fixed by the Code, is that your testimony?

The Court: I am not going to let him answer that question, because I don't know that the distributive share is fixed by the Code in that sense. That is an ambiguous expression.

Mr. Stryker: Well, let me put it this way, then. I respectfully except to that ruling.

By Mr. Stryker:

Q. Could the parties on March 6, 1946, by agreement, alter the distributive share which is fixed by the original agreement?

Mr. Wessel: That is the same question in a different form and I have the same objection.

Mr. Stryker: It is a different question entirely.

The Court: You object to it?

Mr. Wessel: Yes, your Honor.

The Court: I sustain it.

Mr. Stryker: I except.

Q. What were the distributive shares of Dorina Livorsi and Margherita Giglio as of the date of the termination

(2403)

of the partnership? A. Can I see the agreement, sir?

Q. Which one do you want, the partnership agreement or the dissolution? A. The partnership agreement,

sir. That is the one that was filed with the County Clerk's office, sir.

Mr. Stryker: 21, Mr. Dilberian.

By Mr. Stryker:

Q. And did you want the partnership agreement, itself? A. Is that the UU you are speaking of?

Q. What? A. Are you speaking of UU?

Q. Yes. A. Do you want the agreement that is set forth in that statement, sir?

Q. I am asking you. You are asking for certain documents. Is that the one you wanted? A. I am trying to clarify the question. Do you want the distributive share set forth in that agreement or the distribution as I finally made it, sir?

Q. That wasn't my question. I asked you what were the distributive shares of these two ladies as of the date of the termination of the partnership. That was my question. A. Do you want it as set forth where, sir, as I computed

(2404)

it——.

Q. I just want an answer, and you asked for certain documents and I am ready to supply you with anything you want.

The Court: I will ask you to give the answer as you computed it, sir.

The Witness: As I computed it, sir, zero.

Mr. Stryker: Is my question allowed, your Honor?

The Court: He didn't understand your question. I stated a question. That to me, I think, is relevant. You are entitled to know how did he get at those figures.

Mr. Wessel: He answered the question. Just a moment, your Honor——

Mr. Stryker: I think my question was—perhaps I didn't state it very well—"What were, in fact, the distributive shares of Dorina Livorsi and Margherita Giglio as of the date of the termination of the partnership?"

That was my question.

Mr. Wessel: The witness testified, "As I computed it, zero."

Mr. Stryker: I am asking the fact, what was it.

(2405)

The Court: I am going to let that answer stand as he gave it.

Mr. Stryker: What was the answer, your Honor?

The Court: "As I computed it, zero."

By Mr. Stryker:

Q. On what did you compute that? A. That is based on the distribution as set forth in the individual returns of Mr. Giglio and Mr. Livorsi.

Q. Did you compute Lubben's distributive share according to the dissolution agreement? A. Yes, sir.

Q. Was Dorina Livorsi's distributive share computed according to the dissolution agreement? A. As I recall it, it is not set forth in that agreement, sir.

Q. What? A. As I recall it, it is not set forth in that agreement.

Q. Then the answer to my question would be no, Mr. Present? A. Sir, I couldn't do it if the distributive share isn't set forth.

The Court: The answer wouldn't be no. I

(2406)

will sustain an objection to that question. I think the answer is perfectly clear as it stands.

Mr. Stryker: It may be to your Honor. It is not to me. May I pursue it a bit?

The Court: I will sustain the objection to that question.

All right, go ahead.

By Mr. Stryker:

Q. Can you tell me what was Dorina Livorsi's distributive share according to the dissolution agreement? A. It is not set forth, sir.

Q. Well, the answer is you can't tell me from that, isn't that the answer? A. That's right.

Q. All right. Well, if her distributive share, as you have now told us, is not set forth in the dissolution agreement, then it must be computed, must it not, according to the original agreement?

Mr. Wessel: Now I object, and I object to not only this question and the foundation upon which it purports to be based, but upon the questions that preceded it, because we are in an area which the record does not support in any way at all.

Mr. Stryker: That is just the point.

Mr. Wessel: It is perfectly clear when this

agreement was signed, Mr. Roth told Mr. Giglio, who told Mr. Lubben, "let's put in these other people." The agreement wasn't the fact. It wasn't the actual agreement. It was a piece of paper, and that is what the evidence shows.

Mr. Stryker: Well, that is what I have a right to inquire into, as to how he got those figures for these women.

The Court: He has told you how he got them, Mr. Stryker, it seems to me, but—I will withdraw that statement.

That is a perfectly proper field of inquiry, but when you start asking him about what these various parties did and what must follow from this and that, why, then I think you are getting afield from that.

Are you moving, Mr. Wessel, to strike out the previous answer?

Mr. Wessel: No, this specific question says, "Then it must have been based upon the partnership agreement in May of '45." Well, of course, there was a lot of discussion at that time, and he has left out that discussion in the question.

The Court: What is bothering me, among other things, is the characterization of documents in evidence.

(2408)

Now, those, the agreement of March 6th and any subsequent agreement, if there was one—was there a formal agreement thereafter?

Mr. Wessel: There was a formal agreement signed on June 12th, I believe, as of May 31st.

The Court: They speak for themselves. They are both in evidence?

Mr. Wessel: They do speak for themselves.

The Court: What I don't like is your asking this witness what they say and what they don't say.

Mr. Wessel: One of the very issues in this case, if your Honor please, and this is the point of my objection, is that the May, 1945, agreement or June, 1945, agreement did not reflect the understanding between the parties.

Mr. Stryker: Well, that is what I am trying to get into in my poor way.

The Court: Well, this witness can't help you on that, Mr. Stryker.

Mr. Stryker: I know, but he can tell me what exactly it was, on what exactly it was that he computed these figures here in this chart.

I am sure you will not deny me that.

(2409)

The Court: He has told you it was the income tax returns of Mr. Giglio and Mr. Livorsi.

By Mr. Stryker:

Q. That is what you computed it on, is his Honor correct? A. Yes, sir, plus the testimony of Mr. Roth.

Q. Plus Roth? A. Yes, sir.

Q. Have we it now all on which you computed it? A. A. I believe so, yes, sir.

Q. Then you did not compute their shares on any of the partnership agreements, if I have understood your testimony right; is that correct? A. That is not correct, sir. I did use the agreement dated March 6th or 8th, whichever it was, plus the formal dissolution agreement, sir. I did not use the one dated in June, if that is the one you are speaking of.

Q. Well, you have told me that the agreement, itself, did not set forth the shares of the women. Haven't you told me that? A. The one dated March 6, 1946, or March 8—I am not sure of the date now—and the final dissolution agreement dated sometime in June, I believe, of 1946, those two agreements did not set forth the share of the

(2410)

women.

Q. That is all I am trying to get at. A. That's right, sir.

Q. All right. Well, now, Mr. Present, if you assume that Margherita Giglio and Dorina Livorsi were limited partners of Eatsum Food Products Co., Ltd., will you please indicate on Exhibit 141 what their distributive shares of the partnership would be?

Mr. Stryker: That is a hypothetical question which I believe I have a right to ask in cross examination, so many hypotheses having been placed to him in the direct. I don't believe his Honor—I think his Honor will permit that.

If so, will you come down here and show me that.

A. Sir, before I do, will you just tell me the distributive share you want me to assume for the two wives so that I can correct the figures.

Q. Well, if they were limited partners of Eatsum Food Products, on that day——

Mr. Stryker: I withdraw that.

Let me have Exhibit 21, will you?

(Handed.)

Mr. Stryker: Thank you.

(2411)

By Mr. Stryker:

Q. Yes, I will ask you, first, from an exhibit in evidence, Exhibit 21, to compute from the exhibit—I think you will find what you want in paragraph 6 of it, and perhaps paragraph 8, will you compute the figure that you said you were asking me whether I wanted to assume, compute that, please. A. Mr. Stryker, in order to get a percentage here you will have to give me the figures for the two general partners so that I can find out what the percentage each one of these represents to the total, sir.

Q. Well, let's see, these men or people mentioned in paragraph 6 are the special partners, aren't they? A. Yes, sir.

Q. And it says there, "the contributions that they made," doesn't it? A. Yes, sir.

Q. And then it also says that "The limited partners shall make no additional contribution at any time," and then it goes on that "The contribution of the limited partners will be returned on May 31, 19"——A. "1950," I believe, sir.

Q. —"50," and it goes on, "but in the event of the death of a limited partner during the time fixed for the

(2412)

continuance of the partnership, the contribution of such limited partner may, at the option of the general partners, be paid off or returned at any time thereafter." It says that.

Now, it says, also, that "The share of the profits or other compensation by way of income which each limited partner shall receive by reason of his contribution shall be ratably, in proportion"—"shall be ratably, in proportion, which the sum contributed by each limited partner to the capital of the partnership bears to the total amount of the capital of the partnership"; is that right? A. Yes, sir.

Q. Now, you knew what the total amount of the capital of the partnership was from your investigation? A. Yes, sir, $67,000.

Q. Now, with those figures, can't you compute the interest of the limited partners? A. Do you want the two wives, sir?

Q. That is what I am interested in. Don't bother about the rest. A. Mr. Stryker, I have computed a percentage, as set forth here, except that if we read this again, sir, it

does not define how the partnership net income shall be computed, sir.

(2413)

In other words, I will give you a percentage as set forth, that their particular investment bears to the total capital, sir——

Q. Hold it a minute, will you please, while I take a look.

Well, it says that "the contributions," it says, "their share of the profits, they shall receive by reason of their contributions shall be ratably, in proportion, to the sums contributed by each limited partner," it says that, doesn't it? A. Yes, sir, but it doesn't state, sir, how to compute the profits.

There was another agreement which stated that their salaries were to be taken into consideration, sir, so before we could have any distribution we would have to know how much of the salaries—how much the salaries were which would be fixed for each individual.

Q. Well, take this paper as we find it. A. I will be glad to do that, sir.

That would be 11 per cent of some figure. If you will tell me what figure you would want me to apply it to I would be glad to do it for you.

Q. Where do you get the 11 per cent from? A. $7,370

(2414)

represents 11 per cent of the $67,000 total capital.

Q. Well, compute it, if you will. A. What figure would you want me to apply to the 11 per cent?

The Court: Before we go any further on that, Mr. Stryker, will you clear up one thing in my mind?

Mr. Stryker: Yes, sir.

Colloquy

The Court: Exhibit 35, that is the formal dissolution agreement, we have in clause 2:

"The limited partners hereby acknowledge that they have received repayment of the capital contributed by them to the firm and all sums or benefits to which they were entitled from the firm or the general partners and they do hereby severally and jointly release the firm and each of the two general partners and their respective heirs, personal representatives and assigns, of and from all claims and demands of any kind whatsoever which they ever had, now have, or which they or their respective heirs, personal representatives and assigns, may hereafter have by reason of any matter, cause, or thing whatsoever from the beginning of the world to the day of the date of these presents."

(2415)

and then further on, in that exhibit, the plant and the lease and so forth are assigned to Lubben, and then the firm, and Giglio—no, all the other assets of the firm, except the plant, and the stuff that Lubben got, including the goodwill and so forth, shall forthwith be and hereby they are transferred, assigned and set over by the firm and Lubben to Giglio and Giglio accepts the same without any warranty and so forth from Lubben, and Giglio agrees to discharge all of the liabilities of the firm, and so forth.

Now, this is signed, not only by Giglio and Lubben, but by all of the limited partners.

Mr. Stryker: I am aware of that, your Honor.

The Court: What I don't see is the relevancy of your inquiry in the light of that.

Mr. Stryker: The relevancy is that that agreement and no other agreement could change the terms of the Internal Revenue Code. That is my point.

The Court: I don't understand that it did change the terms of the Internal Revenue Code, and I don't think that is the question, but it did purport to change, and the only evidence before me is that it

(2416)

did change the distributive shares, if I understand it correctly.

Mr. Wessel: And may I state, the Code says that the income of a partner is fixed by the partnership agreement. The partnership agreement isn't what Mr. Stryker may say is the May 31st agreement or something else. The partnership agreement as fixed by the parties, and that is precisely what this document, Exhibit 141, is based upon. It can't be any one piece of paper taken without regard to other papers or without regard to conversations or anything else.

Mr. Stryker: If your Honor please, the dissolution agreement can, of course, change the status or the obligations of the parties to the agreement at that time. It can't change either the Revenue Code or the fact of the distributive shares, the amount of distributive shares up to that time, and we are dealing with an income tax return.

The Court: Right.

Mr. Stryker: That is my position.

The Court: What I don't see is any basis for the assumption on which you are asking this witness to make these computations. Now, if there is a basis

(2417)

which escapes me, I am perfectly glad to have it made, but in the interests of saving time, I would

rather not go into that if—in other words, if there is a basis to be established, let's establish that, and then we will go on with the computations.

Mr. Wessel: If I may——

Mr. Stryker: Will you just hold it a minute, Mr. Wessel, if you don't mind?

The Court: Let's see, have you got 182? Are you using it?

The Witness: Yes, sir; you can have it.

Mr. Stryker: Your Honor, the basis for that inquiry is the very document that the witness has. I think it is Exhibit 21.

Mr. Wessel: And that is precisely what I was going to address myself to right now. Exhibit 21 is dated, I believe, June 12, 1945, I believe.

Now, the partnership ran, for their own tax return, the Eatsum return, until May 31, 1946.

Now, the June 12, 1945, agreement might bind provided it wasn't varied orally, or varied by later agreements.

There is in evidence the Loperfido agreement dated December 24, 1945, which varies the other agreement.

(2418)

These are written documents I am talking about.

There is in evidence the dissolution agreement.

There is in evidence all the conversations about what these agreements were to be, and that total sum is the total upon which these calculations, 141, are based, not one document based back in May of 1945, or June of 1945.

Mr. Stryker: Well, if your Honor please, the Internal Revenue people would not be satisfied with a return that was predicated merely on some private arrangement of the parties that altered the distribu-

tion that had existed. The return must contain what the distributive share of the parties had been, not on the date, on some particular date; but what they had been throughout the life of the arrangement, the partnership. That is the point.

Mr. Wessel: What counsel is saying, that you cannot change a partnership during the life of the partnership, and that is just not true. Of course a partner can leave at any time he wants to.

The Court: I think we can go further: If the Internal Revenue Bureau—well, I won't go into that.

(2419)

I don't think they are bound by any formal document, if they don't think that, in fact, represents the agreement of the parties. I mean, if they have—I don't say it is a matter they can come to arbitrarily—but if there is a basis for such a conclusion.

Mr. Stryker: If your Honor please, you will correct me if this is wrong, but in reply to what you say, it is my definite understanding of the evidence thus far that no one has challenged the fact that Mrs. Giglio and Mrs. Livorsi were limited partners.

Mr. Wessel: Now, I would like to just take that right now. I have a little card here which is entitled "Eatsum Dummy Partners."

I am going to read some of the evidence if counsel wishes me to.

Mr. Stryker: What is this document, Mr. Wessel?

Mr. Wessel: This is a little card that I have been making up, based upon my recollection, and my reading of the transcript.

Mr. Stryker: Is this in evidence?

Mr. Wessel: This is a reference to page numbers in the transcript before this Court.

(2420)

Mr. Stryker: All right, let's have the page numbers. Wait a minute. Can I have that document marked?

Mr. Wessel: No, you can't have my own work product marked, but I will be glad to describe the pages of the transcript referred to.

Mr. Stryker: I ask to have that comment of Mr. Wessel's stricken out. If it is made from some note that he has that I haven't seen, and it is not in evidence, it has no place in this trial.

The Court: Mr. Stryker, that table is full of notes that you haven't seen, and they are going to be represented in Mr. Wessel's argument to me in his argument to this jury, and we are not going to mark every one of them for identification.

Mr. Stryker: Just a moment, your Honor. Will you bear with me? I don't like to try your patience.

The Court: All right.

Mr. Stryker: Mr. Wessel, as I understand it, has read from some note that he has. Now, certainly that is not permissible unless we have the note in evidence, is it?

The Court: No, I think it is perfectly permis-

(2421)

sible. Go ahead.

Mr. Stryker: Can I read from any notes I have?

Mr. Wessel: It refers to evidence before this Court.

The Court: Do you want to sum up with me, both you and Mr. Wessel, now, what the evidence is

on this point? If that will expedite the trial, I would like you to read from your notes, too.

Mr. Wessel: Let me state, this is evidence in this court in the testimony of Roth and Lubben, that the original partnership agreement was made solely for the purpose of getting taxes down, that they tossed in other partners, and that evidence is before this Court.

The Court: I recall it.

Mr. Wessel: I won't go into detail now.

The Court: All right.

Mr. Stryker: I think the evidence in this case is that, in fact, the partners, each contributed the capital assigned to them, and that these ladies were limited partners and made their contribution. I think that is the proof.

Mr. Wessel: We are getting into summation.

(2422)

Mr. Stryker: Well, it bears on the admissibility of the questions that I have in mind.

Mr. Wessel: But the fact, the very fact—and that is the point I think of our whole decision, is that this May or June, 1945, agreement is not the only document upon which this partnership was based or the distributive shares, and that is how we got into this, and I apologize for having taken the subject somewhat afield.

Mr. Stryker: Let me bring you back here, if I may: It is a simple matter and I would like to have the figures, the computation that Mr. Present was good enough to make, or about to make when I came into this matter.

By Mr. Stryker:

Q. Can you give me that of the two ladies? A. Sir, based on those percentages they would be entitled to 11 per cent of the net income, sir, and if you will tell me what the net income is you want me to use, I will be glad to make the computation for you.

Q. Take the net income of the—as you got it here, $573,625.76. A. Eleven per cent of $573,625.76 is $63,098.83.

Mr. Stryker: Just a minute, your Honor. It is

(2423)

my fault.

By Mr. Stryker:

Q. Would you be good enough, before you make this computation, to subtract from the $573,625.76 what you say was David Lubben's—I think the word you used is—"distribution" of $117,048.60. A. Sir, I said it was his distribution and distributive share, both.

Mr. Stryker: Will you hold it? I am frank to say I have accountants here to deal with, and you know what they are, difficult.

Just hold it a minute, will you please.

I am very sorry, but I think your Honor realizes I have a somewhat factual complicated situation; you will bear with me, I hope. I don't like to take your time or the jury's.

The Court: That is all right.

Mr. Stryker: I can't help it. Maybe it would help me if I could take a, say, five-minute recess.

The Court: Take our recess now?

Mr. Stryker: Yes.

The Court: All right, we will take our recess now. Don't discuss the case.

(Short recess.)

(2424)

(Jury in box.)

Mr. Stryker: I withdraw the last question.

By Mr. Stryker:

Q. Mr. Present, I understood you to say on your direct examination that you made various assumptions on the testimony, among others, of Mr. Lubben; is that correct? A. You are speaking about——

Q. About anything. Didn't you say you had made many assumptions on his testimony? A. Well, I made assumptions in computing the figures in the chart, yes, sir.

Q. Did you make that on the basis of his testimony? A. Yes, sir.

Q. Did you make it on the basis of just selected parts of the testimony; or on all the testimony? A. All the testimony, sir.

Q. Do you remember—that applies also to Mr. Roth, doesn't it, what you just said? A. Yes, sir.

Q. Now do you remember on page 1047, on Mr. Roth's direct examination, he was asked this question and gave this answer:

"Q. Mr. Roth, with regard to Schedule I"——

Mr. Stryker: To make that clear, could I have that Schedule I, it is the partnership return, isn't it?

(2425)

The Witness: Which partnership, sir?

Mr. Stryker: We are talking about Eatsum.

Q. (Continuing reading:) "Schedule I, the partners' shares of income and credits for Eatsum,

can you tell me whether the persons listed as partners in Eatsum actually received the amounts of money set forth next to their names? A. No, sir; and by that very same token, either William or Margherita Giglio or Frank Livorsi received the amounts of money that is set forth against their names. That is a distributive share of income and has nothing to do with received. It has rather to do with earned."

Do you remember that? Or whether you do or not, did you base your testimony here on that? A. Yes, sir; I heard that, yes, sir.

Q. Did you also base it on this testimony, page 1049, of Mr. Roth on direct examination by Mr. Wessel:

"Q. Am I correct that the only partners during the entire fiscal year"—he is referring to the fiscal year ending May 31st, 1946. I will start again:

"Am I correct that the only partners during the (2426)

entire fiscal year of operations were Mr. and Mrs. Giglio and Mr. and Mrs. Livorsi? A. Yes, sir."

Mr. Wessel: I suggest counsel read two questions down.

Mr. Stryker: Which one do you want me to read? I will read anything you want.

Mr. Wessel: I will read it if you wish.

Mr. Stryker: No, just tell me.

Mr. Wessel: The next question and answer down.

Mr. Stryker: Just a minute now.

Mr. Wessel: All right.

Mr. Stryker: Well, I will read the intervening one, too.

Q. "Q. Now, sir, I ask you whether the distributive shares set forth in Schedule I, are not based upon a full year of operation? A. It is based on a full year of operation in proportion to the percentage of their share of the limited partnership, designated at the inception of the partnership.

"Q. And do you know whether or not the persons whose names I have mentioned were entitled to receive the distributive share I mentioned? A. No, sir.

(2427)

"Q. You don't know? A. Well,——

"Q. Do you know? A. They were not entitled to receive. That was my answer."

All right, did you have that in mind, those questions? A. Yes, sir.

Q. As part of your basis for your opinion? A. Yes, sir. I think that is Schedule I, rather than Schedule l, sir.

Mr. Stryker: I. You are correct. It is I.

Q. Now, did you also base your testimony or your calculations—— A. Mr. Stryker, I based my testimony on all of his testimony rather than any one sentence that you have picked out.

Q. I understand, among other things. Did you hear Mr. Lubben testify on direct examination, at page 98 of the record—well, the question before—— A. Mr. Stryker, before you go on, can I correct one impression that I think has been made?

Q. Why, certainly. A. My computations are not based entirely on that testimony, sir.

Q. I understood. A. They are based only in part on that testimony.

Q. I understood that. The questions are rather confusing but you can have anything you want: (2428)

"A. Sir?"—by Lubben testifying, page 98—well, probably I had better read the question to this this is supposed to be an answer. I think it is found on page 97:

"Q. With regard to your fifty per cent, Mr. Lubben, are you suggesting the persons who shared that were dummies? A. Am I what, sir?"

Then there was an interruption. Then it goes on:

"A. Sir? Yes, sir, they were—I owned my own fifty per cent, sir, regardless of what the paper said, on the partnership agreement, and when the papers were signed in Mr. Goldhill's office Mr. Livorsi was present."

Then it goes on into who was present.

But did you take into consideration his statement that he owned fifty per cent, that is, Lubben? A. As of what date, sir? I think he was speaking of the beginning of the partnership.

Q. Just a minute. I will get that. I think it is the—I think the questions—I can't pick them all out in a two thousand-page volume, but I think it relates to all through the partnership. I haven't the exact question here. A. I doubt that, sir. I think I heard testimony to the contrary of that. (2429)

Q. Did you? A. Yes, sir.

Q. All right, we will see. Maybe you are right.

Now, can you tell me whether or not Mr. Lubben was a 50 per cent partner until either March 6th or May 31st, 1946? A. He was supposed to be.

Q. Well, what do you base the statement on, "he was supposed to be"? A. Mr. Lubben's testimony.

Q. Mr. Lubben? A. Plus the documents in evidence, sir.

Q. Well, in other words, Mr. Lubben said that these people that he had with him as special partners were not really special partners, and he owned half of the business, 50 per cent; isn't that what he said? A. Yes, sir; he was supposed to own half.

Q. I mean, the "suppose" relates to whether these other people, Hankermeyer and Stone, were specials or not, he was supposed to own 50 per cent of the partnership. A. That's right, sir.

Q. That's right? A. Yes.

Q. Now, being supposed to own 50 per cent of the partnership, would not his distributive share have been not $117,048.60, that you have, but 50 per cent of your figure of $573,625.76? A. If he had been entitled to it, sir, it

(2430)

would be. Incidentally, Mr. Stryker, he could have been an owner of any percentage and the partnership agreement could set forth his distributive share for a different percentage. In other words, it doesn't necessarily follow that his distributive share would equal in any way the percentage of ownership that he has in that company. He may have a different equity in the assets here and have a different distributive share.

Q. I suppose he might do anything. A. Sir, you have asked me to state it as a fact, sir, and I don't think you can definitely state that the two necessarily follow.

Q. Well, if Mr. Lubben, according to his oath, was a 50 per cent partner, he owned half the partnership, then if that were so, he would be entitled to half of the $573,625.76, wouldn't he? A. He would be, if that were the agreement.

Q. If that were the partnership agreement. A. As of what date, sir? If that were the agreement of the partners as to what he was entitled to get, that is correct, sir.

Q. You have never found out what that was? A. Sir?

(2431)

Q. You never found out what that was? A. How much he was entitled to get?

Q. Yes, the partnership agreement. A. Well, I know what he was entitled to get, yes, I did find that out.

Q. I am asking you. You said, according to the partnership agreement. Have you never taken any steps to get that partnership agreement?

Mr. Wessel: Objection to the form of the question.

The Court: I will sustain it.

Q. You were here in court when I offered UU for identification, or had it marked for identification, were you not? A. Yes, sir.

Q. Well, the paper was here in court: you had it; did you interrogate anybody about that?

Mr. Wessel: I object. It assumes that the partnership agreement is not in evidence, and it is.

Mr. Stryker: The partnership agreement is in evidence?

The Court: Wait a minute, now. Let me make it clear. I am sustaining the objection because it assumes first that there was a single partnership agreement, and two, that UU is it. Therefore I will

(2432)

sustain the objection.

Q. Did you take any steps to examine the document I marked for identification, UU? A. Before we, before I saw it here?

Q. Here, or when I produced it A. Yes, we made efforts to get copies of it, sir.

The Court: I think Mr. Stryker wants to know whether you looked at it here.

Q. Did you look at it here to see if it was a correct agreement or a spurious one, or whatever it was? A. I looked at it here.

The Court: We have been over this before, Mr. Stryker. I don't think I am going to take much more time on it. So let's get on to the next subject.

Mr. Stryker: All right.

Q. Now, Mr. Present, on the assumption that the only partners during the entire fiscal year of operations were Mr. and Mrs. Giglio and Mr. and Mrs. Livorsi, will you figure what their distributive shares were? A. Will you tell me what the relationship you want me to use existed between Mr. and Mrs. Giglio?

Q. I am taking the testimony as I find it in Roth's direct examination. A. Well, sir——

Q. Which I read several times. A. —I can't give you

(2433)

that broken down, sir. The only testimony that I know of is that Mr. Giglio and Mr. Livorsi were 50 per cent partners. If you want me to combine that, sir, that is what the chart shows.

Q. Well, if these were the only partners, as Roth stated, wouldn't you have to determine—to determine the distributive shares, divide those shares in some way? A. Yes, sir. I used the method that the taxpayers themselves elected to use in their own individual returns.

Q. Well, now, you are criticizing most everything they did in their returns. A. Sir, I am not criticizing anything.

Q. Will you figure, without reference to the way they figured in their returns? A. I don't know of any other way. I will be glad to compute it if you suggest a method.

Q. Well, what would half of the earnings be? There are four partners, according to his document, to his testimony, Roth's.

Mr. Wessel: I object to the form of the question.

Mr. Stryker: Well, I haven't finished it yet.

(2434)

Q. (Continuing) According to Mr. Roth's testimony that I have read, during the fiscal year there were four partners, Lubben, Giglio—wait a minute—there were the two husbands and the two wives, according to his testimony.

Mr. Wessel: I object to the form of the question.

Mr. Stryker: Well, it is there, and I don't know how else to ask it, your Honor.

Mr. Wessel: It isn't there. I object. There is a good deal of testimony on the subject. Mr. Roth testified at great length that Mr. Giglio and Mr. Livorsi were 50 per cent partners.

Mr. Stryker: I am asking about this plain simple question that Mr. Wessel asked and the witness gave that answer, that is all.

Q. If you take that basis, can you compute what the shares were? A. Are you assuming, sir, that all four were equal partners, Mr. and Mrs. Giglio, Mr. and Mrs. Livorsi?

Q. Well, let's take it that way. A. Well, sir, all we would have to do then is take the $573,625.76, subtract Mr. Lubben's share, $117,048.60——

Q. Well, suppose—go on. A. —that would leave $456,

(2435)

577.16 to be divided four ways, on your assumption, sir,

The Court: It would come out half the amount you now show. In other words it would be $114,000-odd for each of the four?

The Witness: That's right.

Q. What would come out half? A. On your assumption, sir, the computation would be exactly half of the 228 shown combined.

Q. Well, half of 228 is 114—— A. That's right, sir.

Q. —144.29; right? That is the way I figured it. I think it is right, half of 228. A. It is 114,144.29; that's right. It would be four ways between Mr. and Mrs. Giglio and Mr. and Mrs. Livorsi.

Q. Then Mrs. Livorsi would be entitled to 144,144.29, would she not, under that computation? A. Based on your computation, yes, sir.

Q. I am basing it on Roth's statement.

Mr. Wessel: I object to the form of the question.

The Court: I will sustain the objection.

Q. All right, call it my computation, if you will. A. That's right.

(2436)

Q. That would be so, wouldn't it? A. That is right, sir.

Q. And that 114,144.29 would decrease the amount assigned to Mr. Giglio by one-half, would it not? A. Yes, sir. It would also preclude Mr. Giglio and Mr. Livorsi for having claimed their wives as exemptions on their own return, sir.

Q. Well, we will come to that. It would also cut Livorsi's 228,288.58 in one-half, would it not? A. Well, mathematically it would, yes, sir.

Mr. Stryker: Would you be good enough to mark this for identification.

(Marked Defendants' Exhibit JJJ for identification.)

Q. I show you JJJ for identification, a compilation that has been made for me, and ask you whether, taking the compilation or the computation as you have just done, whether this paper does not accurately reflect the items that it refers to, the distributive shares of the partners, although down to 573 I have taken your figures? Now would you be kind enough to look at that, Mr. Present? Is that correct, Mr. Present? A. This is based on your assumption—using the figures in the chart down to the point of the $573,000 and using the distributive share for Mr. Lubben,

(2437)

as I have shown it, this merely takes the shares as I have set it forth for Mr. Giglio and Mr. Livorsi, and divides it in half and assumes that Mr. Giglio, Mrs. Giglio, Mr. Livorsi and Mrs. Livorsi were equal partners in the balance, and divides it on that basis.

Q. Well, it does correctly do that? A. Yes, sir.

Mr. Stryker: I offer it in evidence.

Mr. Wessel: So long as it is perfectly clear, if your Honor please, that this is based upon the assumption that Mrs. Giglio and Mrs. Livorsi were in fact partners, true partners, throughout the entire period of Eatsum's existence, the document itself will go into evidence properly. However, I object to the foundation specifically referring to page 101 of the transcript, which is close to what counsel read just a moment ago:

"Q. Anything Mr. Roth told you is all right, Mr. Lubben? A. Okay, sir. Mr. Roth told me that Mr. Giglio wanted to have his investment spread over these people for tax reasons, and that I would be very

smart if I did the same and put it in the same name of certain people. I believe Mr. Roth called them nominees."

(2438)

There is a great deal more testimony on the subject.

Mr. Stryker: That was the very same question and answer that Mr. Wessel asked the man himself.

Mr. Wessel: I object to this argument on the ground it is not based on any facts in evidence.

Mr. Stryker: It is based on the testimony you read.

The Court: What is the testimony that you read.

Mr. Stryker: Mr. Roth. I think it is page 98.

The Court: May I see that?

Mr. Wessel: Page 98.

Mr. Stryker: I answered your Honor's question incorrectly. It is 1049, Roth's testimony. If your Honor wants to see it, I have got it right here, if you will let me come up (handing to Court).

Mr. Wessel: On this page I specifically refer as to my foundation to question number 5.

The Court: I remember it now. That really went to the question—the whole subject under discussion there was the use of the full year for persons who were——

Mr. Wessel: There is also testimony on the subject by Mr. Bercu.

(2439)

Mr. Stryker: May I see it? I think it was 1096.

Mr. Wessel: At page——

Mr. Stryker: Just a minute. I will get this plain question and I will get it right.

I have lost it.

The Court: That is my fault.

Mr. Stryker: It isn't at all, your Honor. We will find it.

1049. The question is by Mr. Wessel, directed to Mr. Roth.

The Court: You don't have to read it, Mr. Stryker.

Mr. Stryker: All right, but you have it in mind.

The Court: But you see, the emphasis there was on the question of the full year or not the full year, I think, rather than who were or who were not partners.

Mr. Stryker: I should say it was on both, who were the partners during that time.

Mr. Wessel: The latter part of the page, I think, specifically refers to the subject. It is also referred to on page 2000, on the testimony of Mr. Berey.

Mr. Stryker: I read everything Mr. Wessel

(2440)

asked me to read. To my mind, it is clear. If it isn't, I will pass on to another subject. I think my exhibit on my hypothesis, which the witness has said is correct—he doesn't agree with the hypothesis, but he said it is correct—I submit it is a proper document. I don't know how else I am going to proceed in this case.

The Court: I have to decide whether that hypothesis has any relation to the testimony. At this point I don't see it.

Mr. Stryker: Well, it is for your Honor to decide and for me to obey.

The Court: I am going to sustain the objection now.

Mr. Stryker: What does your Honor do?

The Court: I am going to sustain the objection. This is on the hypothesis of a four-way equal split. I will sustain the objection to that on the ground there is no basis for that.

Mr. Stryker: I respectfully except.

(Defendants' Exhibit KKK marked for identification.)

Q. This is prepared for me and represents——

Mr. Stryker: Where is the Tavern thing? Have

(2441)

you got that?

The Witness: I have a copy of it, Mr. Stryker.

Q. You have a copy there before you? A. Yes, sir.

Q. All right. A. Just one second, please.

Q. Sure, take your time. This exhibit that is marked KKK, follows your down to 245,828.42, does it not? A. Yes, sir; follows it down all the way to here.

Q. Follows it all the way down to 221, to and through 221,598.77, does it not? A. Yes, sir.

(2442)

Q. All right. Now, then, from there on—it also follows your exhibit down on the left-hand column right through 221,598.77, doesn't it? A. It shows it, yes. Yes, that is similar to mine, yes, sir.

Q. It is identical with yours on those figures? A. Yes, as to the correction.

Q. What you call correction? Right.

Q. All right. Now, then, it also shows what would happen if the 110,799.39 there were divided, with half of it given to Mrs. Giglio and half to Giglio; is that right; that is what it shows? A. It divides the 110 two ways.

Q. And the same with regard to Frank Livorsi and his wife? A. That's right. Instead of dividing the two——

Q. So far as an arithmetical computation, you would say that is correct, would you not? I am not asking you to—I know you will not accept my theory; I am just asking you mathematics. A. The mathematics are correct, yes.

Q. All right. Now, do you remember, and did you consider——

(2443)

The Court: Mr. Stryker, just a second. Could I see the exhibit you showed him for identification? I hate to jump it, but I can follow your testimony better, this reading of the testimony better, if I see it.

(Handed.)

The Court: This is on Tavern?

Mr. Stryker: That's right. The same idea, only on the other partnership.

The Court: All right.

By Mr. Stryker:

Q. Now, did you hear, and have you based your hypothesis, among other things, upon this part of Roth's direct examination——

Mr. Stryker: Mr. Wessel, at page 996.

Q. "Q. Do you recall ever having had any discussion with Mr. Giglio or Mr. Livorsi or Mr. Lawn with regard to Mrs. Livorsi or Mrs. Giglio being partners in the Tavern Fruit Juice Company? A. No discussion with Mr. Lawn or Mr. Livorsi, but a discussion with Mr. Giglio."

Mr. Wessel: May I ask counsel if he would go back two questions?

Mr. Stryker: Let me finish. You can read

(2444)

anything you want. I wish to suppress nothing.

If you will just let me conduct this, I will put in anything you want, a hundred pages, but let me finish it.

By Mr. Stryker:

Q. "A. No discussion with Mr. Lawn or Mr. Livorsi, but a discussion with Mr. Giglio.

"Q. When was that discussion? A. At the inception of the partnership I suggested to Mr. Giglio that at the particular time"—"that at that particular time it would be perfectly legal for them to have their wives as partners on their tax return, under the caption of 'Family partnership,' and Mr. Giglio thought about it and later on adopted that suggestion."

Did you base your testimony in part on that? A. I heard that testimony, yes, sir.

Q. Have you based any of your conclusions on that? A. Sir, that doesn't indicate anywhere the percentage of division to be given to the partnership income.

Q. I am only asking you if you took that particular thing into consideration in giving your assumption? A.

(2445)

Among other things, sir.

The Court: You had two questions you wanted to read, Mr. Wessel?

Mr. Wessel: Yes, other pertinent material, the two questions that precede these.

Mr. Stryker: Would you mind holding it for redirect or show it to me?

Mr. Wessel: I think we are talking about the foundation for this assumption.

Mr. Stryker: All right, go ahead.

The Court: It makes it easier, while you are getting the next section ready.

Mr. Stryker: All right.

Mr. Wessel: (Reading):

"Q. Mr. Roth, do you know whether or not Margherita Giglio and Dorina Livorsi played any active part in the management of the Tavern Fruit Juice Company? A. I do not know of any active management or any active work that they did in the partnership.

"Q. Do you know whether or not they invested any money of their own in the partnership? A. I do not recall them investing any money in the partnership."

Then over at page 1024 there was further dis-

(2446)

cussion on this subject, and Mr. Roth said, in response to a question:

"Would you state what was said and by whom, please? A. Mr. Giglio at that time brought out the interests of Tavern Fruit Juice Co., Inc. and contemplated organizing the partnership, and I suggested to him as a means of tax reduction to organize it in the form of a family partnership, including his wife as a partner, and Mr. Livorsi's wife as a partner.

"He adopted that suggestion and that is the way the partnership was organized."

The Court: All right, I have the picture, all right.

Mr. Wessel: I might say there is a good deal of other testimony, too.

By Mr. Stryker:

Q. Now, here is the Tavern partnership.

Mr. Stryker: Will you let me have it, Mr. Dilberian. 7, it is, I think.

Q. I show you Exhibit 7. Doesn't Schedule 1 on the back——? A. Schedule I. I am sorry to correct you.

(2447)

Q. I am glad to have you correct me. It is letters. A. The reason I do it, sir, there is a Schedule 1; I wanted to avoid confusion.

Q. You are quite right in doing that. I thank you for it. On Schedule I of this exhibit in evidence—that is the Tavern return—doesn't it show the division in four equal parts between William Giglio, Margherita Giglio—follow me—Frank Livorsi and Dorina Livorsi? A. Yes, sir, it shows that. That was, sir, I might add, that was ignored again in the individual returns of Mr. Giglio and Mr. Livorsi.

Q. That was what? A. That distribution was ignored again in the individual returns of Mr. Giglio and Mr. Livorsi. Mr. Giglio assumed the entire share in his individual return.

Q. In other words—— A. It showed that as his distribution.

Q. In other words, his return accounted for more than he owed; is that right? A. No, sir, his return accounted for the entire distribution, and also claimed Mrs. Livorsi as an exemption. That would be true both for Mr. Giglio and Mr. Livorsi.

(2448)

Q. I can't hear you. A. Sir, that was true for both, Mr. Giglio and Mr. Livorsi.

Q. Would you say as an accountant, well versed in these matters—and I am not questioning at all but that you are—that a partnership return or any kind of a tax return could change the actual distributive shares or the relations of the parties? A. The partnership return could change it, sir?

Q. Or could you say that that could change the relation of the parties? A. Sir, I haven't said that that correctly sets forth the relationships. All I have testified to is what that shows, sir.

Q. Could Mr. Giglio's individual return change the fact of the distributive shares?

The Court: I am not going to have him answer that, Mr. Stryker.

Mr. Stryker: For my own guidance, would you mind telling me the basis of that?

The Court: It seems to me that there is no basis for saying that Mr. Giglio's return had the legal effect of changing anything. I mean he is relying on it as a fact, as something that they said in their

(2449)

course of conduct, and I am not going to have him state the legal conclusion——

Mr. Stryker: I see your point.

The Court: As to whether that changed something or whether it didn't. There is a whole series of facts here.

Mr. Stryker: I see your point.

The Court: I am not going to have him express a conclusion as to each one.

Mr. Stryker: The only think I say so that you understand my position, this gentleman was offered and I am questioning that he is a tax expert, and he has given many theories, and I think referred to some sections of the law, and I would have supposed that I could do the same, interrogate him on that.

If your Honor has that before you, and sustains the objection, or does not allow it, then it is clear, and I take a respectful exception.

I have forgotten, did your Honor pass on my last exhibit?

The Court: I don't think you offered it.

Mr. Stryker: I think you are right.

The Court: I looked at it. I am ready——

Mr. Wessel: I make the same objection to it (2450) as I did before.

Mr. Stryker: I offer it in evidence.

The Court: I will sustain the objection on the ground there is no basis for the hypothesis of a four-way equal split between the two Giglios and two Livorsi's.

Mr. Stryker: All right, I respectfully except.

By Mr. Stryker:

Q. Well, now, it would follow, would it not, Mr. Present, that if the wives were equal partners, if they were—I am just asking you to assume that—that it would throw whole charts out on that, wouldn't it? A. Yes, sir.

The Court: Well, it wouldn't throw your whole charts out, would it?

The Witness: It would throw out the distribution, sir, of the distributive shares as shown on those charts.

Q. Of Eatsum and Tavern, it would throw those out? A. It would not throw out the corrections of net income on either one.

Q. It would throw them out to the extent that I have mentioned, would it not? A. It would change the distributive shares shown, sir.

(2451)

Q. Well, now, let me ask you, are you indicating to the jury that Mr. Lubben, in fact, got this 107,000—where is that chart—oh, here—$117,048.60? A. Yes, sir.

Q. That is what you are indicating? A. Yes, sir.

Q. Well, now, in the course of your investigation I think you said that you either began with or had Mr. Lubben's books, the proprietorship books? A. Yes, sir.

Q. And do you remember that Mr. Lubben testified here that he filed a return for this very year of 2,500—25 or something—of $25,000; remember that?

Mr. Wessel: I think I object to the form of the question. I think $25,000 tax if I am not mistaken, as distinguished from income.

Mr. Stryker: No, no, I think you are wrong, but I will verify it in a minute. It is hard to go back through a thousand pages.

Maybe I had better do it now. I am sorry.

Mr. Wessel: As I recall it, and I haven't got the reference quickly ——

Mr. Stryker: Just a minute, Mr. Wessel, I will look for it. If I am wrong, I will withdraw the

(2452)

question.

Mr. Wessel: —his testimony was that——

Mr. Stryker: Let's look at the record.

Mr. Wessel: —he insisted he paid $25,000 which was the tax obligation.

Mr. Stryker: Let's look at the record, and not depend on either of our recollections. Either of us might be wrong.

The Court: Was that return admitted?

Mr. Wessel: It's been sealed. No, it was taken out of the seal, if your Honor please.

Mr. Stryker: Lubben's return was rejected by your Honor, but there is testimony by him. It is that—I can't refer to the return because your Honor did not allow it.

The Court: Yes.

Mr. Stryker: But I can refer, I submit, to his testimony about it, if you gentlemen will find it.

By Mr. Stryker:

Q. Well, while we are looking, did you, in the course of this examination, in the course of your work beginning in, I think you said, October, 1948; did you consider and review Mr. Lubben's tax returns? A. Yes, sir.

(2453)

Q. For what years? A. All the years that were assigned to me, sir.

Q. What were those years? A. There is some question in my mind now about some of the years, the returns, the statute of limitations may have tolled on some of those years now, and I am just trying to refresh my recollection as to what year the statue had no yet tolled on.

Q. You started in 1948, didn't you? A. Yes, sir, but we went back quite a ways.

Q. Give me the returns as well as you can of Lubben's? A. We might have gone back to 1940, if I remember correctly, and in those years the statute might have tolled, long since tolled.

Q. You wouldn't have gone six years back of 1948? A. We might have had to get background.

Mr. Wessel: If I may interrupt, I think I have a page reference.

Mr. Stryker: Will you let me finish with this first?

Mr. Wessel: Page 848.

A. (Continuing) I think it was '42 that we went back to, sir.

Q. All right. Now, did you make a careful examination and scrutiny of Mr. Lubben's returns? A. Yes, sir.

(2454)

Q. Some of them have been produced in court, none of them have gotten into evidence; that is right, isn't it? A. Yes, sir.

Mr. Stryker: Here, I have got now, with Mr. Wolfram's help, the page that I bogged down on a few minutes ago.

The Court: All right.

Mr. Stryker: Page 642 of the record. Let's see.

By Mr. Stryker:

Q. "Q. You could not tell me at all what your income was (I am referring to '46. I am sure); is that right? A. Well, the only way we paid my income that year, sir, was the accountant went over it and reconstructed it from what I could remember and what records were available.

"Q. What did you report your income as in your return?"

Objection, so forth. Then another question:

"Q. Would you be good enough to answer, Mr. Lubben."

(2455)

Then the answer:

"Yes, sir, I believe that the accountant prepared a statement from the records that I had of my bank balance and so forth, and what I could remember. I think I reported 22 or 25 or 26—I think it was something like $25,000."

Do you remember that testimony?

Mr. Wessel: Now I object at this point. In the first place, the words "we paid my income" is obviously "income tax" and not "income" and many other references in the transcript, and I referred to one at page 848 which specifically says it was $25,000 in tax and the whole argument between Mr. Lubben and Mr. Giglio as to what was to be paid was not as to his income, it was as to his income tax and that was about $25,000.

The Court: That is my recollection.

Mr. Stryker: Well, can I now see the tax returns that this gentleman examined of Mr. Lubben? A controversey has arisen as to what he said one place or another. I have read what I thought was pertinent. If there is anything else I would be glad to have it.

Can I now see that return?

Mr. Wessel: If counsel wishes me to, I will

(2456)

read other portions to establish there was no question it was 25,000——

Mr. Stryker: Can I now see the return that Mr. Lubben talked about?

The Court: I would like to hear Mr. Wessel his reading of that testimony.

Mr. Wessel: All right. Page 848, in part of an answer:

"I said, sir, 'All I am looking for is the tax, and the tax says that you owe me about twenty-some-odd thousand dollars.'"

Page 849, in a question by Mr. Stryker, he read from something, in which he said—apparently it was some prior testimony:

"We had Mr. Giglio come down to this lawyer's office after he got a summons. We told him, as far as I am concerned, I am looking for $17,000 plus fees, whatever the tax penalties are going to be. It would be around $25,000. In the presence of my attorney Mr. Giglio said, 'Why don't you make it $100,000?"

Then there was testimony as to the meeting in Ronayne's office, and a good bit of it.

The Court: I think——

(2457)

Mr. Stryker: Now, then, what he is reading from, I think—you remember the lawsuit that Mr. Lubben brought against Mr. Giglio for $25,000; the taxes, I think, were stated as 17,000, and I think that is what Mr. Wessel is reading, of federal liability, and the other was state. Now, that is what I think he is reading.

Mr. Wessel: Yes——

Mr. Stryker: Isn't that right?

Mr. Wessel: The particular complaint isn't in evidence, however.

Mr. Stryker: Now, in view of that, may I not have now, and see, Mr. Lubben's tax return for that year in order that I may conduct this cross examination of what Mr. Present, and especially Mr. Twohig, did in this investigation?

The Court: I don't see any relevance for it yet, any more than I did when you asked for it the first time.

I will deny your application.

Mr. Stryker: I respectfully except.

Mr. Wessel: May I say, if your Honor please, just so that we are clear about this—and I am protecting Mr. Lubben's tax return because it is re-

(2458)

quired to do so—but I believe that was an exhibit in another case, a photostat, and counsel has it.

Mr. Stryker: I thought it was pertinent here. Your Honor rules otherwise; I bow to the Court's ruling.

By Mr. Stryker:

Q. By the way, I think you told me yesterday that you had or would produce the receipt that Mr. Mahon gave the Jersey receiver. A. I don't have it, sir.

Q. Can I have it? A. There should be a copy of a receipt in the files.

Q. There what? A. There should be a copy of a receipt in the files or an inventory or something.

Q. May I have it? A. I don't have it, sir.

Mr. Stryker: May I ask Mr. Wessel for it?

Mr. Wessel: Yes. Mr. Mahon is looking for it now.

Mr. Stryker: I am not going to state it in the presence of the jury, but I am just asking if your Honor has in mind my theory regarding the admissibility of Mr. Lubben's tax return? If you have, why, that's that. If you haven't, I would like to state it. If you have it, I am not going to repeat it.

(2459)

I think I told you very clearly at the bench.

The Court: I believe I have it.

y Mr. Stryker:

Q. Did you tell me yesterday, I am not sure, whether ou received the Tavern ledger that is here from the receiver, avern partnership ledger? A. It is my recollection, sir, ne accounts receivable and the accounts payable ledger, es, sir.

Q. That wasn't among the so-called abandoned books? . No, sir.

Q. You are familiar with that item, too? A. Yes, sir, certainly am.

Q. Were you there when certain books said to be abaned were taken by the Government? A. No, sir. I saw n affidavit. I read an affidavit from the person we obtained from.

Q. Who was that; Mr. Twohig? A. I believe it was, r. I saw the books and an affidavit, sir.

Q. What were those books that the Government got laiming that they were abandoned? Can you enumerate hose?

(2460)

Mr. Wessel: Object to the form of the question.

The Court: Sustained. I think I will sustain the objection as to form.

Mr. Stryker: Form.

The Court: As a matter of fact, he says he wasn't there anyhow. We are going to have to rely on hearsay before we get any answer to that question.

Mr. Stryker: Well, he says he knows, as I understood it.

The Court: He only knows what somebody told him.

Is that correct, Mr. Present?

The Witness: Yes.

The Court: Let's get on to something else now.

Mr. Stryker: I except.

Can I have the receipt that I spoke about?

Mr. Wessel: Mr. Mahon went downstairs to find it.

Mr. Stryker: All right.

By Mr. Stryker:

Q. Now, Mr. Present, I believe you testified as to the value of the equipment given to Mr. Lubben as a part of (2461) the distributive share of the profits, and I think you placed the value as $80,755.84, did you not? A. I used that amount, sir, but I think I stated that that was the basis of the plant, after depreciation, as it appears or should have appeared on the books.

Q. Wasn't the equipment valued on the books of the partnership at over $113,000? A. Could I see that, sir? My recollection is that you were including, sir, in that figure the office at 19 Rector Street and the other office equipment.

Q. Eatsum partnership; you have that book, don't you? A. May I have the Eatsum general ledger, please?

Q. Yes. Mr. Wessel has kindly handed me Exhibit 96, Government's, and it looks like 70B. Just examine those two books on the subject that I am asking about. A. I can answer your question, sir. On the Eatsum general ledger the plant is shown at $42,221.95.

Q. I asked you about the value of the equipment. Does it show that? A. Yes, sir, and that is what is shown here in the Eatsum general ledger.

Q. Isn't there an item of $113,000 there somewhere?

(2462)

A. No, sir. There is a figure of $113,000, sir, and that is a total figure for office, plant and other equipment, sir, and that is not broken down. The only figure shown for plant, sir, is $42,000.

Q. The figure, then, that I read, $113,000, I didn't just make up; it is there in the book, isn't it? A. Yes, sir.

Q. But you recomputed the value of this equipment downward to the extent of more than $30,000, didn't you? A. No, sir, I did not.

Q. You computed it as $80,755.84 as opposed to $113,000, isn't that about—— A. No, sir, I did not. I broke the figures down shown in the books, sir, and used the depreciation figures.

Q. I thought you just told me that you testified that the value of the equipment given to Lubben as part of his distributive share of the profits, that you just testified that you had said it was $80,755.84; haven't you just told me that? A. I certainly did, yes, sir.

Q. Whether broken down or not, the item on the books of Eatsum shows $113,000, doesn't it? A. No, sir.

(2463)

Mr. Wessel: I object to the form.

A. It shows $42,221.95.

Q. For what? A. For the plant.

Q. Yes, what about the rest, machinery—— A. Well, sir, that is the part that I broke down. In other words, I——

Q. Where is a hundred thirteen? A. I built the figure up from $42,000 to 80,000.

Q. Regardless of your building it up, show me the hundred thirteen on the book you were talking about. A.

That it is total value of all assets, sir, without any breakdown.

Q. That is $113,475.14? A. Yes, sir.

Q. Page 20 of the—what is this—general ledger. A. Eatsum general ledger for the partnership.

The Court: What's the account?

The Witness: Plant and equipment.

A. (Continuing) Mr. Stryker, can I point out to you, sir, that there is a total figure here of $113,000; there are two breakdowns totaling $50,000. I think I pointed out, sir, that you cannot break down the $113,000 figure without using the single proprietorship general ledger.

(2464)

Q. And that you have used? A. Yes, sir.

Q. That is the book that Lubben had before he joined these people? A. That is Exhibit 70B.

Q. All right. Now——

(Marked Government's Exhibits 156 and 157 for identification.)

Mr. Wessel: I hand counsel two documents, 156, described to me by Mr. Mahon, 156, as being a general receipt given to the receiver, and 157 being a receipt for certain records of the accountant for the receiver—156, of the documents received from Mr. Nadel, and 157 being Mr. Nadel's work papers.

Mr. Stryker: Thank you.

By Mr. Stryker:

Q. I show you Government's Exhibit 157 for identification. That is the receipt that you referred to, isn't it?

Mr. Wessel: Objection. Counsel knows it isn't the only receipt.

Mr. Stryker: I didn't say the only receipt. Why do you make a statement like that?

Mr. Wessel: Counsel said "That is the receipt you referred to."

Mr. Stryker: It is—I am asking him and I (2465) have a right to ask him. I have a right to ask him.

Mr. Wessel: If you would ask it in the form of a question——

Mr. Stryker: I didn't say "only."

Mr. Wessel: I know exactly what counsel is trying to get at.

Mr. Stryker: I object to that and I submit that that statement is both unfair and untrue.

The Court: Let's not get off into a resolution of that issue.

Let's get on with the question here.

Mr. Stryker: All right, I would love to have an answer.

A. This isn't the receipt for the books, no, sir.

Q. What is this a receipt for? A. Receipt for the accountant's work papers, sir.

Q. Well, it is more than that, isn't it; it is the checkbook of American Brands? A. Receiver's checkbook, sir.

Q. That is the receiver's checkbook? A. Yes, sir, it is not a checkbook of the American Brands Corporation.

Q. All right, it is the receiver's books? A. Yes, sir, (2466) correspondence.

Q. Correspondence, etc.? A. And primarily accountant's work papers, sir. That is not the receipt I had reference to.

Q. Is the other paper Mr. Wessel handed me the one you had reference to? I will show it to you, Exhibit 156 for identification. A. Yes, sir.

Q. That looks to me like—whose handwriting is that, do you know? A. That is a carbon copy, sir, and I would say that was Mr. Mahon's handwriting. This is a receipt, sir, "Received the above records this date, Paul G. Mahon, Special Agent," and this is a carbon copy of the receipt, sir.

Q. Who is it a receipt from or to? A. Receipt from Herman Nadel, in Re: American Brands and subsidiaries. He was the accountant, sir.

(2467)

Mr. Stryker: Well, I offer them both in evidence, both produced by the Government in response to my request.

Mr. Wessel: I have no objection.

The Court: You want both of them?

Mr. Stryker: Yes, sir.

Mr. Wessel: I request your Honor to read them in connection with the memorandum before you.

The Court: I haven't got the memorandum before me any more.

Q. While I am getting them marked, the yellow sheet, was that just an inter-office memorandum, or was it a paper left with the receiver? A. No, sir; I would say that that is a duplicate of the receipt that was given to Mr. Nadel. It is a carbon copy.

Q. Well—— A. I wouldn't know what Mr. Mahon did with it.

Q. I understand. I am only asking what you did. A. It appears to me to be.

(Defendants' Exhibits LLL and MMM received in evidence.)

Q. Well, now, I show you MMM. Do you find any reference to a Tavern Fruit book there? A. MMM doesn't

(2468)

have any books, sir.

Q. LLL does have a book, if I remember right, doesn't it, Tavern Fruit Juice? A. Partnership.

Q. Partnership. A. Right.

Q. Well, do you know where you got that book from? A. Yes, sir.

Q. Where did you get that book from? A. Together with the corporate books right there. There is the receipt that indicates it, sir.

Q. From whom? A. It says "Books received from Herman Nadel."

Q. All right. You read in connection with your studies here, to become an expert and help the Government, the report of Herman J. Nadel, certified public accountant, the accountant appointed by the Jersey court for the receivership, did you not? A. Yes, sir; I read it.

Mr. Stryker: I think it is in evidence. Am I right or wrong about that? Isn't it?

Mr. Wessel: Yes.

Mr. Stryker: Can somebody give me the number?

The Clerk: 88.

Q. Tell me, while I am waiting, from your knowledge of accounting and accounting practice, when companies go (2469)

into receivership, while they are in receivership is it not the duty of the receiver to file what income tax returns are due during that period, sort of like an executor; isn't it something like that? A. I don't know, sir. I am not familiar. This is a Jersey state receivership. It is not a federal.

Q. I am talking about federal. A. It is not a federal receivership, sir, and I am not too familiar—I am not familiar with Jersey law at all. I couldn't tell you.

Q. I am not talking about Jersey law. I am asking if it isn't the practice under the federal regulations, with respect to federal income taxes, isn't it the duty of the receiver to file a return when he has possession of all the books of the entity that is in receivership? A. Frankly, sir, I am not an expert on receivership law, and I am——

Q. I am not talking about receivership law. I am talking about the thing you are an expert of? A. I would hate to give an answer.

Q. It is United States law regarding income taxes. A. Sir, the only thing I can tell you is that a return is required to be filed. Whether it is the duty of the receiver to file it or whether it was the duty of the taxpayer in a case such as

(2470)

this, where there was not a complete abandonment, but a receivership, I am not clear on it.

Q. Then you don't know what the answer is. A. I don't know what the answer is.

Q. And I am not casting any aspersions on you. It is that you just don't know the answer to that. A. Not in this particular circumstance, no, sir.

Q. Mr. Present, will you be good enough to have this before you. You examined that receiver's return——

Mr. Stryker: Strike it.

Q. Mr. Nadel's, the accountant's report? A. I read it, yes, sir.

Q. And you examined it in connection with the books of the companies referred to in it, didn't you? A. Yes, sir; I made my own audit and then compared some of his findings with my own.

Q. Do you know that the report was accepted by the high court of chancery in New Jersey? A. No, sir; I do not.

Q. What? A. I do not.

Q. Was it submitted to the chancellor? A. I don't know, sir.

Q. Well, what you mean is, you don't know? A. I don't

(2471)

know, sir.

Q. You didn't look into that? A. No, sir; I wasn't interested.

Q. I see. A. I was only interested in an accounting point of view to see how it compared with my figures.

Q. Well, now, you found, did you not——

Mr. Stryker: Strike that last question.

Q. Are you familiar with the regulations, federal regulations, of the Internal Revenue Code? A. Yes, sir; I think that you have Regulations 111 in your hand.

Q. 111? A. Yes, sir.

Q. I am glad you told me that. I would have probably said three. All right. Now, are you familiar with this regulation—heavens, what is the number? With all these peculiar—— A. Section 52.

Q. What? A. That is Section 52.

Q. They have got dashes and everything else. That is 52; is that it? A. The section you are pointing to, sir, is 52.

Q. And does it provide there as follows—will you look at it with me and see if I read it right? Can you see where

(2472)

you are? A. Yes, sir. I would like only to point out one thing.

Q. Go ahead. A. I don't know what year this is as of, sir. As a matter of fact it is as of 1943. If you would like to get a later copy that might include 1946, I am not too sure that this would still be in effect in 1946.

Q. Let's take it this way. It is the only one I have. If it has been changed I want you to tell me that. But just take it for the time being. They don't change every regulation every year, or do they? A. Well, there is a Revenue Code in 1944 that I know of, sir.

Q. They do change them back and forth all the time? A. Almost every year, sir.

Q. Is that to make it easier for the taxpayer or the accountant or what? A. I don't know what Congress would have in mind, sir.

Q. Now these regulations, at least the one I have got, whatever the book is, and if it has been changed I want you to tell me—— A. Right, sir.

Q. —find it and tell me—does it not say:

> "In cases where receivers, trustees in bankruptcy or assignees are operating the property or business of
>
> (2473)
>
> corporations, such receivers, trustees or assignees shall make returns for such corporations in the same manner and form as corporations are required to make returns."

That is what that says? A. It says that, yes, sir.

Q. All right, that is the law until you tell me it is wrong.

Mr. Wessel: I object.

The Court: No, I will tell you what the law is, if you ask me.

Mr. Stryker: Judge, don't misunderstand me. I recognize your Honor is the fountain of the law, but this is something where this expert is testifying and I just want to find out from him——

The Court: By reading a 1943 book? I am a little closer.

Mr. Stryker: All right, I may be wrong.

The Court: All right.

Q. As far as that is concerned, that was the regulation then; is that right? A. That was the code, yes, sir.

Q. All right. Now we will see whether that is changed. I don't really know. Would you look that up yourself over (2474) lunch and tell me if I am right?

The Court: No, you have got plenty of people to look it up, Mr. Stryker.

Mr. Stryker: What is that?

The Court: You have got quite a group there to look it up.

Mr. Stryker: I haven't got a library. I have most everything else.

The Court: Mr. Wessel will find the library for you to use.

Mr. Stryker: All right.

By Mr. Stryker:

Q. You found, didn't you, from your examination of the books, that some of these companies began to lose money in a large amount—I think your had an exhibit on that.

Mr. Stryker: Mr. Wessel, could I have that exhibit, with the circles around the figures? Do you remember that? Have you got it here handy?

The Witness: Mr. Stryker, your question in regard to the receivership, I don't quite connect with the corporations.

Q. You don't what? A. I don't quite connect that, sir. These corporate returns for the year 1946 were filed before (2475)

the receivership.

Q. I know that. I am not talking about that. I am quite aware of it. A. I don't quite follow if there was a return due, that the receiver should have filed.

Q. I am talking about the later returns, whether there were two filed in 1950, one of them was in evidence. I think that is what I am talking about. A. You were speaking of the 1947 return, yes, sir.

Mr. Stryker: Have you got that handy? If not—in all events, it is 152.

Q. Well, in order to save time until I get it—— A. I have a copy of it, sir.

Q. Have you got it there? A. Yes, sir.

Q. All right. Now that shows the losses incurred in American Agar Corporation, doesn't it? A. Yes, sir; for the year 1946.

Q. Yes. I am glad you told me that. I don't think the year is on that. That is the year, isn't it? A. Yes, sir.

Q. And you, in your corrected column, do not change that to a penny, do you? A. No, sir.

Q. All right. A. It doesn't really make any difference in my computation, sir.

(2476)

Q. I know. A. It is a loss return. There was no tax due.

Q. It might not make any difference to you, but I understand that is your point.

Mr. Wessel: I object to that comment and ask that it be stricken.

The Court: Strike it out.

Q. $242,058.26 was the loss indicated on the American Brands return; wasn't it? A. No, sir; the American Brands return, consolidated return, showed a profit of $261,753.36. That loss that you referring to was included in making up the $261,000 profit figure.

Q. You are quite accurate. That particular loss is the same loss you have in the corrected column. A. Yes, sir.

Q. And the loss of American Sweets Corporation of $4,853.41, where is that from? A. That was used as an offset against the income shown by the other companies in arriving at the $261,000 profit.

Q. You don't change that item? A. No, sir.

Q. And the Lawn International, $6,109.19, you don't change that item in the corrected column, do you? A. (2477) No, sir, except that I think I indicated that the affiliation schedule doesn't include that loss.

Q. I think you did. A. I think that is one that was an oversight.

Q. I think you did. I think you gave him the benefit of it. I think you are quite right.

Did you examine—what is the exhibit there, Mr. Present? A. Speaking of Mr. Nadel's report? 88.

Mr. Stryker: Judge, I am running over the time.

The Court: I didn't know whether you wanted to clean anything up. I didn't want to interrupt you.

Mr. Stryker: I couldn't do it in this minute. I would love to, but what I have got couldn't be done in two minutes.

The Court: All right, we will suspend now for lunch. Don't discuss the case. We will start at 2:05.

(Recess until 2:05 p. m.)

(2478)

AFTERNOON SESSION

2:05 p. m.

THEODORE PRESENT, resumed.

(Jury present.)

Cross Examination by Mr. Stryker (Continued):

Q. Mr. Present, the consolidation return—— A. Sir, can I say just one thing?

Q. Yes, sir. A. I had an opportunity to check the law on that Section 52 and I find that the 1946 law was exactly as it was in your '43 volume.

Q. Thank you. I thought it was; but I wouldn't be brave enough to say so if I didn't know. His Honor might remember all the law, but I don't.

The Court: No, I am not ready to go along with your statements and the expert's.

Q. Now, the federal consolidated return was filed in September, 1947, was it? A. Yes, sir.

Q. Now, Mr. Giglio delivered the stock minute books of these various corporations to the Government in July or August of 1952, did he not; that was at or about the time, you remember? A. I think it was in September, sir.

Q. What? A. I think it was in September of 1952.

(2479)

Q. All right. In other words, it would follow from that, wouldn't it, that Mr. Giglio had had, in his possession, the stock records for five years after the tax return was filed, before he delivered the stock ledgers?

Mr. Wessel: I think I object to the question as speculative.

Mr. Stryker: As what?

Mr. Wessel: Speculative. I don't think the witness could possibly know.

Mr. Stryker: Well, all right, maybe you are right.

By Mr. Stryker:

Q. At all events, they would not be in the possession of the Government and had been in the possession of either Mr. Giglio or someone from whom he could get the books and papers when he was subpoenaed and brought them up; that is so, isn't it? A. Yes, sir, except we did have a schedule setting forth the ownership as it appeared on another date, a much earlier date.

Q. All right. But the books, themselves, that is what I am interested in, the stock books, stock ledgers, minute

(2480)

books and all that were either in his possession, actually, or some place where he got them and delivered them when he was subpoenaed; that is so, isn't it? A. Yes, sir.

Q. Now, Mr. Present, I think you said somewhere in response to one of Mr. Wessel's questions that you prepared the figures that went into the indictment in this case; did I hear that right, something like that? A. Yes, sir, I made the computations.

Q. Did you also do that with respect to the bill of particulars? A. I don't know, sir. I don't think—I certainly did not do it on my own.

Q. Well, was the—who prepared——? A. I will take the responsibility for the figures in the indictment, sir. That was my own work.

Q. That was your work? A. In the indictment, yes sir.

Q. How about the bill of particulars? A. I don't recall whether I was consulted on that or not, sir.

Q. Well, if you didn't do it, could you tell us who did? A. I would assume that I must have been consulted on it, I would assume—well, I certainly didn't prepare the bill, (2481)
let's put it that way. Somebody in the United States Attorney's office.

Q. I wasn't asking about the draftsmanship of the bill. I should imagine that was done by Mr. Wessel or one of his coadjutors here in the prosecutor's staff.

Mr. Stryker: Have you got that bill handy, the bill of particulars? It belongs to part of the indictment. I gave your Honor a copy of it.

The Court: No, I think I have the original of it.

Mr. Stryker: That is fine. I don't have to offer that in evidence.

By Mr. Stryker:

Q. I show you——

Mr. Stryker: I make that statement, and I assume by your silence, your Honor agrees with me

The Court: That's so.

Q. I show you here what looks to me like the original of the bill of particulars in this case. Can you help me at all as to whether you helped prepare it? A. I recall this document, yes, sir. I was consulted on it.

Q. Well, would it be fair to say that you, through the (2482)
consultation, assisted in some way in its preparation? A. Yes, sir.

Mr. Stryker: All right, may I take it a minute from you?

(2482a)

Q. In this bill you have two paragraphs devoted to the Eatsum partnership and the Tavern Fruit, I mean, one to each; that is right, isn't it? Just check me if I am right about that, at the top and also over here. A. Yes, paragraph 1 deals with Eatsum; paragraph 2 deals with Tavern Fruit Juice Company.

Q. And in that bill of particulars did you purport to set forth everything that you could find you thought was wrong about the Eatsum return and the Tavern return?

Mr. Wessel: I object, if your Honor please. The bill of particulars, insofar as its contents, was of course prepared by me. Mr. Present did assist in the computations. It sets forth the information required by the court and speaks for itself. In that connection I don't think the witness should be examined on it.

Mr. Stryker: Well, now, maybe my question is faulty. Could I hear it? Maybe I will withdraw it if I think it is, before your Honor rules. Will you read it to me?

(Question read.)

Mr. Stryker: I will withdraw it.

The Court: All right.

Q. In the bill, as far as you know, from whatever your

(2483)

collaboration was, was there set forth everything that you could think of that you thought was wrong about these two returns?

Mr. Wessel: If I may make the same objection, if your Honor please. The bill or the requirement of Judge Palmieri as to particulars, is set forth in the

first page of the bill as it is. It does not ask for everything; it asks for certain specified categories.

Mr. Stryker: Well, I think the question is fair. I am not saying he put it in. I want to get from his knowledge of it what it includes or excludes, that is all. I can't do it any other way. The bill speaks for itself.

The Court: I think I will allow him to answer that question.

Mr. Stryker: I think you ought to allow that question, won't you, sir?

The Court: Yes.

A. Can I see it, sir? (After looking) As far as I am concerned, sir, I am not responsible for anything that went into or was not put in. The only thing I did was to give him the figures that he asked me for.

The Court: What Mr. Stryker seems to ask for, were there other things wrong with the return which you didn't specify there, in your view?

(2484)

The Witness: I would like to correct that to say "that are not specified" here, rather than I did not specify.

The Court: Yes, that is it.

Is this something that is going to take some time?

The Witness: Well, sir, there is a question of interpretation.

The Court: Yes. Well, I recognize that.

The Witness: For example, the Eatsum, the computation——

Q. I didn't hear you from the start. It is my fault. Can I come up there and look at it? A. This is subject to inter-

pretation, sir. Under the Eatsum Food Products Company, Ltd., we do not spell out that there was a redistribution made of the net income. Yet, when we get to item 4, or William Giglio, and we arrive at a recomputation of the additional income, of necessity, in arriving at that additional income figure we would have to take into consideration the redistribution of that income that was made in connection with the Eatsum partnership. So for me to say that we did make it or didn't make it and spell it out in that many words (2485) would be impossible, sir. I mean, that is one particular instance that I can think of right away.

The Court: Mr. Stryker, I see a sharper reason for it. I won't go into things that aren't in the bill, in so far as they deal with errors in the returns themselves right now. If you want to tell me up here at greater length why we should, all right, but I just don't like to go into unnecessary computations which I don't see help much.

Mr. Stryker: I won't press it.

The Court: All right.

Mr. Stryker: Pardon me a minute, your Honor. I have no further questions.

The Court: All right.

Mr. Wessel: Just a few questions.

Redirect Examination by Mr. Wessel:

Q. Mr. Present, there was some examination of you with regard to thirty or forty thousand dollars worth of Lubben IOUs which may or may not have been in the cash box. Would you assume that there were those IOUs in the cash box, and further assume that those IOUs were charged to cost of goods sold through the loans and exchange

account; would that in any way reflect your computation
(2486)
of the distributive shares of Mr. Giglio and Mr. Livorsi? A. No, sir; not since we assumed under your—as you said, that the items were charged to the cost of goods sold and were claimed as a deduction, it would have no effect on the distributive shares.

Q. From your examination of the books did you find that there were many borrowings from the loan and exchange accounts, which were charged later to cost of goods sold? A. Yes, sir.

Q. You said this morning in response to questions that your computation eliminating the wives as partners or from any distributive shares from Eatsum and Tavern was based on the returns filed, individual returns filed, and upon the testimony of Mr. Lubben. Was it based upon anything else? A. Well, it would be Mr. Roth's testimony, too, sir.

Q. You said also I believe this morning and yesterday afternoon that the share of Mr. Lubben was fixed by the March 6th agreement, which is in evidence. Was it fixed by that agreement plus the other agreements that were signed by Mr. Lubben and Mr. Giglio and others? A. Yes, sir; there were other agreements, too. There was an agreement with Mr. Loperfido that was dated much earlier than that.

(2487)

Finally you said at page 2335 that the abatement of the tax resulted from a conference in which you participated; what was the conclusion of that conference? A. The decision was made at that conference that a civil suit at that time was not advisable, since it would jeopardize the criminal prosecution that was pending at that time.

Q. And accordingly you jointly decided to let the statute of limitations bar the claim? A. Yes, sir. I got confirmation made at a much higher level than myself, sir.

Q. You were there, though? A. I was there, yes, sir, to supply facts.

Mr. Wessel: No further questions.

Mr. Stryker: No questions.

The Court: All right.

(Witness excused.)

Mr. Wessel: The next witness is Mr. Vincent McCue.

(2488)

VINCENT J. MCCUE, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Wessel:

Q. You are the brother of Joseph McCue, sir, who testified here as a witness sometime ago? A. That is right, sir.

Q. Can you identify in this courtroom Mr. Howard Lawn, Mr. Frank Livorsi and Mr. William J. Giglio? A. Yes, I can, sir.

Q. Would you point them out, please, for the record? A. Mr. Giglio is to the left, Mr. Lawn in the center and Mr. Livorsi in the rear.

Mr. Wessel: Let the record indicate that the witness has pointed out the defendants.

Q. What is your occupation, Mr. McCue? A. I am a lawyer, sir.

Q. Are you associated with a law firm? A. Yes, I am a partner in the firm of Quinn, Doremus, McCue & Russell, of Red Bank, New Jersey.

Q. Would you mind speaking up, please, sir? A. All right. I am a partner in the law firm of Quinn, Doremus, McCue & Russell, of Red Bank, New Jersey.

Q. And was Mr. Howard Lawn once associated with (2489)

that firm until about 1943? A. Yes, he was.

Q. When did you last see Howard Lawn? A. In relation to what period of time, sir?

Q. Well, within—I assume you have seen him in the hallway the last two days? A. Yes, sir.

Q. Before two days ago, when did you last see him? A. Oh, several weeks ago.

Q. Would that be approximately a week before this trial commenced? A. I would say thereabouts.

Q. Was that in your office? A. Yes, that is right.

Q. Who else was present? A. Why, with Mr. Lawn was the gentleman to his left.

Q. Mr. Wolfram? A. Mr. Wolfram, Mr. Giglio, myself and my brother.

Q. That is Joseph McCue? A. That is right.

Q. At that time did you discuss the sale of the estate of Mr. Livorsi and the sale of the estate of Mr. Giglio? A. Yes, sir.

Q. Did you show them the papers that you had shown me in my office? A. I did.

Q. Did you cooperate with them as fully as you had cooperated with me? A. As fully as I cooperated with you. (2490)

Q. Did they from your office make telephone calls to certain other persons in your area, specifically to Mr. Cornwall? A. I believe a call was put through to Mr. Cornwall, yes.

Q. Did you hear that? A. Oh, smatterings of it. I wasn't particularly concerned with the call itself. Because I knew it was in connection with another matter. But I did partially hear the conversation.

Q. And was Mr. Cornwall an attorney who represented some of the purchasers of one of these estates? A. I understand he represented not only the purchaser, but Mr. Giglio as well. Now that is my understanding.

(2491)

Q. And this was all approximately one week before the trial commenced? A. I would say about that, yes.

Q. Now, sometime in 1946, Mr. McCue, were you communicated with by Mr. Howard Lawn in connection with the purchase of certain estates by Mr. Giglio and Mr. Livorsi? A. I was.

Q. Do you recall about when that was? A. It was early 1946, as I recall, and it had its inception, I believe, in a phone call or two from Howard—from Mr. Lawn.

Q. And without going into details, did that result in the purchase of two estates, one by Mr. Livorsi, and one by Mr. Giglio? A. It ultimately did, yes.

Q. Do you know where those closings took place A. I believe the closing from the Barbour estate to Mr. Giglio took place in the offices of Morris & McVeigh in Wall Street, New York City.

Q. And the Livorsi estate? A. That was the purchase from, from Mr. Jacobs?

Q. Yes, sir. A. I believe that took place at Mr. Lawn's office.

Q. Do you recall the dates on which those two closings

(2492)

took place? A. Only roughly, sir, either May or June, perhaps April, of 1946.

Q. Pardon me? A. Of the year 1946.

Q. Without regard to the specific day or date, did they both take place on the same day? A. On the same day?

Q. Yes, sir. A. The same day or thereabouts, or near that time.

Mr. Wessel: I ask that these two papers be marked with the next exhibit numbers for identification.

(Marked Government's Exhibits 158 and 159 for identification.)

By Mr. Wessel:

Q. I show you, Mr. McCue, Exhibits 158 and 9 and ask if you can identify them as the deeds to the two estates you have just been talking about? A. Yes, that looks like it.

And that is referring to Exhibit 158. Would you also examine 159, please. A. Yes, this is Mr. Jacobs to Livorsi, Mr. Livorsi.

Mr. Wessel: I offer Exhibits 158 and 9 in evidence.

(2493)

Mr. Stryker: No objection.

(Government's Exhibits 158 and 159 for identification received in evidence.)

The Court: All right.

By Mr. Wessel:

Q. Incidentally, Mr. McCue, where was Mr. Lawn's office in which this closing took place; that is, the Livorsi closing? A. I believe it was at Rector Street.

Q. Rector Street? A. Rector Street.

Q. Do you remember the number on Rector Street? A. Well, I will have to hazard a guess on that. Was it 19?

Mr. Wessel: Ladies and gentlemen, Exhibits 158 and 9 are the deeds to Mr. Giglio and Mr. Livorsi that have been described.

(Handed to jury.)

Q. Subsequent to that time, Mr. McCue, were mortgages obtained with respect to these various, these two estates? A. I didn't get in on the mortgage end of it, Mr. Wessel. I don't believe there were any purchase money mortgages that went back. I would be involved in those, of course, if there were.

Q. I wasn't referring to purchase money mortgages.

(2494)

I was referring to regular bank mortgages of property. A. I didn't represent anyone in connection with the securing of a bank mortgage, let me put it that way. I believe Mr. Tepper——

Mr. Wessel: Would you mark this for identification, please.

By Mr. Wessel:

Q. Actually, Mr. McCue, I wasn't so much concerned with your having represented them as whether or not you knew of the existence of mortgages with regard to these estates. A. Well, yes, I knew that there was a mortgage on the Livorsi property. I was later to find that out.

(Marked Government's Exhibit 160 for identification.)

Mr. Wessel: Would you mark these papers, please.

Q. I show you Exhibit 160 for identification, Mr. McCue, and ask you if it doesn't refresh your recollection that you knew the fact of the mortgage on the Livorsi estate at about the time it happened? A. Yes, because we had secured a policy of mortgage title insurance on it.

(Marked Government's Exhibits 161, 162, 163 and 164 for identification.)

(2495)

By Mr. Wessel:

Q. I show you, Mr. McCue, Exhibit 164 for identification, and ask you whether you can identify that as the mortgage with respect to the Livorsi estate? A. Yes, this probably was the mortgage, but as I tried to point out before, Mr. Wessel, I had nothing to do with the—I was just looking for my signature on this——

Q. You didn't prepare it, I understand. A. That is what I mean.

Mr. Wessel: I offer in evidence Exhibits 161 through 164, all of which are exemplified copies of these various mortgages.

Mr. Stryker: I have no objection.

The Court: All right.

(Government's Exhibits 161 through 164 for identification received in evidence.)

Mr. Wessel: These documents are all mortgages relating to these two properties, and you will note, with regard to the various exhibits, the name "Howard Lawn" appearing as attorney, or as witness. That was with regard to Exhibit 161, 163 and 164.

On Exhibit 162 the name "Solomon Tepper" appears as the witness to the document.

(2496)

(Handed to jury.)

By Mr. Wessel:

Q. Now, Mr. McCue, did there come a time when the Livorsi estate was sold by Mr. Livorsi? A. There did, sir.

Q. And did you represent him and his wife, I take it, in the sale of that estate? A. I did, sir.

Q. Are there dower rights in New Jersey; is that the reason wives are included? A. Yes, sir.

Q. Now, how did you come to represent Mr. Livorsi? A. Well, arrangements for the sale of his estate had been completed to Mr. Mercer, and I was called upon to close title.

Q. Who called upon you to do that? A. Well, I don't believe Mr. Livorsi called me direct, but someone in his behalf, perhaps Mr. Lawn, and perhaps it was my brother.

Q. You don't recall specifically? A. I don't recall specifically who exactly made the contact with me.

Mr. Wessel: Would you mark this document the

(2497)

next exhibit number.

(Marked Government's Exhibit 165 for identification.)

By Mr. Wessel:

Q. Is Exhibit 165 an exemplified copy of the deed from Mr. Livorsi to Mr. Mercer? A. Yes, that is the deed.

Mr. Wessel: I offer that exhibit in evidence, also.

Mr. Stryker: No objection.

The Court: Received.

(Government's Exhibit 166 for identification received in evidence.)

Mr. Wessel: This is the last deed to the Livorsi estate.

(Handed to jury.)

Q. Who is Mr. Mercer, Mr. McCue, if you know? A. To the best of my knowledge, he is a shipper, or a builder of ships. He is in the shipping industry.

Q. Now, have you brought with you certain documents that I asked you to bring to court in connection with this transfer? A. Yes.

Q. Could you produce those, please, sir?

(2498)

(Documents produced.)

By Mr. Wessel:

Q. Before I have these marked, are all the papers in my hand the papers you showed to Mr. Lawn and others when they were in your office? A. I don't know if I showed them specifically, but they had access to them if they wished. I tried to give them the complete files as I have given to you people.

Mr. Wessel: I ask that these papers be given the next exhibit number, A, B, C, D and so forth.

Q. Do you also have with you, Mr. McCue, a contract for the sale of personal property relating to that transaction? A. From Mr. and Mrs. Livorsi to Mr. Mercer?

Q. Yes. A. Well, I have noted in my file here what purports to be a bill of sale.

Q. Is it a bill of sale of personal property? A. Yes.

Mr. Wessel: I ask that that paper be given an exhibit number also.

(Government's Exhibits 166A through I marked for identification.)

(2499)

(Government's Exhibit 167 marked for identification.)

By Mr. Wessel:

Q. Now, using Exhibit 166H, if you wish, Mr. McCue, would you please state in detail exactly what took place at the closing with regard to this estate, who was present, the date, and all the other events of that closing. A. Well, those present, as I recall, were Mr. and Mrs. Livorsi, a representative of a title company, I believe, a representative of a New York firm, a Mr. Litvin or Levitt or Livet, or something like that, I believe my brother was there, Mr. Mercer was there, and I was there. If there were any others, I don't recall them at the moment.

Now, do you want me to proceed?

Q. Yes, please. A. The title was closed. Mr. Livorsi, I believe, had been paid $5,000 on account of the $85,000 purchase price as a down payment, and I believe that went through the broker, my brother, and there was a balance due him of $80,000. However, there was a mortgage against the property, the balance of which was, balance due on which was $11,070.26. The $80,000 that was turned over to me as attorney was to be escrowed, to be held, so to speak, until certain claims against the $80,000, which

(2500)

Mr. Livorsi was indebted for, were paid by me. I paid those claims, and, if you wish, I will read them.

Q. Will you just state what they were, the round figures? A. Well, from the $80,000 that was Mr. Livorsi's

balance due under the contract, there remained due a balance to him of $64,335.49, and I forwarded our check, our trustee check from our account to Mr. Livorsi on September the 19th, 1947, in that amount.

Q. Is the letter in your hand, Exhiibt 166H, is that the letter which you, a copy of the letter which you sent to Mr. Livorsi? A. That's right, I believe it was sent by registered mail.

Q. Is Exhibit 166A the return receipt signed by him, received by you in the regular course of business? A. That is right.

Q. Have you finished your answer, sir? A. Yes.

Q. Now, also at that closing, I take it there was the sale of certain personal property in the amount of $3,950 from the Livorsi's to Mr. Mercer; is that correct? A. That's right. I believe they settled that direct.

(2501)

Q. In other words, that check didn't go through your hands? A. It did not become part of the $80,000.

Q. That went from Mr. Mercer to Mr. Livorsi; correct? A. As I recall it, yes.

Q. Now, are Exhibits 166F, E, D, B and C the various checks distributing the $80,000 money that you received? A. Yes.

Q. Am I correct that in addition to the $64,000 you have described, there is a check for $3,100.56 to Mr. Livorsi? A. Yes.

Q. And that was sent to him by Exhibit 166G? A. That's right, that was an amount due him in addition to what I had already sent him because of an adjustment on it, an insurance policy, or a title insurance policy.

Q. Now, these various papers that you have in Exhibit 166 are all papers kept by you in the regular course of your business? A. That's right.

Q. In your law firm? A. Yes.

Mr. Wessel: I offer all of Exhibit 166 and 167 in evidence.

Mr. Stryker: These are all right.

(2502)

No objection to those.

No objection.

No objection.

The Court: Received.

(Government's Exhibits 166A through I for identification received in evidence.)

(Government's Exhibit 167 for identification received in evidence.)

Mr. Wessel: That offer should not include Exhibit 166I. I haven't come to that yet.

(Government's Exhibit 166I excluded from offer.).

By Mr. Wessel:

Q. Mr. McCue, to get these papers together, is Exhibit 166A the return receipt which was received after Exhibit 166H was—— A. Yes—wait a minute. Yes, it apparently was.

(2503)

Q. And is Exhibit 166-B the check which was enclosed in Exhibit 166-H? A. That's right.

Mr. Wessel: I will put those three together then.

Q. And as Exhibit 166-C the check which was enclosed in Exhibit 166-G? A. Yes.

Q. Do you recall what day of the week September 19, 1947, was? A. I do not, Mr. Wessel, recall that day of the week.

Q. In any event, you do recall—you did send out Exhibit 166-H on September 19, 1947, a letter to Mr. Livorsi, enclosing a check in the amount of $64,335.49, with the registered return receipt requested? A. That I did.

Q. And you received back the return receipt signed by Mr. Livorsi, on September 22, 1947; is that correct? A. That is right.

Q. Do you recall what day of the week September 22nd was? A. Gee, I can't tell you that.

Q. Will you tell me what happened with regard to this check in the amount of $64,000-odd after you sent it to Mr. Livorsi? A. Well, communications came to the office from Mr. Livorsi that he wanted the check cashed; and then our office communicated with the bank on which it

(2504)

was drawn, the Merchants Trust Company in Red Bank, and the president of the bank said that they ordinarily didn't have that——

Mr. Stryker: One moment. Just a minute.

Q. Don't mention what the president of the bank said.

Mr. Stryker: You are a lawyer on the witness stand, and I am afraid, counsel, you are giving us a bit of hearsay, aren't you?

The Witness: That's right.

Q. Just state what happened, Mr. McCue, unless it was in the presence of Mr. Livorsi. A. Well, as a result of conversations, arrangements were made with me, with myself and Mr. Livorsi, to go to the bank on a certain date and cash the check.

Q. Do you know the date on which you went to the bank (showing the witness)? A. It is stamped.

Q. You are looking at the punched holes in the check, is that correct? A. I believe it was the 25th.

Q. That was six days after the date of the check? A. That is correct, the check being the 19th.

Q. And it was three days after you received the return receipt——

Mr. Wessel: Strike that.

(2505)

Q. It was three days after the date on which Mr. Livorsi signed the return receipt, indicating receipt of the letter from you enclosing the check? A. That is correct.

Q. I notice on the back of the check appears your signature; did you get any part of that money? A. Not a nickel.

Q. Why did you sign it? A. The bank made me sign it to prove the identity of Mr. Livorsi.

Q. What happened at the bank on the 25th of September, 1947? A. The money to pay the proceeds of that check had been received from the Federal Reserve Bank in New York by the Red Bank bank.

Mr. Stryker: One moment. I don't mind much, but I object to transactions not in the presence of one of the defendants. I presume your Honor will agree with me on that.

The Court: I do. Strike it out.

Mr. Stryker: Will you strike out the answer?

The Court: Strike out the transaction between the Federal Reserve Bank and the Red Bank bank.

Mr. Stryker: You will strike that out and tell the jury to disregard it?

The Court: Yes.

(2506)

Q. Will you continue, please. There was money in the bank when you arrived there? A. Yes. Mr. Livorsi and I went to the bank that morning and the money was there to pay the check; and the money was handed to Mr. Livorsi by Mr. McQueen, in my presence.

Q. Mr. McQueen being whom? A. The president of the bank.

Q. Was anybody else with you when you went to the bank? A. There was another gentleman. I don't know who he was.

Q. Can you describe him in physical appearance, please? A. I would say he was medium height, a little on the heavy side, if anything. That is my best recollection.

Q. Age, approximately? A. Oh, approximately forty, forty-five, thereabouts.

Q. Color hair? A. Well, I couldn't describe that; I have no recollection at this time.

Q. Was there anything distinctive about his appearance that might give us some hint as to his identity? A. No more than I have described, Mr. Wessel.

Q. Well, now, you say Mr. McQueen turned the money over to Mr. Livorsi and Mr. Livorsi then left. Was there

(2507)

any conversation that you recall between Mr. Livorsi and Mr. McQueen about the money? A. Well, he was asked if he wanted to count it, and he told Mr. Livorsi that he had proved it, I think, twice, the amount. It was a rather large package. It reminds you somewhat about the size of a pound of butter, I would say; and he said no, he didn't necessarily want it counted; if he had his assurance that there was that much money there he would accept it.

Q. What denomination were the bills? A. I believe it was all hundreds.

Q. Plus, of course, some change? A. Some odd dollars necessary to make it up.

Q. Where did—— A. I didn't count it myself, incidentally.

Q. You didn't get any part of it, did you? A. No.

Q. Where did Mr. Livorsi put the money when he got it? A. Well, he took it and put it right here, right in here.

Mr. Wessel: The witness is indicating into his pants; is that correct?

The Witness: That's right.

Mr. Wessel: I have no other questions of this witness.

(2508)

I would like to hand the jury the various documents that have been identified by the witness.

Mr. Stryker: If your Honor please, I have no questions of this gentleman.

The Court: All right, thank you, Mr. McCue.

Mr. Wessel: Thank you.

(Witness excused.)

Mr. Wessel: Ladies and gentlemen, Exhibit 167 is the bill of sale of personal property in the amount of $3,900-odd from Mr. Livorsi to Mr. McCue—excuse me, not Mr. McCue—to Mr. Mercer. Exhibits 166-A—strike that. D, E, and F are three of the checks which were used at the closing. Exhibit 166-C and G, are a letter and enclosed check in the amount of $300 sent to Mr. Livorsi. Then Exhibits 166-H, B, and A, are the letter transmitting the check to Mr. Livorsi in Long Island, the return receipt signed by Mr. Livorsi, and the check actually cashed on September 25, in New Jersey.

(Hands to jury.)

Mr. Wessel: The next witness is Arthur Levitt.

The Court: All right—well, I was just going to say, I think we better take our recess now, and then during the examination of the next witness, why, you can continue to examine those exhibits. Leave

(2509)

the exhibits right over there on the jury rack. Don't discuss the case.

(Short recess.)

MILTON J. LEVITT, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Wessel:

Q. Mr. Levitt, are you an attorney duly licensed to practice in New York? A. I am.

Q. And you are associated with a firm? A. Yes.

Q. What is the name of the firm? A. Herman Goldman.

Q. Has Mr. Goldman and yourself been attorneys for Henry Mercer for some time? A. Many years.

Q. Who is Mr. Mercer? A. Mr. Mercer is in the shipping business, steamship business.

Q. Is he chairman of the board of the States Marine Corporation of 90 Broad Street? A. He is.

Q. On September 16, 1947, did you attend a title closing in connection with an estate to be purchased by Mr. Mercer in New Jersey? A. I think that is the date. May I refer to a letter that I have?

(2510)

Q. You have a letter which is in the form of a closing memorandum? A. I do.

Mr. Wessel: Supposing I have that marked for identification and you can refer to it to refresh your memory.

(Marked Government's Exhibit 168 for identification.)

Q. Referring, if necessary, to Exhibit 168, Mr. Levitt, would you state what happened at that closing, who was present, where it took place, when, and the other details? A. The closing took place on September 16, 1947, at the office of Quinn, Doremus, McCue and Russell, attorneys in Red Bank, New Jersey. They were present at the closing. Frank Livorsi and Dorina Livorsi, his wife, who were the sellers of this property that Mr. Mercer was buying; Vincent J. McCue, a member of the firm, whose name I read, attorney for the sellers; J. G. McCue, who was the broker in the transaction; Max Weiss, who was a representative of the Lawyers Title Corporation, which was insuring title to the property, and myself.

Q. Without going into all the details, would you state what payments were made and what the general terms of the sale were? A. The general terms of the sale were that the property, the real property, was being bought for a

(2511)

total of $85,000, of which $5,000 had been paid on account at the time of the signing of contract, leaving a balance of $80,000 to be paid at the time of closing; and at the time of closing I had Mr. Mercer's certified check for $80,000, check payable to the order of Frank and Dorina Livorsi. But it developed at the time of the closing that there was an unsatisfied mortgage on this property to the extent of some eleven or twelve thousand, and I entered into an escrow agreement with the attorney for Mr. Livorsi, pursuant to which this check would be given to the attorneys

for Mr. Livorsi and deposited in a special or escrow account, to be held pending the satisfaction of that mortgage, and thereafter the net proceeds remaining of this $80,000 were to be released to Mr. Livorsi.

Q. Was there also the sale of certain personal property from the Livorsis to— A. There was the sale of certain personal property, for a total of $3,950, in payment of which Mr. Mercer gave his check to the order of Frank Livorsi, dated September 16, 1947.

Q. Do you have those two checks? A. I do.

Q. In September—do you also have the check for $5,000, representing the down payment? A. No, I do not. (2512)

That check was Mrs. Mercer's check and I haven't been able to locate that.

Mr. Wessel: I ask that the two checks just produced by the witness be marked with the next exhibit numbers for identification.

Q. I show you, sir, a photostatic copy of a check and ask you if that is a photostatic copy of the original $5000 check to Mr. Livorsi, representing the down payment you referred to? A. Well, now, frankly, I wouldn't know whether this was such, because I didn't handle the down payment. I do know that I have a copy of the contract for the purchase of this property, which bears Mr. Mercer's signature and also Mr. Livorsi's and Mrs. Livorsi's signature, in which it is recited that a payment of $5,000 was made on account.

Mr. Wessel: May I have that paper marked with the next exhibit number.

Q. You don't, I take it, recognize the signature of Catherine S. Mercer? A. No, I don't know her signature.

Mr. Wessel: This paper should be marked, I take it, for identification.

(Government's Exhibits 169, 170 and 171 marked for identification.)

(2513)

Q. Exhibits 169 through 171 are the two checks and the agreement which you have referred to in your testimony; is that correct, Mr. Levitt? A. Yes.

Mr. Wessel: I offer those exhibits in evidence.

(Government's Exhibit 172 marked for identification.)

Mr. Stryker: No objection.

The Court: All right, received.

(Government's Exhibit 169, 170 and 171 for for identification received in evidence.)

Mr. Wessel: I have no further questions of Mr. Levitt.

Mr. Stryker: And I have none.

The Court: All right. Thank you, Mr. Levitt.

(Witness excused.)

Mr. Wessel: I will hand these to the jury.

Ladies and gentlemen, Exhibit 169 is the $80,000 check which was given to Mr. McCue. It is payable to Mr. Livorsi, but he didn't receive that money. He received the proceeds after the mortgage and other things were paid off.

Exhibit 170 is the payment of $3,950 for per-

(2514)

sonal; and Exhibit 171 is the agreement pursuant to which a $5,000 down payment was made. (Hands to jury.)

Mr. Wessel: The Government's next witness is Kenneth McQueen.

KENNETH H. MCQUEEN, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Wessel:

Q. What is your occupation, Mr. McQueen? A. I am president of the Merchants Trust Company of Red Bank, New Jersey.

Q. Do you know the defendants, Howard Lawn, William J. Giglio and Frank S. Livorsi? A. Pardon me, Mr. Wessel?

Q. Can you identify in this courtroom the defendants Howard Lawn, William Giglio and Frank Livorsi? A. I can identify Mr. Lawn and Mr. Livorsi.

Q. Will you do so, please? A. Yes, sir. Mr. Lawn is the third one from the left at this table, sir. Mr. Livorsi is sitting in the back seat.

Mr. Wessel: Let the record indicate the witness has identified the two defendants mentioned.

Q. Do you recall what day of the week September 22, 1947, was? A. September 22nd? That was on a Friday. (2515)

Q. Well, have you brought some papers with you, Mr. McQueen? A. September 22?

Q. Yes, sir. A. September 22nd was on a Monday.

Q. Now on either September 22nd or September 23rd did you receive a request as president of your bank from the firm of Quinn & Doremus in Red Bank? A. Yes, sir.

Q. What was that request and what did you do pursuant to it? A. The request was to cash a check in the amount of $64,335, that they had issued in closing a real estate title, and I said that we didn't have that amount of money on——

Mr. Stryker: Pardon me.

Q. Without regard to conversation. A. Pardon me?

Mr. Stryker: Who is this conversation with? Maybe I have no objection.

Mr. Wessel: I take it it is with the firm of Quinn Doremus.

Mr. Stryker: I object and ask to have it stricken out.

The Court: It will be stricken.

Q. Without regard to the conversation, Mr. McQueen, would you only state what request you received and what you did about it? A. I was requested to cash a check of $64,335. Can I say what I told them?

(2516)

Q. Yes.

Mr. Stryker: No. This is McCue, isn't it?

Mr. Wessel: All right, don't say what you told them, sir.

Q. What did you do? A. I called the Federal Reserve Bank of New York——

Mr. Stryker: One moment. Now that is another hearsay statement. It should be stricken out.

Mr. Wessel: It is not hearsay. He knows whether he called the Federal Reserve Bank.

Mr. Stryker: That is not binding on anybody, as I can see.

Q. Did you make a request of the Federal Reserve Bank?

Mr. Stryker: I object to it as calling for hearsay.

Mr. Wessel: Whom should I bring in to testify to that fact, sir?

Mr. Stryker: We don't know.

The Court: We will let you answer yes or no. Did you make a request to the Federal Reserve Bank?

The Witness: I did, sir.

Q. What was the date of that request? A. September (2517)
23rd.

Q. 1947? A. 1947, yes, sir.

Q. And subsequent to that time did you received some bills in your bank? A. Yes, sir.

Q. In what amount, in what denomination were the bills? A. $50,000 in hundred-dollar bills.

Q. Was that pursuant to the request you made? A. That was pursuant to the request I made.

Q. After you received the bills in the amount of $50,000 in hundred-dollar bills, did Mr. Livorsi and anyone else come to your bank? A. Yes, sir.

Q. When was this, who was with him, and what happened? A. That was on the morning of September 25th. Mr. Livorsi, another gentleman and Mr. McCue came to the bank and handed me the check, which was endorsed properly, and I took the check to the teller, got the money, which was in a package, and brought it into my office and handed it to Mr. Livorsi. I asked him to go to prove it. He said no; he took it, opened his coat, put it in his belt, and that was it.

Mr. Wessel: May I have for just a moment from the jury the one check for $64,000?

Q. Mr. McQueen, I show you Exhibit 166-B in evidence and ask you if that the check that you referred to in (2518)
your testimony? A. Yes, sir.

Q. I notice on the back of the check the name of Vincent McCue. A. Yes, sir.

Q. Did you cause that signature to be put on there? A. I did.

Q. Was that a request you made in the presence of Mr. Livorsi? A. That was a request I made in the presence of Mr. Livorsi, yes, sir.

Q. Now I notice the name at the top of Dorina Livorsi, and I ask you if she was present at that time? A. No, sir.

Q. Can you identify in any detail the person who was present with Mr. Livorsi? A. No, sir.

Q. His age, approximately? A. No, I can't. I can't recall, Mr. Wessel.

Q. Do you recall any further conversation at that time with Mr. Livorsi with regard to counting the money? A. Nothing but what I just stated.

Q. Did he say any words to the effect that he would take your word for it? A. That's right, yes, sir. When I handed him the package of money I told him that was the amount of the check, and I asked him if he wanted to

(2519)

prove it. He said no, if its been proved, that is all right, and that is all that was done about it.

Mr. Wessel: I have no other questions of this witness.

Mr. Stryker: I haven't any questions.

The Court: All right. Thank you, Mr. McQueen.

Mr. Wessel: Thank you, Mr. McQueen.

(Witness excused.)

Mr. Wessel: Government rests, if your Honor pleases.

The Court: All right, I will excuse the jury now.

Mr. Stryker: Can I come up there on the question of time?

The Court: Yes, come up.

(Discussion off the record at the bench.)

(2520)

The Court: Mr. Foreman, ladies and gentlemen, I am going to take tomorrow with counsel on all the cumulative questions of law to date. You take tomorrow off. We will start at 10:15 on Friday with your part, with the continuation of the testimony.

Today is Wednesday, isn't it? Okay, so it will just be counsel and me tomorrow, and you come back at 10:15 on Friday. All right, we will move along as fast as we can then.

(Jury excused.)

The Court: We will start at our regular time tomorrow, 10:15.

(Adjourned to February 10, 1955, at 10:15 a. m.)

(2521)

New York, February 10, 1955,
10:15 o'clock a.m.

Trial resumed.

DEFENDANTS' MOTION TO DISMISS

The Court: Defendants are going to be here, aren't they?

Mr. Stryker: No.

The Court: You are going to make a move to dismiss, aren't you, at the close of the Government's case? Shouldn't that be in the presence of the defendants?

Mr. Stryker: If they are not here, I think is it my fault. I hadn't supposed it was necessary. That is a motion usually made in chambers, before the judge. It is as though we asked for a conference there. I shouldn't think it is necessary.

Mr. Wessel: They are normally present, but I think if counsel will formally state as he has, already, that he is waiving whatever——

Mr. Stryker: Yes, I will do that in any way (2522) you want.

Mr. Wessel: —whatever rights they have.

The Court: I will tell you, I will hear argument this morning, and we will see. I think I want them—in other words, I want to formally dispose of the motions in their presence. I think they are entitled to know what I do—well, I mean, to the extent that a defendant is required to be present, his presence should be at the time the motion is disposed of.

Mr. Stryker: If there is any fault, it is mine, because I hadn't supposed they were necessary, and I will make any waiver at all that you think of for their not being present, and we will be able to dispose of it this way. I think we can do it, your Honor.

The Court: I think we can take a few minutes tomorrow morning to pick up any loose ends there may be.

All right.

Mr. Stryker: First, your Honor, I am moving to dismiss the indictment on the ground that it has

not been substantiated by the evidence. My motion also includes the fact that we have not been permitted, in this trial, to establish that it was through

(2523)

leads and clues gained from papers, personal papers, partnership papers, improperly and illegally obtained by the Government.

Now, your Honor may remember that you asked me to give you a brief on that subject.

The Court: Yes.

Mr. Stryker: I can make it shorter here, and, I think, as effectively state my position right here, and I would like to do it from page 71 of the hearing before Judge Palmieri, which, when I read it, I think you will see covers my point.

The Court: I know your general view, Mr. Stryker, but I want to know what is there in this case that you say was improperly obtained from the defendants, what exhibit, what testimony.

Mr. Stryker: The whole line of proof of the vendors, those six or eight men that came in here, with their records—I don't remember the names of any of them, but I know you know what I am talking about—it is my contention that those witnesses and the facts which they adduced were the result of information obtained by the Government, improperly obtained by the Government from the partnership

(2524)

records.

Now, I endeavored by a motion before Judge Palmieri, which I had always understood is the proper and the required method of adjudicating an issue like this—and as your Honor knows, I was denied a hearing and an opportunity to examine the

witnesses whose affidavits appeared in the Government's opposing papers to mine.

Now, the significance of that is made very clear, I think, by the argument before Judge Palmieri.

The Court: Before we read that, Mr. Stryker, I don't wish to interrupt your argument. Any time I interrupt or disturb you, please tell me.

Mr. Stryker: No, please do, Judge.

The Court: Is there anything besides this testimony of the vendors—what I would like to get before me, what are we talking about in concrete terms?

Mr. Stryker: That is the principal matter. We contend that we were entitled to interrogate all of the Government's witnesses fully as to what was used before the grand jury, just as if we had had a hearing before Judge Palmieri.

The Court: That goes to the motion before Judge (2525)
Palmieri, but what I am interested in now, is there anything in this trial before this jury that has been improperly obtained? That I regard as my primary responsibility.

Mr. Stryker: Well, let me reply to that.

The Court: Yes.

Mr. Stryker: The point was really that we were not able to find out whether those things were improperly obtained or not. As the record stands, it is not clear, but we were not allowed, not permitted to inquire into the fact. That is the point, and the difficulty in which we find ourselves is due to the fact that Judge Palmieri remitted that issue which he did not decide, or permit us to obtain evidence or secure evidence or cross examine witnesses, which, in my judgment, would have given him a basis for it, so

that the matter was, of necessity, thrown into this trial, which I think it should not have been.

The Court: What he said was, I think, that there was no adequate foundation before him for such a hearing.

Now, if an additional foundation developed before me, why, then, I would reconsider it, as, of course, I would: We would then have a new situation.

(2526)

Mr. Stryker: Let me clarify that. I think you will see my point if I read you this.

The Court: All right.

Mr. Stryker: I think it will answer you better than I have been doing. Page 71 of the Palmieri hearing:

"The Court: Is it your position that a subpoena duces tecum which would otherwise be in violation of defendants' legal rights is less so because there is something technically wrong with it?

"Mr. Wessel: No, your Honor. What I am discussing, I am sure I have not made myself clear, I am trying to show why the Court should, in the discretion that it does in part have, and I believe part of this is a matter of law, but in part the Court does have discretion as to whether or not it should hear these motions for hearings now—these motions for hearings now or later on, motions to suppress evidence.

"The Court: It will save time at the trial, and if the trial judge decides to hold such a hearing, it would necessarily postpone the trial and create more inconvenience and expense than now.

(2527)

"Mr. Wessel: I think not.

"The Court: What possible advantage could there be to anyone to have a decision as to the possible hearing rendered by the trial judge?

"Mr. Wessel: If I may read from the words of Judge Holtzoff, your Honor, I think this is the very nub of what is disturbing me at this time. Judge Holtzoff, speaking at page 48 of the Government's brief, United States vs. Carter, referred to in 15 Fed. Rules Decisions, page 367-372:

" 'To permit such unbridled and unlimited inspection in every case may result in a defeat of justice. It may lead to fabrication of countervailing testimony, to intimidation of witnesses, to bribery of witnesses.'

"The Court: I know that."

Then skipping a few lines, the Court said:

"Please do not accept any of this as being any reflection on you (he is speaking to Mr. Wessel). You inherited a very unhappy responsibility, and you have my profound sympathy, but the fact of the matter is that you are here urging that there be no hearing, that he be made to stand trial, and that at best the trial judge rule on whether or not there

(2528)

should be a hearing regarding the finding of this indictment. Is that your position?

"Mr. Wessel: Yes, your Honor, precisely my position, but I think your Honor has assumed because counsel so carefully and so magnificently—I should say (I'd just as leave strike that) convinced your Honor that there was"——

The Court: We want the whole picture, Mr. Stryker.

Colloquy

Mr. Stryker: Now, the point there is, I think, quite clear, that Mr. Wessel was saying, well, this ought to be a hearing before the trial court. I was saying definitely it shouldn't be, and at that point Judge Palmieri seemed to be saying the same thing.

Now, under your Honor's rulings, I think you made one ruling, quite a careful one, at the bench, as I recall it, about this; I regarded your Honor's ruling as to the effect that I could not, in this trial, stop and produce witnesses to determine that issue.

Now, that is the point. So we were left, by reason of Judge Palmieri's ultimate decision that he would not grant the hearing, to this Court. Certainly I am not to blame for that.

(2529)

The Court: Mr. Stryker, just so there is no misunderstanding now as to my position——

Mr. Stryker: Yes, sir.

The Court: —I did make a ruling at one point at the bench. Then after the recess which followed immediately I came back and reconsidered that ruling to the extent of telling you that I thought I should not act without giving you an opportunity, and Mr. Wessel, if he wished to reply to it, to go through the record of this case and show to me any item which gave you any foundation for such a hearing, and that is the memorandum that I asked for, and that, I understand, is what you are now——

Mr. Stryker: Addressing myself to, yes.

The Court: If there is anything here I don't want to overlook it. I, in my own recollection, don't recall anything. But I don't think I should act on my own recollection in view of a record so large as

to perform a perfectly reasonable and simple and conventional act of assisting at the transfer of this property.

Now, the transaction was not concealed from anybody. The records that were made were all recorded in the County Clerk's office as appears on the back of the documents themselves.

It seems to me that that is carrying suspicion to the ultimate point, to sustain a charge which the Government has assumed of proving beyond a reasonable doubt that Lawn did the acts charged against him.

I really don't—well, to me, at least, the charge that the Tepper incident was concealment or conspiracy or any of the things charged against Mr. Lawn to my mind, frankly, your Honor, is ridiculous.

Now, his drawings from the American Brands in June to September, 1947, that fact is totally and thoroughly consistent with a hypothesis of inno-

(2551)

cence.

I don't think we have got the tax laws so far that people have to stop doing business, stop being paid, and they have a right to assume that they are going to do business, and the fact that there are drawings is not concealment, is not suppression of assets, and is not conspiracy, and on this head, your Honor, I am making no mere pro forma motion.

I submit here that this gentleman, unimpeached except in so far as this charge is concerned, that to deny my motion with regard to him really flies in the face of the evidence as Mr. Wessel has narrated it and of the elementary principles of law.

this, and I just want to be sure whether you can supplement it in any way.

Mr. Stryker: Yes, your Honor's recollection accords with mine.

The Court: All right.

Mr. Stryker: As the case, as the record stands,

(2530)

there is, I grant you, no proof that these documents of these vendors, and their testimony, were obtained through leads and clues improperly obtained, I admit.

The Court: It is not just that, Mr. Stryker. Is there anything in the record which suggests to you—I mean, I don't ask you to show me on this record proof that anything was obtained by improper leads and clues, but what is there here which even suggests or lays any basis for a hearing or an investigation into that?

Mr. Stryker: Yes, I will tell you that. Yes, there are two answers to that: One is the dismissal of the 6 indictments by Judge Goddard; two, the indisputable fact that this indictment is shown in our papers by parallel columns to be—well, I would say 97 or 98 per cent identical with the dismissed indictments. There is that.

And here appear these witnesses, and their documents. Now, where did the Government get that information. I haven't proved where they got it because, as I understand the ruling, I was not allowed to go into that inquiry, which would be quite a separate inquiry, very disruptive of the trial. I grant you to call all the witnesses who made affi-

(2531)

davits in the proceeding before Judge Palmieri, to call them, and each one, and cross examine regarding

that which would take us quite afield from the issues tendered by the indictment.

(2531a)

The Court: Mr. Stryker, reluctant as I would be to break in on the trial, I would do so if I saw any basis for investigation.

Mr. Stryker: Well, your Honor——

The Court: You mention these vendors. Now may I interrupt just a second and ask Mr. Wessel—

Mr. Stryker: I wish you would.

The Court: Did you learn who those vendors were from the accounts payable records of Tavern?

Mr. Wessel: I can give you a positive answer, if your Honor please. The information comes from the Tavern accounts receivable ledger in evidence in this case. Yesterday in the course of the trial there was introduced by the defendants Exhibits LLL and MMM, showing that that book was obtained from the receiver before any grand jury subpoenas were ever served, I think before any informations were ever filed. Finally, as I recall it, each one, or if not each one, most of the witnesses, those vendors, who were on the stand in this case, were inquired of by counsel for defendants as to when it was they talked to the Government. In most cases the letters asking for the documents were not available, and at least one, the Nulomoline Company, which is most important, there was in evidence, or at

(2532)

least is marked for identification, a document in July of 1950, before the informations were ever filed, two years before any grand jury subpoenas were filed, in which the Nulomoline Company turned over to the Government those very documents.

I would like to state again, if your Honor please, positively, finally and affirmatively—I will do it under oath or any way that I possibly can—that I am positive that there has been nothing in this case in the trial or before the grand jury that in any way comes from those partnership records which Judge Goddard found to have been illegally obtained. I am certain of that. I have made every possible effort, inquiry, to determine that. I have submitted affidavits twice to this Court, not only from myself, but from each person who worked on the case.

The Court: What were the partnership records again, now?

Mr. Wessel: The records were a group first of checks, and 80 cartons of documents that have been described here, some of which, of course, were corporate, many of which were partnership of a variety of different kinds. They are described fully in affidavits before the Court, and in large measure

(2533)

they are completely irrelevant.

We found—I say "we"; that is before I even came with the Government, I think, but this is described in the affidavit of Mr. Present—we found that most of the checks of significance were not included in the documents turned over, and I believe—and I state this not from personal knowledge—that many of the documents presented to the witnesses in this case were not included in the group that we had back in 1952.

Mr. Stryker: Now let me just reply to that.

The Court: Yes.

Mr. Stryker: Mr. Wessel, of course, does not have, and has very frankly stated he does not purport

to have, personal knowledge. We know that those illegally seized papers were used before the grand jury that found the six indictments. That is a fact of record. We know that Judge Goddard dismissed those indictments on that ground. That we know. We know that the present indictment is nearly identical with the charges in the six indictments, as shown by the parallel columns, which your Honor may remember in our papers. We know that. And knowing that much, my submission to Judge Palmieri was that we were not precluded by the ex parte statements of anyone, agents, assistants or

(2534)

anyone else, as to what happened. Indeed, somewhere in the hearing—I think I read it to you before—Judge Palmieri said that to deny in effect—can you put your finger on that—that to deny a hearing would be to act as a rubberstamp for the Government. That isn't an exact quotation, but if I can find it I will give it to you.

The Court: I remember your reading it to me the first day of this trial.

Mr. Stryker: I think I did.

The view that Judge Palmieri expressed, certainly he did not express in his final decision, but it was a view that was completely expressive of my point of view, that we were not and should not have been precluded by the ex parte ipsi dixits of any witnesses but should have been allowed to examine them and cross examine them with regard to this vital issue. I sought to do that in an orderly way in a motion made now three or some months ago. Judge Palmieri, for reasons that I have no doubt he sincerely felt were correct, denied that, and I just read

you from the colloquy of Mr. Wessel, where he says in effect that it would be proper to remit that issue to the trial court. That is the way—he is shaking his head, but I have read you whatever he said.

(2535)

The Court: I read Judge Palmieri's opinion this morning, so I——

Mr. Stryker: All right, you are familiar with that.

Now that is my position on that matter.

The Court: All right, Mr. Stryker, I will briefly state that I think on the record before Judge Palmieri, his determination is the law of the case. Even if it weren't, upon that record as I have gained knowledge of it through the trial and the arguments of both of you, I would decide it exactly as he did.

Incidentally, after I saw Mr. Wessel's brief on that, which was submitted to me yesterday when he submitted his memorandum on this question, and I found it a very moving and powerful brief, and if there was any change in the position of the Judge between the day of the argument and the day of the decision, I would say that that might be a contributing cause.

I find nothing in the record of this trial which suggests any use of illegal clues. I find, and as I hear your summary of argument today, I don't think you have a thing more than you had before Judge Palmieri.

(2536)

Mr. Stryker: May I——

The Court: And so, I think, at this moment, I mean, my determination on this question of whether there should be a hearing or something, which you

may reopen from time to time as you have anything additional to add, but as of this moment I see no basis for such a hearing.

Mr. Stryker: Well, one statement your Honor made I would like to comment on, and that was that Judge Palmieri's decision was the law of this case. It is the law of this case with respect to the motion that I made before him.

The Court: Yes.

Mr. Stryker: That decides that, and there is no question about it. But it does not decide, it does not decide that the inquiry that I there sought and failed to obtain could not be had here. That is the only comment I want to make.

The Court: Well, I make that decision myself.

Mr. Wessel: If I may, however, just for a moment to explain what I think is an inadvertent misreading of Judge Palmieri's opinion. I argued several things in the memorandum of law. I argued that the defendants were not entitled to a hearing because they hadn't made any showing. I argued

(2537)

among other things that if they were entitled to a hearing, let's not have it now. I was very much afraid of anything happening to the evidence, and the part counsel read relates to that subject.

Mr. Stryker: Your Honor won't permit me, I am sure, to call all the affiants in those moving papers and cross examine them with respect to this issue. I gather from what your Honor said that you would not allow that. I grant you it would be quite destructive of the trial, and that your Honor won't allow that.

Now, without that, I am just left hanging in the air, that here are the deadly parallel between the

present indictment and the previous indictments and I certainly think, and I convinced Judge Palmieri in the argument—I didn't do it well enough to have it stick—that that certainly was a prima facie basis for the inquiry. In other words, it wasn't a frivolous, mere——

The Court: I think we are going over ground now that we have already covered, Mr. Stryker.

Mr. Stryker: Maybe we are.

The Court: I think the affidavits produced by (2538)
the Government before Judge Palmieri handled the "deadly parallel."

Mr. Stryker: It does, ex parte, Judge. It is as though we called a witness on direct and then there was no cross-examination. However, this is an old subject to you, this trial. I am correct, am I not, that you would not allow me—I couldn't do it in the direct case—to call, well, four or five witnesses, whatever they were, and interrogate them with respect to that matter, which definitely isn't an issue in this trial? I am right in that, am I not?

The Court: Yes, you are right on that, on the basis of the presentation you have so far made.

Mr. Stryker: All right.

The Court: Now, if you have any additional points, if you can show me any additional points, I have asked you for concrete matters instead of these abstract contentions, speculating from the parallels of the indictment. Now if you have got anything further—just to give you an example—I mean, it seemed to me we have labored the point far enough.

Mr. Stryker: Well, then, I say that I have nothing further to add on that point other than what

I have said, and I understand your Honor denies my motion to dismiss on that ground.

(2539)

The Court: Yes.

Mr. Stryker: I except.

The Court: Mr. Stryker, would it bother you if I interrupted for a sentence?

Mr. Stryker: Not at all.

The Court: This will be a relatively brief proceeding, because we have been over the ground before.

Mr. Stryker: Not at all.

(Brief recess.)

The Court: All right, Mr. Stryker.

Mr. Stryker: Has your Honor the indictment before you?

The Court: Yes, I have it.

(2540)

Mr. Stryker: The defendant, Howard Lawn, your Honor will see, is mentioned in two counts only.

The Court: Three.

Mr. Stryker: Three counts, 7, 9 and 10.

The Court: That's right.

Mr. Stryker: All right. I submit that there is no evidence whatever in this record to sustain count 7. There is no evidence that Howard Lawn concealed any assets of William Giglio, and let me reserve for a further part of this motion that subject of concealment.

Paragraph 9, the next count that mentions Mr. Lawn, charges that he, in effect, misappropriated and converted, and diverted assets of the aforemen-

tioned corporations. It says "to their," it is plural, of course; here as to "his" use and benefit.

I submit, without rehearsing the evidence which your Honor has before you, that there just isn't any evidence to support that count, none.

Now, as to count 10, I submit that there is no evidence to support a charge of conspiracy, which that count is, against the defendant Howard Lawn.

(2541)

I won't stop to argue those facts, unless you want me to, but I submit that that is the record. If I am right, then I submit that those three counts, which are the only ones against Lawn, ought to be dismissed right now.

The Court: Well, I would like to have my recollection refreshed, without elaborate argument, as to the state of the record as to Lawn.

I recall, I think, the principal points, but, Mr. Stryker, would you like to summarize it or is it a matter that perhaps Mr. Wessel should take on, inasmuch as he undoubtedly will assert there is adequate proof?

Mr. Stryker: If he does, maybe that will be a fair way to do it.

Mr. Wessel: I hope I have it all summarized.

The Court: Just give me the outline. I don't ask you to give me a page-by-page reference or every last letter.

Mr. Wessel: I wonder if I could review it from my notes to your Honor?

The Court: Yes.

Mr. Wessel: You will recall testimony with

(2542)

regard to Mr. Lawn's office at 19 Rector Street,

his general background, his intelligence, what he must have known of income tax law and other laws.

You will recall testimony with regard to his participation in the corn syrup deal, and his connection with Bob Hanegan, his purchasing in St. Louis of certain corn for corn syrup.

Your Honor will recall with regard to American Brands Corporation that he was instrumental in bringing in Mr. Rabkin of the firm of Rabkin & Johnson, and Mr. Portner, an accountant, to go over the American Brands picture with regard to the tax setup of the American Brands Corporation.

The Court: He was a vice president of that corporation.

Mr. Wessel: Yes, he was an officer of the corporation. He was a stockholder in all of the corporations on the books, and, as the witnesses testified, in fact he held a 25 per cent beneficial interest in one of the corporations, the loss corporation.

The testimony with regard to his legal fee in Tavern, which was on the final return alleged to be a loan, but which in the earlier papers was a legal fee, was quite detailed.

(2543)

It appears that during the course of Tavern's fiscal year, and before the close of its fiscal year, the legal fee was treated as, the $15,000 payment to Lawn was treated as a partnership expense, therefore, income to Mr. Lawn.

After the close of the fiscal year, Exhibit 58, I think B or A, was drawn up, and indicates that it was treated as a legal expense.

Sometime after that, and apparently about the time that Mr. Lawn's own personal tax was to be

filed, it was changed from a legal expense into a loan, therefore not being income to Mr. Lawn, but, of course, not being a deduction to the partnership.

Now, of course, Mr. Lawn's own tax return isn't involved in this prosecution, but it was as much a part of the conspiracy to file a false return for Tavern, whether or not that resulted in a tax benefit to the defendants who had to report Tavern's income, it was as much a part of that conspiracy.

Your Honor will recall the testimony as to his conversation with Mr. Roth in the Pennsylvania Station at which time he said, "If you tell the truth before the New Jersey grand jury I will go to jail." (2544)

I think that testimony was particularly persuasive in connection with the consyiracy count.

He was on the Tavern payroll at a salary of between $250 and $350 weekly. His duties in Tavern were described. He was instrumental in connection with the purchases of the various estates, in connection with the sales of the various estates, and, in particular—now we are referring to count 7—in connection with the concealment of Mr. Giglio's estate.

He arranged that Solomon Tepper be brought in as the attorney to draw the papers for Mr. Roth and for Mr. Giglio, a transaction in which the parties were represented by only one attorney, a transaction in which an $85,000 estate costing, I believe, a hundred thousand, was transferred by an attorney for $200, a transaction which took place right at the time that the tax returns were filed, showing tremendous tax liabilities, and in which cash payments were made by Mr. Roth in the amount of two $5,000

Mr. Wolfram: Your Honor, they show his having received it, and we built it up through the checks, through the machinery and everything else. We were trying to show the total picture.

The Court: What he was talking about was an income tax return. These checks don't show, as I remember, and there has been no connection yet anyhow, as to whether they are current income, whether they are the return of his investment, or what they were.

Mr. Wolfram: Well, we start——

The Court: As a matter of fact, as to a lot of those checks, particularly the group that I excluded, I was never convinced, or at least let me say, I didn't see anything, any basis for concluding that they were his personal drawings. I assume that Lubben drew a lot of checks to cash for various purposes. They were dealing in cash. So I don't see how this group of checks goes to your $100,000 figure.

(2566)

Mr. Wolfram: If your Honor please, with respect to the last group of checks, we were not permitted to inquire of Lubben whether they were drawn to his——

The Court: Lubben?

Mr. Wolfram: (Continuing) Whether he used them for his personal expenses or not, on the theory that Mr. Wessel is now propounding, that the books are the best evidence. Now the books aren't the best evidence; they are not in any way comparable to the checks themselves, plus the witness's testimony, and that is what we have got now. There is no possibility of confusion here, your Honor. We are not going to contend before the jury that here are a

checks which were cashed at a bank and which money never went into Mr. Giglio's own—never went to the Government on account of Mr. Giglio's tax liability.

Your Honor will recall with regard to the consolidated returns that were filed, that Mr. Lawn

(2545)

permitted American Agar Corporation, in which he clearly had a beneficial interest, to be included in the consolidation, even though, under the law, and as he must have known in view of his background and in view of his having retained Mr. Rabkin and all the other knowledge he had, in view of the fact that it was highly improper for such a corporation to be included in a consolidated group.

Now, the fact is, I think, from the record before us, that with regard to the other corporations, American Brands Corporation, American Brands Wholesale Corporation, American Sweets Corporation, American Trucking & Forwarding Corporation, the fact is that the stockbooks don't seem to reflect the beneficial interest.

I think the record will bear out that those corporations were beneficially owned 50 per cent by Mr. Livorsi and 50 per cent by Mr. Giglio. The fact that Mr. Lawn may have had an interest on the books is not borne out by the evidence. The fact that one share or two shares or three shares were in the hands of persons like Roth doesn't make any real difference, I think, because I think the evidence does establish that Mr. Giglio and Mr. Livorsi were 50 per cent owners.

(2546)

Now, with regard to Agar, that wasn't so. With regard to Agar, the research corporation, Mr. Lawn

was to have a truly beneficial interest, because his uncle, as your Honor will recall, Mr. Schwartz, or it may have been his cousin, had been instrumental apparently in this research work and because that was the one place where he was to have some rights.

Now, that is important because that one corporation was the only one they wanted to have in the consolidation that had the big loss.

The Court: All right.

Mr. Wessel: And your Honor will recall Lawn International, in which he had an interest, was kept out of the consolidation, because its loss was de minimis, $6,000-odd. And I refer to that now in connection with the conspiracy count.

Your Honor will recall him asking Mr. Roth to furnish false consolidated information to Dun & Bradstreet, in order to be able to work various deals, I think the testimony was.

Your Honor, I am sure, will recall his testimony of wanting to have a dynasty, and he would never be happy until the Government brought an antitrust

(2547)

against him and his companies.

He was present at the conversation in the office of Walter T. Kohn when they were discussing the receivership, and how they should go about keeping Loraine out and making it appear that these loans due from Giglio and the others to the various corporations were in fact really moneys in fact balanced off.

That is a fairly complicated picture.

The Court: I recall that.

Mr. Wessel: But he was present and was instrumental in working out that highly complicated and almost magnificent swindle.

Your Honor will recall, I believe, the talk with Mr. Giglio and Mr. Roth at Pennsylvania Station, at which reference was made to a candidate for the United States Senate from Indiana coming into the picture and influencing Mr. Saypol to drop the informations, and the testimony about Mr. Caudle having called Mr. Saypol, and his specific reference on numerous occasions to "criminal intent" and what the Government would have to do in order to prove intent.

His stockholdings in the various corporations,

(2548)

your Honor has already referred to, and his being an officer in some of the corporations, specifically his own drawings during 1947 from American Brands Corporation, at a time from January, 1947, until November when everybody knew tax liability for 1946 was going to be great, at a time, March 15th on, when everybody knew that there should not have been an extension or, in any event, that the tax was fixed as of that time, from June on, after extensions were gone, and they had to pay or should have paid, and even from September on, when the tax returns were filed and they didn't pay any money.

The testimony yesterday, of course, as to his association with the McCue firm, and how he worked out the various estates, the purchases——

The Court: I think I have the gist of it, Mr. Wessel.

Mr. Wessel: Thank you.

Mr. Stryker: Will you hold it just a minute, Judge.

I listened as carefully as I could to Mr. Wessel's —am I interrupting, Mr. Wessel?

The Court: I interrupted.

Mr. Stryker: —Mr. Wessel's summary of what (2549)

he believes the evidence is regarding Mr. Lawn.

Now, I have failed, utterly, to gather from that narrative any evidence whatever to the effect that Lawn concealed assets of Giglio or of American Brands or that he conspired. I am coming to two statements that Mr. Wessel made that I will take up separately.

Now, the only two that he mentioned that could come anywhere near, anywhere near concealment was the arrangement with Tepper—that he had arranged to have Tepper brought in, and also his drawings from the American Brands Corporation from June to September, 1947.

Now, those are the only things that even faintly approach evidence in substantiation of these counts.

Now let's take the Tepper incident, Tepper. Mr. Tepper, as I recall it, was a lawyer unimpeached unimpeached by the Government, certainly by me and Mr. Lawn, according to the evidence, as narrated by Mr. Wessel, I think substantially accurately was brought in to —was engaged or came in to handle the sale of Mr. Giglio's house.

(2550)

Now let's take that as anything approaching substantiation of concealment. There is a reputable member of the bar of New Jersey. No one has said that he is a conspiractor or was acting corruptly.

Colloquy

It isn't enough for the denial of my motion that there is some scintilla, that there is some debatable fact creating some suspicion. Your Honor knows better than I that the requirement is far stronger than that, and that the Government must have proved these things charged in the indictment beyond a reasonable doubt, first to your satisfaction beyond a reasonable doubt, before the case should be sent to the jury at all with respect to Mr. Lawn.

This is an intensely serious motion. I submit to (2552)

your Honor that really this is a place where I think the Court should act on reflection, and dismiss this indictment in so far as Lawn is concerned, which is all I am talking about at the moment.

I don't think there is anything approaching a quantum of proof adequate for submission of these issues as to him to the jury.

The Cour : Well, I am going to——

Mr. Wessel: Before your Honor has ruled, because counsel is so effective in extracting portions of the record out, I want to be perfectly clear I have not reviewed all the evidence about Mr. Lawn.

Mr. Stryker: If there is anything else you have that you want to put in, it is certainly your right.

The Court: I am not going to take the time for it, Mr. Stryker, because I think on the facts of Mr. Wessel's summary, plus my recollection, that I am going to deny your motion.

I will deny it.

Mr. Stryker: I regret that decision, and I respectfully except to it. I really think that this case ought not to be sent to the jury at all about Mr. Lawn, but you have heard me very patiently and I (2553)

don't suppose there is anything I can add to that.

The Court: I don't think so, Mr. Stryker.

Mr. Stryker: I would like at this point to renew the motion that I made quite early, I think the beginning of the trial, for a severence of the indictment with respect to Howard Lawn.

You remember I made it a long time ago.

The Court: Yes, I remember that, and I will deny that.

Mr. Wessel: May I also, in connection with that, bring to your Honor's attention the fact that in connection with the informations filed in 1950, a motion was made for such severance in due course and promptly. I don't recall whether there was a disposition or not.

No such motion was ever made in this case, and I want your Honor to recall it, until the case actually came before your Honor, and the first day of trial began.

Mr. Stryker: All right, now let's see what else I have got.

Your Honor denies my motion?

The Court: Yes, I deny your motion.

Mr. Stryker: And I except.

(2554)

I now move for a judgment of acquittal on each count of the indictment pursuant to Rule 29 of the Criminal Rules.

The Court. I will deny that motion.

Mr. Stryker: I renew my motion made earlier in the trial to dismiss the indictment on constitutional grounds, on the ground that this indictment, in view of the facts and of the decision of Judge Goddard, is an unlawful indictment, and to pursue it is to deny the defendants their constitutional rights.

The Court: I will deny that.

Mr. Stryker: I except.

I also renew the motion made, oh, I think at the start of the trial, to dismiss the indictment upon the ground that by the Government's conduct in subpoenaing the defendants, themselves, and their personal records, before the grand jury, while a criminal charge was pending against them, that immunity was thereby conferred upon the defendants in accordance with the decisions that I read you at that time. You remember that point?

The Court: Yes.

Mr. Stryker: I think you do.

(2555)

The Court: I will deny the motion as renewed.

Mr. Stryker: I respectfully except.

I also would like to renew, at this point, my motion for a continuance with regard to all the concealment counts upon the ground that, first, the indictment with respect to those charges does not come up to the constitutional requirement as to what an indictment should contain, nor to the requirement set forth in the Rules of Criminal Procedure, and, further, upon the ground that although we moved for a bill of particulars, to explain and amplify what was not explained in the indictment, that motion was denied.

Does your Honor deny those?

The Court: I deny your motion as renewed.

Mr. Stryker: All right, respectfully except.

Well, then, at this point I would now ask for a continuance in order to prepare to meet these charges of concealment which are not defined in the indictment, and concerning which nothing has been supplied us by way of a bill of particulars.

Mr. Wessel: May I state, in connection with (2556) that, that your Honor will recall yesterday's testimony by Mr. Vincent McCue about the conference in his office a week before the case began?

The Court: Yes.

I will deny the application.

Mr. Stryker: I didn't hear your Honor.

The Court: I say I deny your application.

Mr. Stryker: I respectfully except.

Off the record.

(Discussion off the record.)

The Court: Now, I think these motions, without the supporting arguments, should be made again in the presence of the defendants.

Mr. Wessel: Mr. Fraiman pointed out to me Rule 43, a sentence of which reads:

"In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent the continuing of the trial to and including the return of the verdict," so I would take it as long as counsel has stated it is voluntary——

Mr. Stryker: And I want it fully understood (2557) that if there is any mistake made about that it was not the defendants, it was me.

The Court: Oh, Mr. Stryker, I understand that, and I realize that you would not take advantage of this, but I don't feel that—I would somehow like the defendants present when these motions are denied.

Mr. Wessel: As long as it will be indicated in their presence tomorrow that their absence was voluntary——

Mr. Stryker: I will put anything on the record that is definitely the fact, and you can phrase it and I will adopt it.

Now I would think, just because now it is my turn to go ahead, to save time, this would be my suggestion, just to save time, that when they are here, before the jury comes in, you could make a simple statement to the effect that I have made motions on various grounds stated in the record, and that they have been denied.

The Court: All right.

Mr. Stryker: And that if you like, you can ask them if they do not entirely waive the fact that they were not here when this happened. Any way you want the record on that, I will help you.

(2558)

The Court: What I thought I would do was ask Mr. Wolfram to just briefly summarize the motions, without the argument in support of them, in their presence, renew the motions at that time, and I will deny them, and you can come in five minutes later tomorrow.

Mr. Stryker: It will take that much weight off my feet.

Mr. Wessel: We are still on these checks.

Mr. Stryker: I will let Mr. Wolfram handle them.

Mr. Wessel: I don't know how your Honor wishes to proceed. I can explain why the Government moves to strike them at this time.

The Court: Let me get back in my mind the picture. There are two, at least, in my recollection, there are two groups of checks we are talking about.

one group which is now out, another group which is now in.

Mr. Wessel: Yes, sir.

The Court: You want to strike out the group that is now in.

(2559)

Mr. Wessel: Supposing I review them for the record.

The group includes defendants' Exhibits S, T, V, which relate to Cheel Construction Company and payments made on account of Lubben to that company, on account of Eatsum.

Exhibits W and X, which are checks to Altman & Company, apparently on Lubben's behalf.

Defendants' Exhibits BB, CC, and DD, which are a group of Eatsum checks relating to a variety of other things, such as, for example, a $10,000 payment to Mr. Stone.

The checks not in evidence are Exhibits Y, Z, AA, EE, FF, and III. I believe I have those correct.

The reason the Government moves to strike those checks which are in evidence is because they are not material. While relevant to this prosecution in a very limited way, there is far better evidence before the Court with regard to the amount of money taken out by Lubben from Eatsum, and with regard to his distributive share. The evidence, I think, establishes that he withdrew in excess of $200,000 from the partnership, of which approximately half represented his original capital contribution and his net withdrawal or income from the partnership,

(2560)

approximately $117,000.

These checks total no more than about $50,000. They are clearly only a relatively small part of the total drawing by Mr. Lubben.

The reason I have concern about them is because the jury might become confused and believe that these are in addition to the $117,000 net income. That is, that Mr. Lubben actually drew out 160 or 170 or 180 thousand dollars, that is, it increases, in variance with the indictment figure, gets greater, and at a certain point the jury might believe there isn't proof as to the amount defendants actually evaded in connection with the Eatsum account and with their own accounts.

Now these checks have not been tied in, in so far as this record is concerned, with the Eatsum books or with Mr. Lubben's distributive share. They went in through Mr. Lubben, because he identified them as having been payments on his behalf, but there is no evidence in this record that the Cheel checks, for example, were charged as expenses or not as expenses on the Eatsum books.

Mr. Roth was not questioned about that, I believe. Mr. Bercu was not questioned about that, I am quite sure. They merely represent a group of

(2561)

checks of Mr. Lubben's, but there is no indication at all of what those checks are. They are payments he received, but the Lord knows what kind of payments.

Because there is no foundation therefor, and because even if there were a foundation, it would only repeat the proof in the record as to his distributive share, I therefore move to strike those checks.

The Court: All right, Mr. Wolfram.

Mr. Wolfram: If your Honor please, the fact that the checks aren't tied into the record isn't our fault. I don't think we can be charged with that. The checks were put in evidence through Mr. Lubben, who is, I believe, one of the very first witnesses, and Roth followed him and Mr. Present followed him, and the Government could have proved it in any way they wanted to. They could have tied it in any way they wanted to, but chose not to.

The checks, Mr. Wessel said are relevant, but he also said there is far better evidence in the record, and I can't see what is a better record of a payment made to a man than the check which he himself signs and draws to the order of some company, and then acknowledges on the stand that that was a payment made in his own behalf, for himself, personally.

(2562)

I don't think there is any better evidence than that. I don't think a book could take the place of the check, plus the witness's testimony, and each one of the checks that is in evidence was put in evidence, as Mr. Wessel says, through the testimony of Lubben.

Now we have a got a group of checks that didn't go into evidence because Lubben refused to identify them. As a matter of fact: there is a large group of them, checks that are related to the loan and exchange account, which Lubben wouldn't even look at.

The Court: Well, Mr. Wolfram, what I don't understand is, what do you think those checks show, what do they prove?

Mr. Wolfram: They prove in a very dramatic way, your Honor, which a book can't do, payments

made to Lubben during the life of the partnership, and they were brought in because Lubben, on his direct examination, made several statements about what he did not get from this partnership.

The Court: All right. Could you tie them in for me now? I mean, what these checks do to the statements that Lubben made, what do they show?

Mr. Wolfram: Well, for one thing, the checks (2563)

prove quite clearly that Lubben got more money from the Eatsum partnership than he admitted on his direct examination.

The Court: What did he say on direct?

Mr. Wolfram: He said on direct examination that all he got out of the partnership was the machinery that he put into it originally, and he said——

The Court: Oh, no. He was talking about the dissolution. He never denied receiving his regular drawing during the time of the partnership.

Mr. Wolfram: Well, he didn't deny it, but in that particular context he didn't admit—he didn't say, "I got my drawings and I got the machinery that I put in." He just said, "I got the machinery."

The Court: I think that was on cross. Am I right on that, that he replied to one of Mr. Stryker's questions? I remember that. I remember that at the time I was thinking of interrupting the record, but I thought it was clear enough from the context that he was talking entirely on what he got on dissolution, and that he was in no sense negativing having received his regular drawings during the course of the partnership.

Mr. Wolfram: Well, now, if your Honor will recall what is by now the famous Ronayne confer-

ence. that was on direct examination and Lubben
(2564)
came into the conference, at which he said Giglio and Roth and Ronayne were present, and he said that someone showed him, Ronayne showed him, the partnership return, and the partnership information return said "David Lubben, 99 or 100 thousand dollars," and Lubben said—and this is all on direct examination—he said to Mr. Ronayne, "I didn't get the $100,000."

Then the defendants had a very angry conference and Ronayne turned to him and said. "You So-and-sos, I thought you told me he did get the $100,000."

That clearly presented a picture on direct of this man not getting what he was entitled to out of the partnership. As a matter of fact, I might add that when we came all the way down to the end of the trial, and when Mr. Present was on the stand, Mr. Wessel made a statement to the jury that "we were charging or crediting Lubben with receiving more than the information return showed"; but the picture as it developed with Lubben on the stand is that he had been cheated out of his just share of the partnership, and that when he announced it to the defendants in the presence of Ronayne, they fell into an angry squabble; there was a lot of mumbling.

The Court: Well, now, what do these checks show? I mean, assuming there is some materiality,
(2565)
for instance, whether Lubben got $100,000 or $117,000 or $50,000? I don't see—tentatively, I don't see its materiality. But assume he having said that, gave you the right to say that his statement was wrong, how do these checks show he was wrong, in other words, having received $100,000?

group of checks that Lubben got over and above what these books show he got. We can't do that. It wouldn't be honest for us to do that, if it is reflected in the books; and Mr. Wessel speaks after we do, and I am sure that if any confusion is injected by the defendants, the Government can clear it up very readily.

The Court: Ordinarily I recognize the force of your argument, but here we have a case which has a fair degree of complexity, and I don't think it is proper just to let a mass of checks in that aren't going to help. I mean, it is easy enough if we limit (2567)

this case to its bare bones, to the things which we couldn't get along without, there would be adequate basis for confusion. I mean, just in attempting to explain it in its simplest terms, there is some danger, I think, of confusion. Now, when we add to that, I think then the trial court is not performing its function.

What I still don't see is where these checks bear on the direct testimony of Lubben. You mentioned this $100,000 figure. They don't show that he got $100,000.

Mr. Wolfram: Well, they tend to show——

The Court: They don't show he got anything different than what he claimed to have gotten, and I don't recall that he ever fixed a figure that he claimed to have gotten.

Mr. Wessel: May I just make one reference?

Mr. Wolfram: Yes.

Mr. Wessel: I do want to make clear on the record that I am not making any application that these checks are not the best evidence, and I have no reference at all to the best evidence rule.

The Court: I am not talking about that either.

(2568)

Mr. Wessel: Mr. Wolfram said something about that. As I recall the testimony, Mr. Stryker asked Mr. Lubben whether something from the Kefauver minutes, that he got a few lousy pieces of machinery, was true. Mr. Lubben said yes. Then the question was, hadn't he gotten money during the time of the partnership, and Mr. Lubben said his accountant couldn't tell him, and he couldn't get the books and papers from the defendants, so there was no way, in effect, of his knowing whether when he got $10,000 it was his own money he was getting back or whether it represented income to him.

Now here we have a man who put in a plant valued at whatever money it was, but at least $75,000. He put in $33,500 as his own contribution to the partnership, and he put in half of the May profits, another $13,000. So he put in $120,000-odd, or something like that, and when he gets money back he has no idea whether it is income or not, and the only person who can tell him is an accountant, who looks at the books and says, "Here is reserve for depreciation on plant: you got so much; you did this and you did that," and that was the trouble he had when he went to the defendants and said, "Let me see the books." They said, "What books?" And

(2569)

they gave him laughs, and so on and so forth. So I don't think there is anything inconsistent with showing him some checks which may or may not have been his own money he was getting back, and the record doesn't disclose, in so far as his own testimony was concerned, whether these checks were his own money or were not his own money.

The Court: I don't recall—and incidentally, Mr. Wolfram, I told you I would be glad to have a memorandum on this, or a schedule or anything you wanted to give me—but my present recollection is that he never fixed the amount of money he got from the partnership. He never denied getting income from the partnership. Now, if he did, then my recollection is wrong.

Mr. Wessel: In fact, he testified that his accountant went over his books and everything else to try and find out what it was, and the nearest they could work it out was that he owed $23,000 or $25,000. He said that wasn't accurate. Now, 23 or 25 thousand in his bracket, I don't know what that was. It must have been something more than 23 or 25 thousand, let's say 40 thousand.

The Court: You would have to know his whole personal situation.

(2570)

Mr. Wessel: That would represent his income or $50,000 as income from Eatsum, and if that is so, then these checks would be perfectly consistent with what he said on direct, which was that he did owe taxes.

Mr. Wolfram: I am very happy Mr. Wessel mentioned that, because the checks would bear on the truth or falsity of his contention that he needed the books to see what he drew, because if he drew checks to Altman and he drew checks to Cheel, and we proved that he did that and make him admit that he did that, he doesn't need the books of Eatsum to determine that he spent some 30-odd thousand dollars with Cheel or some several thousands of dollars with Altman, and that he was drawing these

other checks for his own personal use. We are not bound by his statement that he needs the books, and we are entitled to show through the checks that he could have determined it some other way through his own personal accounts.

Mr. Wessel: Those checks were part of the partnership books.

The Court: Mr. Wolfram's argument is that he could reconstruct it, he could go to all the people he did business with, get his bank statements and figure out what he got.

(2571)

Mr. Wolfram: We did it the same way. We went to Altman, we went to Cheel, we found out what he spent with Altman and Cheel. If we could do it eight years later, he could have done it back in '46 or '47.

Mr. Wessel: Don't you see, there is no way of his knowing that represents income or not until they compute his capital contribution.

The Court: I assumed he did try to reconstruct, or at least his accountant, as far as I could see, did try to file a tax return, or something.

Mr. Wessel: And he so testified.

The Court: Well, I am going to strike those checks and keep out those that are not in. Now, I don't want to press you. I realize during the course of the trial you had a lot of things to do, but if you can show me by schedule or otherwise that these checks have any material bearing on your case, or on the credibility of Lubben, either one, why, I will reconsider. But my present decision is that they go out.

Colloquy

Mr. Wolfram: I don't think I can do any better than I have done at all.

The Court: All right, you will be going through the testimony for various reasons, and if as you go (2572) through it you can put together some kind of a schedule for me and make it bear more sharply, I will be glad to have it.

Mr. Wolfram: I respectfully except.

The Court: All right.

Mr. Stryker: I guess that is all we can bother you with this morning.

The Court: Is there anything else you want to get into the record?

Mr. Wessel: Thank you, your Honor.

The Court: You have six hours to dispose of all the questions of law in the case if you want to. Well, we will call it a day then.

(Adjourned until Friday, February 11, 1955, at 10:15 a.m.) (2573)

New York, N. Y., February 11, 1955,
10.15 o'clock a. m.

Trial resumed.

Mr. Wessel: May I hand up to the Court a memorandum of law regarding Tax Liabilities of Partnerships?

May I refer to page 2560 of the transcript yesterday, in which I referred to certain exhibits. Ap-

parently the exhibit, Defendants' Exhibit U, was not included in the list, but I recall having mentioned that number, and the clerk has it, so it appears to be just a typographical omission.

The Court: All right.

All right, Mr. Wolfram, if you will just run over these motions that we have in the presence of defendants.

Mr. Wolfram: Yes, sir.

I move, your Honor, in behalf of the defendant, Howard Lawn, for a judgment of acquittal on the ground of the insufficiency of the evidence.

(2574)

The Court: I will deny the motion.

Mr. Wolfram: I move in behalf of the defendant, Frank Livorsi, for a judgment of acquittal on the ground of the insufficiency of the evidence.

The Court: Deny the motion.

Mr. Wolfram: And I move in behalf of the defendant, William Giglio, for a judgment of acquittal on the ground of insufficiency of the evidence.

The Court: I deny that motion.

Mr. Wolfram: I renew the motion for severance in behalf of the defendant, Howard Lawn.

The Court: I will deny that.

Mr. Wolfram: And I move in behalf of all of the defendants for a dismissal of the indictment on the grounds of the constitutional issues which have been raised before.

The Court: Elaborated here. I will deny that.

Mr. Wolfram: And on the grounds of immunity.

The Court: I deny that.

Mr. Wolfram: And, further, on the grounds that we haven't been permitted to pursue the question of leads and clues.

(2575)

The Court: I will deny that motion.

Mr. Wolfram: I further move to dismiss the concealment count of the indictment on the grounds that they are vague and indefinite and don't comply with the constitutional requirements.

The Court: I will deny that.

Mr. Wolfram: And I move for a continuance on the ground that we have had no bill of particulars of the concealment counts and have had no time to prepare for trial.

The Court: I will deny that.

Mr. Wolfram: Now I have a new motion, your Honor.

The Court: I see, all right.

Mr. Wolfram: And I don't think Mr. Stryker even knows about this.

The Court: I will give you a minute to confer.

Mr. Wolfram: I am sure he won't object to it.

The Court: All right.

Mr. Wolfram: I move to strike Exhibits 141 and 151, and Mr. Present's testimony relating to

(2576)

those exhibits, on the ground that the assumptions upon which those exhibits are predicated have no basis—are insufficient as a matter of law.

The Court: What's 151?

Mr. Wolfram: 141.

The Court: I know that one.

Mr. Wolfram: Well, 151 winds up with the personal tax returns of the defendants Giglio and Livorsi. I don't know which one it is.

Colloquy

The Court: I will deny that. I think that is good enough to go to the jury on that.

Mr. Wolfram: May I state the basis of the objection, your Honor?

The Court: Oh, yes.

Mr. Wolfram: The basis for the objection is that the assumption on which those exhibits is predicated is that partners must report actual distribution as distinguished from their distributive shares.

Mr. Wessel: If I may state, that is not the basis upon which the charge was prepared. As I understand the evidence it is based upon the distributive share which happens to fortuitously coincide with actual distribution in this case.

The Court: All right, Mr. Wolfram, I will deny (2577)

your motion.

I think we can get the jury now.

Mr. Stryker: Before they come in, may I say to you, I am doing my level best to run this thing smoothly, but I haven't the facilities that they have. Here and there, a witness—they are all under subpoena—if they don't show up, I know you will try to be as patient with me—I will try to make it as fast as I can.

Mr. Wolfram: I erroneously said 141 and 151. It should be 141 through 151.

The Court: All right, very well.

(Jury in.)

(2578)

The Court: All right, Mr. Stryker. I guess we are ready.

Mr. Stryker: If your Honor please, in view of your Honor's denial of the motion to dismiss spe-

cifically as to the defendant Howard Lawn, because in my view there is no evidence at all, as I pointed out to you, to support the charge, because of that the defendant Howard Lawn rests.

The Court: All right.

Mr. Stryker: Mr. Leone.

JEROME J. LEONE, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

The Court: May I see Mr. Stryker and Mr. Wessel at the bench for a moment.

(After a discussion off the record at the bench, the following colloquy was recorded not in the presence of the jury:)

The Court: With reference to the possible testimony of this witness, it is my tentative view, subject to correction by counsel, that the mere interrogation as to the 1952 proceedings is as yet too remote from the issues of this case, and I don't wish to go into it in the absence of any further connection

(2579)

than which has already been laid.

Now on the broader question of the possible bias of the prosecution, I don't want to start into that until I see its connection with this immediate proceeding, in other words, the present prosecution as distinguished from any past prosecution.

Mr. Stryker: I don't believe, your Honor, that you can decide this in a vacuum. I don't think you can.

The Court: Well, I would like to avoid as much of an extraneous issue getting before the jury a

I can. Now I recognize the difficulties, but I also recognize the skill of counsel here, so I am taking advantage of it.

Mr. Stryker: In my submission, what I intend to ask him—and I regard myself as barred by your Honor's ruling as to what the evidence was before the grand jury that found this indictment, so I am bowing to that—but as to the rest of it, I think the only way you can pass on it is step by step.

The Court: Well, I will tell you what I would like to know, either in the presence of counsel for the Government or not——

(2580)

Mr. Wessel: I will be happy to step away.

The Court: —I would like to know how it ties into the present prosecution? Would you rather tell me that alone or——

Mr. Wolfram: Suppose we take up a line with Mr. Leone that doesn't have anything to do with the indictment that these defendants are being tried under, or the preceding indictment which was dismissed by Judge Goddard, and after we finish that, suppose we then take up with your Honor what we propose to do then, because there is a line that has nothing to do with Judge Goddard's ruling.

The Court: What I don't want to get off into here is a wild goose chase on bias unless I see a connection.

Mr. Stryker: The first line doesn't relate to this. So let's take it up step by step.

The Court: All right, let's go along.

(The following took place in the hearing of the jury:)

Direct Examination by Mr. Stryker:

Q. Mr. Leone, you appeared here in response to a subpoena, did you not? A. That is correct, sir.

Q. You were at one time an assistant United States (2581)

attorney here in this district? A. That is correct; for three years.

Q. From when to when? A. From—July—pardon me. You will have to forgive me. I have a slight cold, and once in a while I gag.

Q. All right. A. From approximately the 1st of August, 1950, until approximately the end of July, 1953.

Q. And did you during that period have charge of the prosecution against these defendants? A. I did, sir.

Q. Did you, before the hearing before Judge Skelly Wright, speak with another assistant who is still here on the staff, Mr. Heffron? A. Mr. Heffron?

Q. Heffron, H-e-f-f-r-o-n? A. I don't believe I know Mr. Heffron; I don't know, sir.

Q. Would this refresh your recollection, Mr. Leone, on page 48—— A. Mr. Stryker, you are speaking now of a hearing that took place, it was a grand jury hearing that took place sometime in the summer, if I recall correctly, of 1952? Is that what you are speaking of?

Q. No, sir; I am not. A. You will have to help me out then. I don't know.

Q. That is quite all right. I am referring, Mr. Leone, to a hearing before Judge Skelly Wright, at 4:30 p.m., on (2582)

July 19, 1954. I know that you were not there, at least the record does not reveal your being present at that time. That is what I am talking about. A. Well, as far as I know, I know nothing about a hearing at that time, sir.

Q. Well, would this refresh your recollection——

The Court: Show it to him, Mr. Stryker, rather than read it.

Mr. Stryker: What is that?

The Court: If it is just a matter of refreshing his recollection, show it to him.

Mr. Stryker: All right.

Q. I show you page 48 of the official stenographer's minutes of that particular hearing, beginning "Mr. Heffron." A. Just a moment. Now I believe I have knowledge of what you are speaking. Mr. Heffron—I had a conversation with an assistant, and sometime later I had a conversation with Mr. Bauman, and it did not concern this case, however.

Q. Well, now, let's just read that and see if it refreshes your recollection.

The Witness: Your Honor, may I say this? From what Mr. Stryker has shown me on page 48 of this record, I have a recollection of having a conversation—now, whether it was July or not—con-

(2583)

cerning one of these defendants, with one of the assistants, who was never in charge, to my knowledge, of this particular prosecution; and at some time, whether it was the same day or the day after, I have a recollection of a conversation with Mr. Bauman. Now I don't know whether or not that plays any part in this particular prosecution.

The Court: All right, you had those conversations.

The Witness: (Continuing) And I don't recall the conversations I had. I don't have to look at the record.

Q. Well, do you recall a conversation—I am not reading it out loud—let me drop that for a moment and go back, if you will, to the time when Mr. Roth came into your office with Judge Pecora; do you remember that? A. I do, sir.

Q. Could you give me about when that was? A. I can't give you a date, sir. I can fix it—I can fix it approximately, but I cannot give you a date. It was some time ago.

Q. Do the best you can. A. It was some time, if I recall correctly, in the late summer or early fall of 1952.

(2584)

Q. It was a couple of days before the statute ran? A. That is correct; that is correct. It was some time in that period, before the statute ran. That is correct.

Q. Well, would Thursday, September 11, 1952, would you accept that date? A. I wouldn't say yes, and I wouldn't say no. I would say it was approximately that time. Whether it was that date or not, I don't recall.

Q. All right. On that occasion—— A. (Continuing) Let me add this. I had many conversations with Judge Pecora.

Q. I understand that. I am talking about this specific one with Mr. Roth and Judge Pecora. A. I think they were both present many times.

Q. Do you remember on that occasion Judge Pecora talking to you? A. Oh, yes.

Q. Do you remember his saying to you, "In all frankness, if he"—meaning Roth—"is telling me the truth, you may find that his testimony would not be of much avail to you"? Do you remember that? A. In just those words? I don't recall it.

Q. Will you look at page 3 of the minutes referred to, where Judge Pecora is speaking, and see if that refreshes

(2585)

your recollection? I don't care about just those words. I

didn't pick that up for that reason. In substance did he say that to you?

The Court: Mr. Stryker, I am not going to go into the question of what Judge Pecora thought would be of materiality or would not be. So anything that hangs on that link I am not going to permit you to go into.

Mr. Stryker: It is only on the conversation with this gentleman about the witness Roth. It isn't a question of what he thought. It was what he said there.

Mr. Wessel: I would like to object, sir. It is obviously hearsay.

Mr. Stryker: I am asking this gentleman if Judge Pecora said, if not those exact words, in substance the words I have shown him from the hearing. That is all I am doing at the moment.

The Court: I will sustain Mr. Wessel's objection to that.

Mr. Stryker: What is that, sir?

The Court: I will sustain Mr. Wessel's objection.

Q. Well, Judge Pecora did speak to you at all events in Mr. Roth's presence, did he?

(2586)

Mr. Stryker: I respectfully except to your Honor's ruling.

The Court: All right.

A. He did, yes.

Q. And after that did you call in a stenographer and begin to interrogate Mr. Roth? A. There came a time when I did interrogate Mr. Roth. Whether it was on that

particular day of the conversation to which you refer, and as I say, I don't recall the exact conversation as it appears in the record, but there did come a time when I interrogated Mr. Roth in the presence of others before a stenographer. That is correct.

Q. Well, Judge Pecora was there at that time, I think? A. He was, and there were other persons present. I don't recall who, but I have a recollection of other persons present.

Q. And didn't this happen, that while you were interrogating Mr. Roth, in that way, a messenger came and said, "The grand jury is waiting," and did you then take Mr. Roth before the grand jury? A. I did not take Mr. Roth before the grand jury, sir. Mr. Roth went before the grand jury.

Q. All right. And that happened while you were taking

(2587)

the statement of Mr. Roth? A. As I recall the particular morning—and I am only going back—they usually, the grand jury met at eleven o'clock, and if I recall correctly, Judge Pecora, Mr. Roth, and I believe there was another gentleman present from Judge Pecora's office—and this is only, as I say—I know he was present at one time. Whether he was present at that conversation or not. I don't know. However, they were present in my office, and I commenced to take a statement, and the statement was not completed, and it was time to go before the grand jury. We went before the grand jury.

(2588)

Q. That is all. Thank you very much. And that was on or about the 11th of September, 1952, at all events? A. I have so testified; that is right, sir.

Q. All right. Now, going back to another—did Mr. Roth cooperate with the Government before that grand jury. A. I don't think that I understand what you mean, sir.

Perhaps I might enlighten the Court as to the circumstances under which Mr. Roth——

Q. I am not asking you—— A. Well, I don't understand your question.

Mr. Wessel: He should be allowed to answer the question. This is direct examination.

Mr. Stryker: I don't want to interrupt the witness. I don't want to interrupt him at all.

By Mr. Stryker:

Q. I am not asking you for the words that Mr. Roth used before the grand jury. I haven't the right to do that at this point.

Mr. Stryker: Strike all my questions on before.

By Mr. Stryker:

Q. Is it not the fact that at that time the grand jury (2589)

was investigating Roth's personal returns?

The Witness: Your Honor, should I answer that question?

The Court: I don't know to what extent the seal of secrecy around the grand jury proceedings has been broken here. I am not disposed to have you answer the question unless this is already a matter that has been——

Mr. Wessel: I think the seal has been broken to this extent: Mr. Roth testified on direct examination, and on cross examination, that he lied before the grand jury, and that the inquiry before that grand jury, the nature—I won't go into it—but the nature of the inquiry of the grand jury, the grand

jury minutes were shown to your Honor. Your Honor did not disclose them at that time, and there has been no further disclosure.

The Court: They did not disclose any past proceeding in this case?

Mr. Wessel: No.

Mr. Stryker: Then I believe your Honor allows the question?

The Court: All right, go ahead, answer that question.

(2590)

(Question read.)

A. Among other things, that is correct, sir.

Q. Did Roth seem only interested in doing what he could to extirpate himself with respect to his own personal income taxes?

The Court: I don't think I will permit him to answer that question because of its form.

Mr. Stryker: Because of its what, your Honor?

The Court: Of its form.

Mr. Stryker: The form?

The Court: In other words, I am not going to have him start expressing views as to what Roth seemed to do and so forth.

By Mr. Stryker:

Q. Well, now, let me show you—did you not tell that to Mr. Heffron in September, 19—rather, July, 1954?

The Court: I am not going into that either, Mr. Stryker, until I see the link to this case.

Mr. Stryker: Well, before that, let me ask this way, and then your Honor will rule on that:

Q. I show you page 48 of the stenographer's minutes of the hearing before Judge Skelley Wright, and ask if (2591)
you will be kind enough to look at it and tell me whether that refreshes your recollection as to what you told Mr. Heffron.

Mr. Wessel: Objection, I don't think his recollection needs refreshing.

The Court: We aren't up against any problem of recollection. What's bothering me is relevancy.

Mr. Stryker: Well, I don't know that I should state at this moment, but I assure you it is relevant to an issue that has definitely been tendered in this case. I will state it at the bench if your Honor pleases, exactly what it is, why this is relevant.

The Court: Very good. Come on up.

(Following discussion at the bench:)

Mr. Stryker: Judge, let me explain this. Heffron is here saying to Judge Skelley Wright, "Well, your Honor, I asked Mr. Leone the very same question as to whether he was cooperating, assuming that was the reason for the delay of the sentence, and he said he is not. I took him before the grand jury. The man seemed only interested in doing what he could to extirpate himself with respect to his own personal income taxes." (2592)

He is quoting Leone. This is a quote, see.

"And Mr. Leone told me that he was not interested in giving him any cooperation."

Now, one of the things that was brought out, on direct, and I think quite heavily stressed, was

Roth's testimony that he had cooperated with the Government. This is a direct refutation.

The Court: He said that he lied.

Mr. Stryker: No, no, Judge, you have that wrong.

Mr. Wessel: He did say that.

Mr. Wolfram: May I present this? Roth said on direct examination—and this is just the way the thing was presented—Mr. Wessel said to Mr. Roth, on direct, "Did Mr. Giglio ever threaten you?" and Mr. Roth said, "Yes."

Then Roth continued:

> "I went down to see Mr. Leone with my lawyer, Judge Pecora, and I wanted to cooperate with the Government. Within 36 hours after that, Mr. Giglio called me on the telephone; I met Mr. Giglio; he put his arm around me and said something or other,"

which left the distinct impression that Roth was being threatened, and left the further implication that the reason that he no longer cooperated with the

(2593)

Government was that Giglio had threatened him.

Now that is a very vital part of the case, your Honor.

The Court: No, I am not going to go into this question of cooperation or lack of cooperation on that basis. I mean the question of whether there was a threat or whether there wasn't is not a matter——

Mr. Stryker: No, it goes to the distinct credibility of Roth. It refutes him. It refutes him directly on a categorical point.

Mr. Wessel: May I say this——

Mr. Stryker: Let me finish.

Mr. Wessel: I am going to agree with you, Mr. Stryker.

The Court: Let Mr. Stryker finish.

Mr. Wolfram: You might as well quit when you are ahead.

Mr. Stryker: If you are going to agree with me——

Mr. Wessel: I don't think it is relevant or anything else, but I want the witness examined because I think the damage has now been done and I think it would be very, very detrimental if counsel is cut (2594)
off at this point. Counsel has read questions. I think the witness has not to answer the questions now.

Mr. Wolfram: He didn't read the questions.

Mr. Stryker: If you think I should proceed, there is no dispute.

Mr. Wessel: I am very much afraid of the witness not answering questions, because it might have a damaging effect in the jurors' minds.

Mr. Stryker: If it is admissible that way, I don't have to give——

The Court: No, I would rather hear some other ground, Mr. Stryker. I am not disposed to start off on this.

Mr. Stryker: Well, it also bears directly on the point that Roth, because of the threat then held over his head, on this hearing before Judge Wright, of immediate jail sentence on his former plea, was intimidated into finally pleading in this case and giving

the testimony he has given here. That certainly is relevant.

The Court: That is a different thing. This man did not have anything to do with that.

Mr. Stryker: He has this to do with it, that (2595) what was said there before Judge Skelley Wright came from this man.

Mr. Wessel: What difference does that make?

The Court: That is a different matter.

Mr. Stryker: After all, if I call Mr. Heffron, he might say, "I don't know. All I know is what Leone told me."

The Court: If your contention is that Roth did something because he was threatened, whether that threat was based on fact or fancy, what difference does that make?

Mr. Stryker: Well, it makes a great deal of difference when it is tied in with the question of his total failure of cooperation.

He says he cooperated.

Mr. Wolfram: And wanted to cooperate.

Mr. Stryker: And wanted to cooperate, and I now propose to produce evidence that refutes that definite statement which has been tendered as an issue (and not by me) by the Government in this case.

Mr. Wessel: You can't. It is his state of mind which is an issue, not what he did or did not do. Obviously he didn't cooperate; he lied, and he said he lied, but he intended to cooperate.

(2596)

Mr. Stryker: He said he cooperated at the beginning. I want to show he never cooperated, and

that this alleged lack of cooperation is a total falsehood, according to this assistant who had charge of it.

I really think—I have tried to make it plain. It seems to me not to do that, with all deference to the bench, I think would be a serious error.

The Court: All around, in any lawsuit, there are a whole series of little issues——

Mr. Stryker: This is a big issue.

The Court: That is a matter of degree.

Mr. Wessel: May I say very frankly, I do have some concern with the four or five questions that are on the record now. I don't care if they are stricken or not; they are before the jury. I would personally like this witness examined on his opinion of cooperation.

The Court: All right. Go ahead.

Mr. Wessel: I don't mean to get into any new issue.

The Court: No; I just wanted to keep the record as simple as I could.

Mr. Stryker: I know you did.

(2597)

The Court: I don't think I am in a better position with both of you combined.

Mr. Wessel: I should have objected earlier. I will in the future.

The Court: I think a case with this many issues, and this long a trial, whether you like to object or you don't, I want—this goes for both of you—I would just as soon keep things down to as close to the case as we can.

Mr. Stryker: How do we stand now?

The Court: Go ahead. Both of you want it.

Mr. Stryker: Read the last question, please.

(Question read.)

Mr. Wessel: I have an objection to that. I think that objection was sustained.

The Court: We don't need his recollection refreshed.

By Mr. Stryker:

Q. Can you tell us what you said to Mr. Heffron?

Mr. Wessel: I don't think that is proper either. I think the question now is whether or not Mr. Roth was cooperating, and not what he did or did not tell Mr. Heffron. That is no question in this case. I object to the question.

(2598)

The Court: I go along with Mr. Wessel on that, Mr. Stryker.

Mr. Stryker: Except.

By Mr. Stryker:

Q. Did Roth cooperate with the grand jury in September, 1952? A. Well, Mr. Stryker, it depends on whether you understand what Mr. Roth's purpose was or how Mr. Roth got to the grand jury. I didn't bring Mr. Roth to the grand jury, as I told you before, and it depends on what you mean by his cooperation.

Mr. Roth went before the grand jury. I stated that.

Q. Well, have you not said that he didn't cooperate before that grand jury?

Mr. Wessel: Counsel is seeking to impeach his own witness.

Mr. Stryker: Well, he is very far from my own witness.

Mr. Wessel: On the contrary, counsel, you know very well he is your witness. Now, I think that counsel is asking for the witness' opinion as to whether or not Mr. Roth cooperated, and the witness can, of course, state his own opinion as to whether or not. I haven't objected to the witness'

(2599)

opinion of what Mr. Roth did or did not do. That is quite different from the fact of what Mr. Roth thought he was doing, and counsel knows that is the proper question before the Court.

Mr. Stryker: I think Mr. Wessel has instructed me in this trial, with some of the witnesses called whom he thought were hostile witnesses, that he has a right to pursue the questioning as though it were cross examination. That is a standard rule, and Mr. Wessel has enunciated that, and I believe your Honor has followed it.

The Court: Mr. Stryker, I suggest we not get off into that problem until we have to.

I am not going to get into a technical discussion here as to the form of questions, but you say, "Didn't you say this?"

As yet there has been nothing to the contrary here.

Now, we have been fencing around on this word "cooperate," and I think maybe you could use some other word that we could get to the heart of this thing more quickly.

Mr. Stryker: I know you don't mean anything

(2600)

by "fencing around." I am not.

The Court: I say "we"—that means all of us.

Mr. Stryker: I am not fencing around. I am using a word that I believe this gentleman used: I am using his word.

The Court: I don't care what word he used. What are the facts that are relevant here and let's get at those facts.

Mr. Stryker: All right.

By Mr. Stryker:

Q. Did he try to extricate himself from his own problems when he appeared on that occasion before the September grand jury? A. He did.

Q. Did he lie? A. He did.

Q. Did you ever call Roth before the grand jury again after this occasion?

Mr. Wessel: Object to the form of the question.

Q. Just the fact.

Mr. Wessel: Object to the form of the question.

Mr. Stryker: All right, maybe you are right.

(2601)

By Mr. Stryker:

Q. Did Mr. Roth ever appear under a subpoena or otherwise before any grand jury after the one you have mentioned? A. Not to my knowledge; not that I recall.

Mr. Stryker: Your Honor, I never want to even in any way trespass on any ruling, and if you think I am in these questions, you stop me, and then I would like to tell you at the bench.

I believe I am not, but you may think I am.

Q. Mr. Leone, three informations were filed against these defendants in September, 1950; that is a fact, isn't it?

Mr. Wessel: Objection, as irrelevant.

Mr. Stryker: It is a record fact. I can go and get them, If I have to stop.

Mr. Wessel: Then it is really irrelevant. I think it is irrelevant under any circumstances, but if it is the record, this witness' testimony is certainly incompetent.

The Court: I will take it.

Q. Is it?

Mr. Wessel: Wait——

A. As far as I know it is. I did not file those informations. (2602)

The Witness: Your Honor did allow the question.

The Court: Yes, I did.

Mr. Wessel: Oh, I didn't know that.

By Mr. Stryker:

Q. You know, don't you, from your handling of the case —whether you filed them—three informations were filed against them, charging misdemeanors in September, 1952 —1950, you know that, don't you? A. Three informations had been filed prior to my taking charge of the prosecution.

Q. Well, now, you knew that, did you not, when you issued subpoena duces tecum——

The Court: Well——

Mr. Stryker: Let me finish, please.

The Court: No, I am not going into that at all. We have been all over that.

Mr. Stryker: Let me see if you won't allow this. If you don't, then I would like to be heard.

The Court: Come on up now and tell me what you want to ask.

Mr. Stryker: I have opened to this jury telling (2603) the history of this case and I don't want to be told later on that I haven't done my best to susbtantiate what I have told them. We won't need the bench on this.

The Court: Yes, come on up.

(At the bench.)

Mr. Stryker: Your Honor, I believe, as a fundamental principle of law, that a history of the case on trial is always relevant; what has happened in the case, what has been done in the case, what has transpired.

I can't give you offhand the exact section of Wigmore; maybe you remember it; but I know that that is a fundamental, basic principle.

All right. Now——

The Court: Well, I don't acquiesce in that, but go ahead.

Mr. Stryker: You don't?

The Court: No.

Mr. Stryker: I will have to go down to my books.

The Court: Go ahead.

Mr. Stryker: I have said to this jury, in the opening, that this case was founded in bad faith, bad faith.

(2604)

The Court: All right.

Mr. Stryker: I have—I mentioned in some detail the basis of that statement, namely, the unconscionable act of subpoenaing defendants in a criminal case to testify against themselves. Now that happened.

It is all of record. Judge Goddard's decision is in the books.

The Court: We are quite familiar with that.

Mr. Stryker: I know you know it.

The Court: I don't think that has any bearing on the issues of this case as they have developed so far.

Mr. Stryker: Well, I don't want it to be said that I made a statement about the history of this case, which I made in all good faith, and I believe a very accurate one, without the opportunity to substantiate what I said.

I think it bears on this whole case, on the whole Government's conduct of the case. I am sure if the shoe were on the other foot, anything the defendants ever did, anything in their history would be relevant.

The Court: We haven't put the shoe very far

(2605)

on the other foot yet. Mr. Stryker, I would like to point out the very first conversation I had with you and Mr. Wessel related to this subject, and at that time Mr. Wessel expressed his fear that you were going to go to the jury on this issue, and we have ruled on the question as a matter of law. You have a clean-cut ruling; you have got your exception; that is the end of it.

I don't think we need to fool around with it any more.

Mr. Stryker: Can't I at least have the jury know——

The Court: We will worry about that later.

Mr. Stryker: —that I made the statement in good faith, what I am asking about, so they know I

have asked; so it won't be debated that I did not do something I promised to do?

The Court: There won't be any challenge.

Mr. Stryker: Well, I think I ought, in view of my opening, be allowed to ask a few questions——

The Court: No, no.

Mr. Stryker: —that would develop this thing, and your Honor can rule and rule them out.

The Court: No, we are not going into any

(2606)

questions at all.

I think there is so much in this case, that this dropped off. If the jury has any recollection of it, I will be surprised, but we will cross that bridge when we come to it.

Right now I am concerned with making a record on the facts and on that I am not going into these questions.

Mr. Wolfram: And your Honor's ruling covers the question of being able to ask this witness anything about leads and clues or what was presented to the grand jury?

The Court: That's right. If you have any better foundation for that, you come back.

Mr. Wessel: Let me state on the record, it is my belief that this witness was not in charge of presentation of evidence in the 1953 grand jury. It didn't appear he was there.

Mr. Wolfram: I believe he made an affidavit, he and Mr. Kilsheimer made affidavits that they spoke to the agents before any evidence was presented to the grand jury.

Mr. Wessel: That's right.

Mr. Wolfram: And we are not permitted to question about those affidavits?

(2607)

The Court: No, I don't see any basis for that.

Mr. Stryker: It sort of leaves me that I have made a statement to the jury, and then I don't make good on it. I know I can. I had conceived, from my limited knowledge of law, that that was definitely——

Mr. Wessel: You can't just set up a straw man and then complain when you can't hit it down, Mr. Stryker.

Mr. Stryker: I made a statement of fact, which was a statement of fact——

The Court: Mr. Stryker, you made that statement within 15 minutes after Mr. Wessel had raised the very point that he thought that was what you were going to do, and we had plainly held this to be a question of law which was not going to the jury.

Mr. Stryker: As to the correctness of Judge Goddard's ruling or anything else, that certainly isn't before the jury, but what the Government did, what the prosecutors did in violating the rights of these defendants, as bearing on the whole nature of this prosecution, I submit has the highest relevancy.

(2608)

The Court: Mr. Stryker, if I can control this trial to that extent, there is only one thing going to this jury, and that is a clear-cut understanding of the question of law before them and a clear-cut understanding of the evidence that bears on that question, and I am not going off on these side roads.

Now, that is the end of this.

Mr. Stryker: Your Honor has made it plain enough, I think.

The Court: And I guess that is all I can do. That is the law for this case.

Mr. Wolfram: You respectfully except?

Mr. Stryker: I respectfully except.

The Court: Very well.

Mr. Stryker: Well, have you any objection to my asking whether or not he issued those subpoenas?

The Court: No, just drop the whole subject of subpoenas for the time being.

Mr. Stryker: All right.

(In presence of jury.)

Mr. Stryker: In view of your Honor's ruling at the bench, I understand I am precluded from pursuing the line of inquiry that I had thought, in my ignorance, was relevant. Your Honor has ruled on that; you are the judge; I bow to it, and, of course,

(2609)

I ask no questions about what you have ruled out.

The Court: Very well. It is strictly a question of law and I think it is a question for me, and that is the end of that.

Mr. Stryker: That is all, Mr. Leone.

Cross Examination by Mr. Wessel:

Q. Mr. Leone, as I understood your answers to some of Mr. Stryker's questions, you said that Mr. Roth did not cooperate and that he lied to the grand jury. A. That isn't correct, Mr. Wessel. I said he lied. I didn't go into the subject of cooperation.

Q. That he lied. But in any event, I take it, that is an expression of your opinion as an attorney and as a former

assistant United States Attorney; is that correct? A. It is an opinion based on what transpired before the grand jury.

(2610)

Q. And you don't know what was inside of Mr. Roth's mind? A. Hardly, sir.

Q. Did he appear voluntarily before that grand jury? A. At his own request, and through his counsel, I might add. It was at his own request and through his counsel's request of me.

Q. You are a disabled veteran, Mr. Leone? A. No, I am not. I was, but I am no longer.

Q. In any event, you are a veteran of the services? A. I am.

Q. The Navy service? A. Yes, sir.

Q. Three years? A. Almost three and a half years.

Mr. Wessel: No other questions.

Mr. Stryker: That is all.

The Court: All right, Mr. Leone, thank you.

The Witness: Thank you, your Honor.

(Witness excused.)

Mr. Stryker: Richard Leoni.

I might add, as far as I know, no relationship to the previous witness.

The Previous Witness: I will sustain that.

(2611)

RICHARD LEONI, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination by Mr. Stryker:

Q. Mr. Leoni, you occupy a public position, do you not? A. I do, sir.

Q. You are the clerk of a court in New Jersey? A. I am one of the clerks, one of the head clerks in the office.

Q. Of what court is that? A. I am Clerk of the Superior Court.

Q. In the Superior Court of New Jersey? A. That is right.

Q. That, on the reorganization of the court system, took over the old Chancery Court; am I right about that? A. That is correct, sir.

Q. In your office do you have the records, the original records, of the receivership of American Brands and allied companies? A. Yes, sir; we do.

Q. Have you produced those papers? A. I have.

Q. May I see them? A. (Witness hands to counsel.)

Q. I hate to interrupt your file. Can I take them apart? A. You certainly can.

Q. Well, maybe you had better. It won't take a minute. (2612) Just count them so I will know what I am having marked for identification. Just give me a count of what they are. A. Count the papers?

Q. Just give me a count of what the papers are you produced. They are one, two—and then go on. A. Sixty-seven papers.

Q. You know that? A. Yes.

Mr. Stryker: That is fine. Then I don't have to make a bad count.

Now, will you be good enough, Mr. Dilberian, to mark these——

Q. Can I mark the original documents, or how? I don't know about that. A. No, sir, not in ink. We can mark them in pencil for identification.

The Court: Put slips on them or something, so that we don't mark another court's papers.

Q. That would be all right with me. Would that be all right with you? A. If they are marked in pencil I will have no objection to marking the papers, so that they can be erased.

Mr. Stryker: All right, will you do that?

The Witness: I might suggest you mark the file as a whole.

(2613)

Mr. Stryker: First have the whole thing marked. Then I will come to it piecemeal.

The Court: All right.

We will take our recess now, Mr. Stryker. I didn't realize there were 67 to be marked.

Mr. Stryker: All right.

The Court: Don't discuss the case.

(Short recess.)

(Defendants' Exhibits NNN-1 through NNN-67 marked for identification.)

Q. Would you, out of these exhibits just mentioned—there are the identification numbers—would you be good enough to pick out the final order there in that receivership? A. I have it.

Q. That is Exhibit what, NNN what? A. NNN-3.

Q. For identification. All right, will you just lay those aside, the ones you pick out. Thank you. Will you also give me affidavit of mailing of the rule to show cause of August 20, 1948, mailed August 26th? I have got a rough memorandum here. To save all these questions, would you look at this memo I have made and pick out the papers called

for there and lay them on one pile? Can you do that? A. (2614)

Yes.

Mr. Stryker: The witness was asking me about the papers.

That seems to be what I want. I think this seems to be subscribed September 1, '46, doesn't it? I think so.

The Court: Mr. Leoni, do you think you will be sometime yet on this?

The Witness: No, sir; I have two more to locate.

Mr. Stryker: Your Honor, on these exhibits, it is nobody's fault, including not mine. I gave this batch to Mr. Dilberian, who is one of the most co-operative and active gentlemen I have ever seen in a court. He was busy with them and I couldn't read the exhibit numbers to this witness until they were done. So it is not Mr. Dilberian's fault, it is not Mr. Leoni's fault, and I think it is not my fault.

The Court: Well, I was just thinking, without getting into fault at all, we could go on to the next witness.

Mr. Stryker: I think he has got them all.

The Witness: I believe we have them all.

(2615)

Q. Mr. Leoni, I will take them as they come, in the pile. I have asked you to select certain papers, and you have done so? A. Yes.

Q. All right. One of them is Defendants' Exhibit NNN for identification, isn't it? A. That's right, sir.

Q. What is that paper?

Mr. Wessel: Well, I don't have any doubt of the authenticity of these documents. I won't question the authenticity. If counsel wishes——

Mr. Stryker: Are you willing that they go into evidence?

Mr. Wessel: I want to see what they are as to their relevancy or materiality, but I don't question their authenticity.

The Court: Why don't you show, those that you want to introduce, to Mr. Wessel?

Mr. Stryker: I think that is a good idea. Maybe that will save time.

Is that all this batch here (indicating)?

The Witness: Yes.

Mr. Stryker: All this batch here (handed).

The Court: You are going to offer the entire file?

(2616)

Mr. Stryker: No, the ones I have picked out, I think, bear on the case.

The Court: All right.

Mr. Wessel: I wonder if we can do it this way—if these are to be used with the next witness, I won't make any suggestion.

Mr. Stryker: I don't know.

Mr. Wessel: Then I had better do it now.

Mr. Stryker: While he is doing this—I might do that. I might take a short recess while Mr. Wessel——

The Court: Do we need to hold Mr. Leoni? That is the only thing.

Mr. Stryker: I have got to identify these papers, each one, I think. And then, your Honor, I wish you would ask him or I will ask him——

The Court: Any testimony as to the contents of this.

Mr. Wolfram: Our present probem is this, your Honor: The next witness is going to work with the papers that were produced by this Mr. Leoni, and Mr. Wessel has them.

(2625)

The Court: Is he outside?

Mr. Stryker: Yes.

The Court: Can you put on somebody else?

Mr. Wolfram: I doubt it very much.

Mr. Wessel: I can do it very quickly. There are a lot of papers, but I can do it very quickly.

Mr. Stryker: I will tell you what I will do: I have quite a few questions before I do that. I will ask them while your people examine the papers.

Mr. Wessel: My people can't do it. I have to do it.

The Court: I don't want him preoccupied.

Off the record.

(Discussion off the record.)

(In the presence of the jury.)

Mr. Stryker: Mr. Meyer, in view of certain rulings the Judge has made, I can't pursue this testimony further. Thank you for coming, and that is all.

Mr. Wessel: Well, now, just one moment or two, counsel.

Cross Examination by Mr. Wessel:

Q. You testified for the defendants in the Shotwell case? A. Yes, sir.

(2626)

Q. How much were you paid to testify in that case? A. I was given just $100 for journey fees from New York to Chicago.

Q. That is all you received? A. That is all, sir.

Mr. Wessel: No other questions.

Redirect Examination by Mr. Stryker:

Q. How much were you paid to come down here? A. I wasn't paid anything, sir.

Mr. Stryker: That's all. Thank you.

Mr. Wessel: I have one more question.

Recross Examination by Mr. Wessel:

Q. Did you receive authority from Mr. Lubben to reveal any of these documents; yes or no? A. I don't understand the question.

Q. Have you, in the course of the last several weeks, shown work papers of Mr. Lubben to Mr. Stryker, Mr. Wolfram, Mr. Giglio, Mr. Livorsi, Mr. Lawn or any of those persons? A. The work papers were subpoenaed from Sproul, Scholz & Company.

Q. Do you have them in court here? A. No, sir.

Q. Who subpoenaed them? A. The defendants.

(2627)

Q. Aren't subpoenas returnable in court?

Mr. Stryker: That is a legal question, isn't it?

A. I haven't got the subpoena. I wasn't subpoenaed for the work papers. The firm was supoenaed.

Q. You know they were turned over to the defendants? A. I understand they were turned over to the defendants.

Q. You didn't receive permission from Mr. Lubben, did you, sir? A. I had nothing to do with it.

Q. Do you know whether or not Mr. Sproul received permission? A. I don't know. You will have to check on that with Mr. Sproul. I am sorry, I had nothing to do with it.

Q. He hasn't spoken to you in some time? A. He hasn't spoken to me about what?

Q. He didn't tell you I called him about two weeks ago? A. He said someone called him, but he didn't say who.

Mr. Wessel: That is all.

Redirect Examination by Mr. Stryker:

Q. As a matter of fact, on that point, aren't you conversant of the fact that in accounting circles the work papers (2628) of an accountant are the property of the accountant? A. That's right.

Recross Examination by Mr. Wessel:

Q. You also know what the ethical standards of certified public accountants are, don't you, Mr. Meyer? A. Yes.

Mr. Wessel: That's all.

Redirect Examination by Mr. Stryker:

Q. And the subpoena calls for you to appear in court, am I correct? A. Yes.

Q. Which is what you are doing now? A. That's right.

Mr. Stryker: Right; thank you.
Mr. Wessel: All right, thank you.

(Witness excused.)

Mr. Stryker: Walter Kohn.

(Government's Exhibits 173 through 185 marked for identification.)

Mr. Wessel: May the record show that I am turning over to defendant certain documents they have asked for which the Government obtained, I believe, by Treasury subpoena from a witness.

Mr. Stryker: This is something else. Not the court records.

(2629)

I am getting a little mixed up with all these records.

Mr. Wessel: Yes.

(2629a)

WALTER T. KOHN, 286 Fifth Avenue, New York, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination by Mr. Stryker:

Q. Mr. Kohn, you are a member of the New York bar, are you not? A. I am.

Q. How long have you been a practicing lawyer? A. I was admitted in February 1903.

Q. 1903. Was that about the time you were on the Olympic team? A. That was before that.

Q. What? A. That was before that.

Q. Were you on the Olympic team one year? A. I qualified in 1904.

Q. What was your event? A. 400 and 800 meters.

Q. I think, in looking at your button, and in talking to you, I find we were both veterans of the First World War, is that right? A. That's right.

Q. Have you been practicing your profession steadily since you were admitted to the bar back in 1903? A. Yes, sir.

Q. Did there come a time when you represented these defendants as a lawyer? A. Two of them.

Q. Mr. who? A. Lawn and Livorsi—Lawn and Giglio.

(2630)

Q. You did not represent Livorsi? A. I never saw Livorsi.

Q. Did you represent them in the Jersey receivership in 1948? A. Yes.

Q. Let me ask you how you became acquainted with Mr. Lawn, the circumstances? A. Well, I have lived down in Jersey for 47 years since I married, and Mr. Lawn's father-in-law was an officer of the Temple of which I was the president for the last 23 years, and I met Mr. Lawn, and I was very much impressed with him, and I finally asked him to become a member of our Board of Trustees of our Temple.

Q. That is the way you met him? A. That is the way I met him.

Q. There came a time when he came to you and consulted you professionally? A. Correct.

Q. Were you paid a fee? A. No, sir.

Q. The work that you did you did for nothing? A. Subsequently he made a payment to me on account but it was small compared with the work that I did.

Q. There was a receivership in the Chancery Court of American Brands and other allied companies, was there not? A. Correct.

(2631)

Q. Can you tell me from memory when that receivership began? A. I don't know. To the best of my recollection it was sometime in '47, late in '47, that the proceedings were instituted.

Mr. Stryker: Who has all these things now? The complaint in the receivership, let me have that, will you?

Mr. Wessel: If it is just the date, I don't think there is any question that it is December 2nd.

Mr. Stryker: You admit it, so I won't bother with it. It is December 2nd by concession.

Q. Were receivership and bankruptcy matters among your specialty as a lawyer? A. Yes, sir.

Q. And Mr. Lawn came to you, consulted you and asked you to help in this particular receivership? A. Mr. Lawn and Mr. Giglio.

Q. You did so? A. Yes, sir.

Q. What was the situation in this receivership when you came into it? A. Well, they asked me to come down to court, which was before Vice Chancellor Egan in Jersey City, and I said to Mr.—to both of them, "You know, I am not admitted in the State court; I am admitted in the Federal court here and I don't know whether the Judge will permit me to practice in that particular court."

(2632)

So they called for me, and I went down to the court and I found that there were probably eight or ten lawyers, and of the eight or ten, five or six had previously been practicing in New York; and they welcomed me; and the attorney for the creditors proposed my admission to the bar for the purpose of taking care of that case; and throughout the case it was noted, "Walter T. Kohn of the New York Bar."

Q. And the Judge accepted that? A. And the Judge admitted me, yes, sir.

Q. It isn't so unusual, is it, for a lawyer of another state to be admitted out of courtesy in a court of another state for a particular matter? A. There was a time when we had a reciprocal arrangement with Jersey, whereby you were

permitted to practice. But that was subsequently cancelled by Jersey, but the judges in Jersey have on many occasions admitted me to practice in separate cases.

Q. I don't think I asked you, maybe I didn't ask you enough—can you give us a little picture of the general situation in the receivership when you came in the matter? A. Well, there had been a report prepared by an accountant that was designated by the judge, and that report was shown to me. It was a voluminous report, and I analyzed that (2633) very carefully. That report was by a Mr. Nadel, and——

Mr. Stryker: Wait just a minute.

Can I have that report? What is the exhibit number? It is in evidence. 88, my mentors tell me. I don't know.

The Clerk: Yes, that is right.

Q. I show you Government's Exhibit 88 in evidence and ask you if that is the Nadel report to which you referred, Mr. Kohn? A. Well, there were several copies. I had one, I received one, yes. This is——

Q. I mean, that is—— A. Just let me look at it carefully.

Q. All right. A. Yes, sir.

Q. Will you continue, Mr. Kohn, in your narrative of the situation, what had happened, what confronted you, what was there when you came into the receivership? A. Considerable testimony had been taken. A report had been filed, showing what the assets were. Some of the property had been disposed of, practically all of the property had been disposed of. Some fees had been paid and there was a certain amount of cash in the estate.

Mr. Stryker: Now, your Honor, I have gone (2634) about as far I can without working with the Papers. We get into that. So I think I will be glad if your Honor would adopt Mr. Wessel's suggestion about time.

The Court: All right. Mr. Kohn, I will ask you to come back this afternoon. These papers have to be examined before they are received, and we can't use them with you until they are received.

I will excuse the jury now. Come back at two o'clock. Don't discuss the case. We will try to have the papers ready for you before the time we get back.

I suggest that counsel come back at quarter of two and we will then go into the question of what happens with these papers.

Mr. Stryker: All right.

(Recess until 1:45 p.m.)

(2635)

AFTERNOON SESSION

(1:50 p.m.)

(The following took place in the court room not in the presence of the jury:)

Mr. Wessel: I have been through the exhibits, 67 exhibits, and I don't see how in any event we could proceed without having those exhibits here in court. In other words, we have to have either them or photostatic copies for use during the testimony of the various witnesses. So we always have the mechanical problem about what we do about the Jersey court.

Secondly, I have no doubt that some of those papers may ultimately become relevant, and the mere fact of filing, material. That may be of some significance. At the present time I don't think it is. Of course, the documents cannot under any circumstances be admissible at this time for the truth of the matters asserted in them. For example, they refer to transfers; they refer to what the books show; they refer to claims; they refer to creditors, and so forth.

Now, for the facts asserted in the documents now,—and I am not now referring to authenticity, but the truth of the matters in the documents—they are not admissible at this time. They may later become admissible merely for the fact of filing, and I don't want to state as of now that they won't be, but (2636)
I don't think at this time there is any materiality or relevance to the mere fact of existence of those documents in the Jersey court.

The Court: And if that does become relevant, that can be handled by stipulation, can it not?

Mr. Wessel: I certainly think so. I think we ought to have the papers here.

Mr. Stryker: We will have them here this afternoon anyway. Well, the first point, of course, would be to show that something happened, certain papers filed here are the original papers. That is a fact. It is in this receivership. I have brought here the best evidence I suppose there is in the world, and I think what we are talking about is the offer I made just by the production of the documents. It may be that at this moment Mr. Wessel wants to object, and perhaps I can see that they may not be admis-

sible at this point. But I think they will become so in the interrogation of the witness.

Mr. Wessel: Then we are in agreement. I have no objection to authenticity. Counsel is in agreement.

Mr. Stryker: In other words, you don't think the documents are fraudulent.

Mr. Wessel: I don't believe they are fraudulent. (2637)

Counsel, I think, agrees that as of right now the mere fact that there are such documents isn't material.

Mr. Stryker: I don't know as I agree, but I see the point and I won't detain you on it at this time. I made an offer ad lib here of the documents to put them in evidence. But if Mr. Wessel wants to object at this time, I won't press it at this moment.

The Court: All right. Now what de we do next?

Mr. Stryker: Call the jury in and let me go on with the witness.

The Court: We don't need Mr. Leoni any more, do we?

Mr. Stryker: You try to get them away from him. You try to get the documents away from him.

The Court: Oh.

Mr. Stryker: You are better than I if you do.

The Court: I see.

Mr. Stryker: I have got to keep him here until we make some kind of decision what to do.

The Court: All right.

Mr. Wessel: Here is a group of documents which were not offered.

Mr. Stryker: Quite a lot.

(2638)

Mr. Wessel: Some of those do relate to the others but—well, we will come to that probably.

Mr. Stryker: I picked out what I thought we would need. They are here, the whole record, in case the Government wants to make any use of them.

The Court: All right, I guess we will get the jury in and get Mr. Kohn back on the stand.

Mr. Stryker: I guess that is the way we do it.

The Court: All right.

Are there any documents in there that we could profitably discuss at this time? You know what you are going to want and perhaps we can boil it down to either a stipulation or something like that.

Mr. Stryker: All the documents that I segregated, I think I marked those only for identification, all of those I want ultimately to get in evidence if I can. The fact that I didn't segregate I am not offering, but they are there if anybody wants them.

(2639)

The Court: What is the nature of the documents that you are going to offer?

Mr. Stryker: Well, let's see; they are the following:

The complaint filed December 2, 1947, which began the proceedings;

The intermediate report, April 21;

The affidavit of mailing, March 24, which shows the offer to sell, and the creditors' list, including the Collector of Internal Revenue of New York and the Collector of Internal Revenue in Newark;

The affidavit of mailing, April 1948, which shows the order to show cause why the machinery should not be sold at public auction.

It shows also the creditors' list which includes the Internal Collector of New York and Newark.

By Mr. Stryker:

Q. Mr. Leoni, these are all original papers from your court files, aren't they? A. They are, sir.

Q. I imagine you guard them practically with your life, don't you? A. I sure do.

Mr. Stryker: Well, now, I have only asked for some of your papers, the ones that I think bear (2617)

on this case. How can we work that out?

The Court: Well, if Mr. Leoni will indulge us to that extent, let Mr. Wessel keep them until 2:00 o'clock.

Mr. Wessel: That is what I was going to suggest.

The Court: And then we will go on with some other witness and we will come back to these after 2:00 o'clock.

Mr. Stryker: Could I do this: The Government has all sorts of facilities that I don't have; maybe they would be good enough to photostat them.

Mr. Wessel: I am sorry.

The Court: The Government has many facilities, but we are a little low on money these days.

Mr. Wessel: I think counsel should know that the Government's funds are a good deal less, perhaps, than should be desired. I couldn't possibly have them photostated.

Mr. Stryker: I don't know how to handle it. I don't like to keep Mr. Leoni away from his court duties. I frankly don't know how to handle it.

The Court: I think we will save time all around this way: Let Mr. Wessel go through the papers. (2618)

Also the order barring creditors of August 19th;

Also the affidavit of mailing of April 21st;

Also the petition for instructions, August 23rd;

The affidavit of mailing, August 26, which contains the proposal of settlement and so on.

Then, let's see, anything else?

Also the amended proof of claim by the Government, September 1;

(2640)

And 10, the final order, September 13;

And 11, the receiver's report of the distribution, March 24, 1949, which ended the matter formally.

Those are the papers that I am interested in.

The Court: Well, now, how much of that is merely a matter of formal recognition, that something happened on a particular day?

Mr. Stryker: You are asking Mr. Wessel, I guess.

The Court: No, I am asking you. Mr. Wessel doesn't want any of these papers at the moment. You are the one who wants them in.

I want to know what you want to establish by it. I am not trying to telescope your proof in any way, Mr. Stryker, but we are going to be faced with a problem of a lot of documents going back to New Jersey, and I should like to get over the mechanical hurdle now.

Mr. Stryker: These things I have referred to just now, among other things, relate to what seemed to me the essential formal steps in that proceeding.

Of course they relate to other things, too, but that.

The Court: Well, now, can we get a stipulation as to the chronology here?

(2641)

and we will go on with you at 2:00 o'clock, Mr. Leoni. All right?

The Witness: Yes, sir.

Mr. Stryker: All right. Then those that there that are not in the list that I called for, you had better keep charge of them.

Mr. Wessel: No, those I might possibly—I don't know if they are part of the picture or not.

The Court: You had better keep the category separate, but look at them all.

Mr. Stryker: I will tell you what I will do—you will trust Mr. Dilberian with them, won't you? The court clerk, I assure you, is trustworthy.

The Witness: Yes.

Mr. Stryker: All right. Now, I am turning this batch over to Mr. Dilberian for safekeeping until we get you back this afternoon. I am sorry to take so much of your time.

(Witness temporarily excused.)

Mr. Stryker: The next witness I am calling out of order for the reason your Honor suggested is Mr. Meyer.

(2619)

JOSEPH P. MEYER, called as a witness by defendants, being first duly sworn, testified as follows:

Direct Examination by Mr. Stryker:

Q. Mr. Meyer, you have appeared in response to our subpoena? A. Yes, sir.

Q. What is your occupation? A. I am a senior accountant for Sproul, Scholz & Company.

Q. Sproul, Scholz & Company. Is that a well known, established accounting firm here in the city? A. Certified public accounting firm in the city.

Q. How long have you been associated with them? A. Since 1942.

Q. And did there come a time when your firm became the accountants for David Lubben? A. We became the accountants for General Confections, Inc. and subsidiary companies, of which Mr. Lubben was president at that time.

Q. When was that? A. We became the accountants in August of 1946 and we did the work for one fiscal period beginning March 1, 1946, to February 28, 1947, one fiscal year.

Q. And did the work that you began in August, 1946,

(2620)

include an audit and an analysis of the books and records of the Lubben companies for a period before August? A. Yes. It comprised of the audit from March 1st, all of the transactions through to the 28th of February, 1947.

Q. Now, you participat. in the work done for the General Confections, the Lubben companies? A. Yes, sir. I was the senior accountant on the job.

Q. You had charge of the work? A. Yes, sir.

Q. Can you state how much gross business Mr. Lubben's company, General Confections—companies——

Mr. Stryker: Strike it out.

Q. Can you state how much gross business Mr. Lubben's companies, General Confections and Reserve Trading Company, did in the year from March 1, 1946, to February 28, 1947?

Mr. Wessel: Objection as completely immaterial to any issue in this lawsuit.

The Court: Sustained.

Mr. Stryker: I respectfully except.

Q. I am not allowed to ask you what it is, but you have the record and you could state it if you were allowed? A. (2621) That's right, sir.

Q. Can you state how much profit was earned on the sum of those earnings?

Mr. Wessel: Same objection.

The Court: Same ruling.

By Mr. Stryker:

Q. All right, if you were allowed, you could state it? A. Yes.

Q. Have you a certified final statement of Sproul, Scholz for Lubben's companies, Reserve Trading and General Confections? A. Yes, sir.

Q. May I see it? A. Right there, sir.

(Handed.)

Mr. Stryker: I will ask to have this marked for identification.

(Marked Defendants' Exhibit OOO for identification.)

Q. What is OOO for identification?

Mr. Wessel: Objection.

Mr. Stryker: I am not asking for the contents.

Q. Just describe what it is.

Mr. Wessel: I think counsel has already described in his question what it is.

(2622)

By Mr. Stryker:

Q. Does this paper relate to the period that you have testified about? A. Yes, sir.

Q. Just tell me what the paper is without giving its contents. I think his Honor allows that.

The Court: I don't want to have any further questions on this, but go ahead, we will take one more. Go ahead.

A. It is a certified statement of the operations and a balance sheet for the period involved.

The Court: All right.

Mr. Stryker: I offer it in evidence.

The Court: Show it to Mr. Wessel.

Mr. Wessel: I make the same objection.

The Court: All right, I sustain the objection.

Mr. Stryker: May I make an offer at the bench?

The Court: Surely.

Mr. Stryker: With Mr. Wessel, and state the reasons for my offer.

(At the bench.)

Mr. Stryker: The purpose of this testimony, rather, the relevance of this proffered testimony is

(2623)

this: This document relates to the year, the fiscal year, let's see——

The Court: March 1, 1946, to February——

Mr. Stryker: To February 28, 1947.

The Court: Yes.

Mr. Stryker: Now let me point out the specific issues that this exhibit is relevant to. One is the statement of Lubben that all he got out of this whole thing was a few lousy pieces of machinery and the plant. I want to show by this document that——

Mr. Wolfram: By the testimony.

Mr. Stryker: —and by the testimony of this witness, that, among other things, what he got was a business that earned over $5,000,000. That is one point.

The Court: All right.

Mr. Wolfram: The second point, your Honor, is that Lubben's income that should have been reported on that '46 return, which we have had so much about here, included his income from General Confections as well as his income from Eatsum Food Products Co., Ltd., the partnership, and that question is very much before us.

Mr. Stryker: That is, among other things, be- (2624)
fore us, because it is one of my central contentions that Lubben has lied in this court in order to prevent or forestall prosecution against himself.

You recall that I have asked repeatedly for his income tax returns, and your Honor has ruled them out.

The Court: Yes.

Mr. Stryker: And it bears on that testimony.

Mr. Wessel: May I state very briefly—or does your Honor not wish?

The Court: I am not convinced by Mr. Stryker's position, but if you want to add anything for the record, go ahead, but by own feeling is that there is no connection for this document at this time, and I will sustain the objection.

Mr. Wolfram: And on his own testimony, does the same ruling apply to the previous questions that were excluded on his oral testimony? They were offered for the same purpose.

Q. The receiver? A. The custodial receiver.

Q. Oh, custodial receiver, yes. A. Yes, sir.

Q. That is what that is? A. That is the original, yes, sir.

Mr. Stryker: Well, I offer this in evidence. (2649)

Preliminary Examination by Mr. Wessel:

Q. Did you participate in the negotiations, Mr. Kohn, for the sale of the assets of 360 Troutman Street? A. The sale had already taken place when I came in, but I used it in connection with my offer of settlement.

Q. Your offer of settlement? A. Of settlement upon the basis of which the proceedings were subsequently dismissed.

Q. These proceedings were dismissed? A. Yes, sir; complaint dismissed.

(2650)

Q. These proceedings were dismissed? A. Yes, sir; complaint dismissed.

Q. Oh, there was no final adjudication? A. There was a final order, final decree, expunging claims, paying claims, and dismissing the proceedings upon payment of the settlement.

Q. Discharging the debtors? A. Sir?

Q. Did it discharge the debtors? A. Well, the time had passed in which to file claims. There had been an order limiting the time to file, and all those creditors who had filed were paid the settlement.

Q. What do you know about the sale of the assets of American Agar Corporation to Carl Aster? Did you handle any of that? A. That was all done before I came into the case. I came in in July, my recollection is, of 1948. I was only in the case July and August, July, August and

September. I think September 13th was the date of dismissal.

Q. Did you know who the stockholders of Cornelison Holding Company were at the date of this order? A. I did not.

Mr. Wessel: I won't go through the whole order. My objection is to the contents of the document. It is hearsay.

(2651)

The Court: Sustained.

Mr. Stryker: I except.

The Court: Mr. Stryker, as I rule on these, I will be glad to consider any specific purpose that you may have in mind. I have not grasped it yet, and you just say, "I offer this in evidence." It is hearsay, and I am not taking it. Now if there is some limited purpose you want it for, I will be glad to consider that at any time.

Mr. Stryker: I haven't a limited purpose. I have a purpose of establishing that this receivership was a properly conducted receivership, in good faith.

The Court: Well, you tell me what this document establishes here, that you want to offer.

Mr. Stryker: It is part of the chain of proof, Judge. I can't. It is just like saying what does one brick hold? I have got to put the bricks in to make a wall.

The Court: All right, go ahead.

Mr. Stryker: Pardon me a moment, your Honor.

The Court: All right.

By Mr. Stryker:

Q. I show you Defendants' Exhibit NNN-63 for identification, and ask you if you can just describe what that docu-

(2652)

Colloquy

Mr. Wessel: There is no question about December 2nd, the receivership was started by a bill of complaint; there was a final order; there were intermediate reports; the Collector of Internal Revenue did file claims; those facts are—not only do I think they are undisputed, but I don't see why we need a lot of papers for that.

There is no question what the purpose of the offer is. I think your Honor knows it as well as I do, and counsel does, and that is to establish, I suppose, first possibly that the Government is barred in some way, but secondly, that this final order of the receiver, of the court in Jersey, in some manner or fashion bars the Government.

If your Honor looks at the final order and examines some New Jersey law, I think your Honor will find that just isn't so; it couldn't be so.

It might require quite a bit of legal understanding to understand why, but it isn't so.

This receivership never discharged anybody or anything. It was taken away from the receiver sometime in September of 1948—I believe was the date—and that was the end of it.

It started out as a receivership, but it was

(2642)

finally stopped, and the receiver never paid anybody anything except certain administration expenses, the balance going to the treasury.

The Court: To what extent are you in agreement? Mr. Stryker, I am not trying to force a stipulation on you at all, but if we can simplify and boil down to one or two documents which may encompass whatever dispute there is between you and Mr. Wessel, then I think we have gone a long way toward

getting these documents back in the Jersey court, and you, perhaps, photostating those you want to keep here.

Mr. Stryker: I will tell you, your Honor: I think really, the shortest way to do it—I really do—is by the witness who handled this receivership. Your Honor knows my own fatigue is such that I am not eager to take any time aside from your Honor's time—I think the shortest way to do it is by the man who did these things, and whatever the documents show, they show, and neither my interpretation nor Mr. Wessel's interpretation can change that.

This receivership was referred to in the direct testimony and I want to show what happened. Everything that my clients did is suspect by Mr. Wessel's view; everything is wrong.

(2643)

I want to show, well, we come to this one thing, I want to show what the facts were from the best evidence by an unimpeached lawyer who was there and did it. That is my point.

The Court: Well, I may or may not see the point. All I am trying to get at is whether there is a simpler way to do it.

If you want to go ahead with the lawyer, well, go ahead.

Mr. Stryker: I will be glad always——

The Court: I am glad to have the lawyer's testimony to the extent it is relevant. I am facing the problem of documents.

Mr. Stryker: I will try to make this as short as I can.

The Court: All right, Mr. Stryker.

Mr. Stryker: Let's try it that way and see where we get. Hasn't he come?

The Clerk: He is not here yet, your Honor.

Mr. Stryker: Oh, for heaven's sake. I will tell you, I have another witness, a short one that I can put in. I don't know where Mr. Kohn is. Let's put one witness on and make some progress, if I can.

The Court: O. K.

(2644)

(Jury in box.)

The Court: All right, call the next witness.

Mr. Stryker: All right, they tell me he is here. I will go on with Mr. Kohn.

The Court: All right, we will go on with Mr. Kohn.

WALTER T. KOHN, resumed the stand.

Direct Examination by Mr. Stryker (Continued):

Q. Mr. Kohn, I show you Defendants' Exhibit—I think you were not in the receivership at the time it started, as I recall it. A. Right.

Q. But do you remember whether you later looked at the bill of complaint that started it? A. Yes, sir.

Q. I show you Defendants' Exhibit NNN-1——

Mr. Stryker: Is that right?

The Clerk: That's right.

Mr. Stryker: I am not criticizing your handwriting.

Q. —NNN-1 for identification, and ask you if that is the original bill of complaint?

It is the document produced here by the Clerk of the Court this morning.

Mr. Wessel: Of course, there is no question (2645) about that. I thought I had admitted those facts.

Mr. Stryker: Well, let's just go along and see how we do.

A. I believe so.

Mr. Stryker: All right, Mr. Wessel says there is no question about it, I offer it in evidence.

Mr. Wessel: I don't know what it establishes, if your Honor please. There is no question but that there was a receivership commenced on December 2nd. If counsel seeks to get into evidence the facts asserted in the document, there is an affidavit there, I think, and a number of other assertions; I think whoever it was that signed it should be here.

As far as a document merely stating a bill of complaint exists, I have no objection to it, except that I don't think it establishes anything.

Mr. Stryker: Well, in this case, every conceivable suggestion that I think could be made adverse to the defendants has been made. I want to go into this. I want to show that this was a proper and correct transaction and receivership, and here is the original document, and it starts with the bill of complaint; it is produced from the court record; I didn't start talking about this receivership, the Government did.

(2646)

Now, I can't see why I can't have that in evidence. It is a document in that case.

The Court: Well, Mr. Stryker, the reason you can't have it in evidence would be the same that you can't pour into evidence here every document which conceivably might touch on some fringe of the case.

Now there is a lengthy document, and there are 67 more, I am not going to divest the New Jersey court of its reorganization file unless I see that it is going to be of some help to us.

Mr. Stryker: I think it will be of great help to the defendants, to show their good faith, and their good faith is impugned in every stage of this case, and here is a place where I can really establish what I want to establish.

Mr. Wessel: Let me state my objection, and I think I do see counsel's purpose better than I did.

Apparently he wants to put this into evidence to show somehow the truth of the facts asserted in it. If that is the case, then I do object to it as hearsay.

Mr. Stryker: That isn't the point. The point is, here is the complaint, the thing that started this receivership off. This gentleman came into it, he says, after it started, but examined the papers.

(2647)

At all events, the clerk has brought it, and there can't be any question about it, and here is this whole receivership, and without proving what happened from the best evidence I can, it might be left to this jury that there was something the matter with that. There seems to be something charged against everything that my clients did. Here is the paper—here are the papers. I submit it is admissible.

The Court: I am not making any charge at the moment at all.

Mr. Stryker: I know that, your Honor.

The Court: I am just questioning whether or not I am going to ask each of the jurors to read that document as well as read it myself. At this point I am not. You and Mr. Wolfram can look it over. If there is something in there that you want for the record, we will consider your offer as to that extent, but as of the moment I am not going to take it as a shotgun.

Mr. Stryker: I respectfully except.

Q. Was this a voluntary or involuntary receivership? A. This was a custodial receivership, involuntary.

Q. You will have to explain. A. That is to say, a——

Q. What does that mean, a custodial receivership? A. The plaintiff, Dupont, something or other, brought an

(2648)

action against the American Brands and affiliated companies, and they asked for the appointment of a custodial receiver, which is a temporary receiver.

Subsequently, after all the creditors were notified an application was made to change that custodial receivership into a statutory receivership, and that statutory receivership was granted.

At the time that I came in, Mr. Boyle had been appointed, originally custodial receiver, afterwards statutory receiver, and was acting as receiver under bond, and had by order of the court appointed an accountant, and the court had approved his appointment. That was that Mr. Nadel.

Q. I show you Defendants' Exhibit NNN-45 for identification and ask you if you can identify that paper?

It is produced—it is an original paper produced from the files of the court. A. Well, that appears to be the first intermediary report that was prepared by Mr. Boyle.

that Mr. Boyle, the receiver, had filed a petition asking for instructions of the court with respect to an offer which was made of a settlement to all the creditors of the defendant corporations, a copy of which offer was attached to the petition—that is my letter—and it appearing from the said offer that among other things, as a condition of the said offer, the offeror represents that various claims filed with the said receiver are improper and are erroneous, and are not due, and having made it a condition of the said offer that the receiver reject the said claims, as more particularly set forth in paragraph 5 of the offer, it is ordered that the creditors of the defendant corporation will file claims with the receiver, show cause before the chancellor, at his chambers, in Exchange Place, Jersey City, on the 7th of September at 10 o'clock, or as soon thereafter as counsel can be heard why the offer made hererin should not be accepted or why such other and further instructions should not be given and it is ordered that these various creditors, the

(2672)

Isabella Sugar Company, Fay Kaminsky, Brill Equipment, Wallace H. Gibson, Pepsi-Cola and others, show cause why the claim should not be expunged, and it is further ordered that a copy of this order to show cause, and a copy of the offer which is annexed to the petition be mailed to all creditors who have filed claims herein and to solicitors for the intervening creditors—solicitors are attorneys——

Q. I know. A. —within four days from date hereof and within the same time a copy of this order to show cause and a copy of the said offer be mailed by registered mail to the aforementioned claimants, whose claims are the subject matter of the application, that they be expunged and disallowed, with an affidavit of service on everybody.

Q. Including the Government? A. Including the Government.

Q. What was the offer of settlement referred to in the paper you have just read? A. Ten cents on the dollar, in addition to anything that they may have received in full of their claim. That is only to unsecured creditors.

Q. Does this paper show—what does the offer show with

(2673)

respect to the claims of the United States Government, and I call your attention particularly to (e) on the last page of this document? A. It shows they claimed $140,195.11. According to the report of the disinterested receiver—the disinterested account for the disinterested receiver—that there was nothing due. If the Government could show that that amount was due, the offer had to be withdrawn, because you can't settle with the Government; you have to pay them in full.

Q. Did the Government ever come in and make the reply to that order to show cause? A. On the 7th of September I was present in court; the Government did not appear. It was adjourned to the 13th. The Government did not appear on either of those two instances.

Q. Was Mr. Twohig there on one of those occasions? Do you remember him? A. I don't remember ever seeing him in the Jersey court.

I just want to be sure that I have them right. This is Mr. Mahon here (indicating).

Which is Mr. Twohig?

Are you Mr. Twohig?

Mr. Twohig: Yes, sir.

(2674)

The Witness: Then you weren't there.

By Mr. Stryker:

Q. I show you now Defendants' Exhibit NNN-3 for identification, and ask you if you will tell us what that document is? A. This is the final order.

ment is, and as you do so, I particularly direct your attention to the next to the last page. Tell me if that is a list of the creditors? A. May I have the Nadel report, or the intermediate report, which would show the correct list? I think either one of those two would show the correct list.

Q. Is this the intermediate—no. I don't know which this is. Is this the intermediate report? Yes, it says so. Wait a minute. I am showing you Defendants' Exhibit NNN-45 for identification. A. The list is not attached to this paper, to this intermediate report.

Q. No, I know that. I show you—— A. Just wait one moment. Let me look through this.

Mr. Stryker: Can I have Government's Exhibit 88?

Q. I am handing you Government's Exhibit 88, which appears to be a Nadel report. Maybe that will help you in answering me. A. Yes.

The Court: Was Exhibit 88 received for all purposes, or was it received for a limited purpose?

Mr. Stryker: I have no recollection of any (2653)

limitations at all.

Mr. Wessel: I think it went in for all purposes.

The Court: All right.

A. It woud seem to me from recollection that this is a correct list.

Q. Now, you say "this." Will you identify the exhibit number. A. That is to say, the paper that you showed me.

Q. Which is exhibit what? A. Exhibit for identification, February 11, NNN-63.

Q. Now forget that for a moment. Go on and tell me generally what the paper is? A. This paper is an affidavit

of mailing, an order to show cause by the receiver, with the postage paid to everybody who is on that list, to show cause why an offer had been received for the receiver's right, title and interest in the machinery and equipment located at 101 Fairmont Avenue, Jersey City, and the receiver having prayed for instructions, the court directed that notice be given to every creditor of that sale, and these two pages which are attached here give the list of all the creditors of American Brands and American Brands Corporation.

Q. Do you find among those creditors the Collector of (2654)

Internal Revenue for New York and the Collector of Internal Revenue for Newark, in there somewhere? A. Collector of Internal Revenue, Custom House, New York City; Collector of Internal Revenue, Newark, New Jersey.

Q. Were the creditors of these companies notified in advance in writing, to show cause why the assets should not be sold? A. Yes, sir. This affidavit of mailing by the receiver's representative sets that forth.

Q. Was the United States, was the Government of the United States notified that the assets of the corporation were about to be sold by the receiver? A. According to this paper, they received notification.

Q. You are still talking about Exhibit—— A. NNN-63.

Mr. Stryker: I offer it in evidence.

Mr. Wessel: No objection.

The Court: I will be perfectly glad to take it, Mr. Stryker, if you want anything more out of it than you developed orally. Mr. Wessel didn't object to your questions as to its contents. Isn't that enough, so that this can go back to New Jersey?

Mr. Stryker: I think with a couple more questions it can. I am as eager to do that as you are. (2655)

The Court: All right, it is received. If Mr. Stryker wants it in, we will leave it.

(Defendants' Exhibit NNN-63 for identification received in evidence.)

Mr. Stryker: This, gentlemen, Mr. Foreman, and ladies and gentlemen, I would like to have you examine it, is an affidavit of mailing, stating that—addressed to all the creditors, and this is an affidavit of mailing to all the creditors. It seems to be verified the 25th of March, 1948. The order to show cause is there, part of the papers, and Schedule A is there, and the last two pages are schedules of creditors, as this gentleman has told us, and among them, Mr. Foreman, if you look, maybe you can see this, is the Collector of Internal Revenue, Custom House, New York, New York; Collector of Internal Revenue, Newark, New Jersey (handing to jury).

Mr. Wessel: Since this document won't be here, let me just bring to the attention of the jury while it is here, that you will recall where the returns were filed, and that was in the Second District, I believe, uptown—Third District, uptown, not in the Custom House.

Mr. Stryker: I am not——

(2656)

By Mr. Stryker:

Q. There came a time, did there not, when the assets of these companies were sold, I believe, at auction; is that right? A. Under that order to show cause.

Q. Well, they were sold. A. Yes, sir.

Q. I show you Defendants' Exhibit NNN-48 for identification, and ask you if you can identify that paper. That is also an original, produced by the Clerk of the Court? A. This is the report by Bartholomew Boyle.

Q. Who is he? A. He is—at the time that this paper was submitted, he was the statutory receiver.

Q. All right. A. —and he alleges that pursuant to an order that was made on the 29th of March, 1948, he conducted the sale of the assets, more particularly described in the petition heretofore filed, located at 101 Fairmont Avenue, and the assets were offered first in bulk and then in lots; The best offer in bulk was $15,000; Then they were offered in lots.

Q. $15,000 for all these companies? A. $15,000 in one bid, and then—but in separate lots the bids were $29,257, and that the appraisers who had been appointed by the court, one had—the appraisal which was made, was made from two viewpoints. One was by a value being put on

(2657)

the machinery if the purchasers were required to remove the machinery, and the second set of values put, being put on the machinery——

Mr. Wessel: Objection, Mr. Kohn, please.

The Court: I will sustain the objection.

Q. Well, you identify the paper? A. Oh, I beg your pardon. I beg your pardon.

Mr. Stryker: No, maybe it is my fault.

Now this paper, NNN-48, thus identified, I now offer in evidence.

Mr. Wessel: Well, I have the same objection as to the——

Preliminary Questions by Mr. Wessel:

Q. Were you present at the sale, Mr. Kohn? A. No, sir.

Mr. Wessel: Same objection.

Mr. Stryker: Well, it is not disputed that this is the original paper, is it?

Mr. Wessel: None of these documents in any way is disputed as to authenticity.

Mr. Stryker: Well, then, on that basis, on the identification, I submit it is admissible, and I will offer it.

The Court: No, I won't take it.

(2658)

Mr. Stryker: Exception.

Q. Was the purpose of notifying the creditors in advance of the sale, to permit creditors to—to give creditors an opportunity to object to the sale?

Mr. Wessel: I object, if your Honor please. It is leading; it is speculative; it is not within this witness's opinion; it is the court's action, and there are lots of other objections to it.

The Court: Sustained.

Mr. Stryker: I think he can tell the purpose of the notice, can't he. He is a lawyer handling this?

The Court: He wasn't handling this at this time, as I understand it, Mr. Stryker?

Mr. Stryker: Well, I should think he would know, as a lawyer who came into it, from the original documents.

The Court: No.

Mr. Stryker: You don't allow that?

The Court: No.

Mr. Stryker: Well, I except.

Q. Did the United States Government or any of the creditors object to the sale? A. There were two or three objections but the objections were overruled.

Q. Who made the objections? A. I don't remember

(2659)

offhand. I would have to look through the papers.

Q. Did the United States Government offer objections? A. No, they did not.

Q. I show you NNN for identification, and before I ask you what it is, will you look at it and see if you can give me the background of that paper? Just take a look.

Mr. Wessel: I think I had better object to this question before it is answered, because I really don't —it is much too broad. I haven't any idea what is going to come out.

Mr. Stryker: All right.

Q. Will you identify the paper. Maybe that is the better way to proceed. Will you do it that way? Just identify the paper, can you? A. Certainly I can.

Q. What is it? A. This is the order on the fixing of the statute of limitations and barring all claims not filed by the date set in the order, fixing the time to file claims. It is called a bar order, b-a-r; not a drinking bar, but——

Mr. Stryker: One page, isn't it?

I offer this in evidence.

Preliminary Questions by Mr. Wessel:

(2660)

Q. Is it your testimony, Mr. Kohn, that this barred any claim on the part of the United States Government?

A. The United States Government had already filed its claim at that time, according to my recollection.

Q. In other words, this only barred people who had not filed claims as of that date? A. Not actually filed.

Q. It has no effect whatsoever on any claim of the United States Government having filed? A. No, because the United States Government, having filed its claim, could amend it at any time, and I understood did amend it.

Mr. Wessel: I don't know what it does, but I have no objection to it.

Mr. Stryker: All right.

The Witness: May I just look at the date on that once again, please. May I just look at that paper just once again, please? (After looking) Yes, that's right; that is correct.

(Defendants' Exhibit NNN-58 for identification received in evidence.)

Q. I show you NNN-5 for identification and ask you if you can tell us what that is? A. I can.

Q. What is it? A. It is the amended claim of the (2661)

Collector of Internal Revenue in the matter of American Brands Corporation and affiliates—and subsidiaries, dated September 1, 1948, which amended the claim which had previously been filed, and if my memory serves me rightly, on August 4th.

Mr. Stryker: I offer this.

Preliminary Questions by Mr. Wessel:

Q. Is it your suggestion, Mr. Kohn, that this document correctly sets forth the claim of the United States? A. No. I just say it states that it is an amendment to the claim previously filed.

Q. And that it properly relates to this receivership; is that correct? A. In this receivership.

Q. And it properly relates to the companies in this receivership? A. Oh, yes, it was filed with the court in that matter.

Q. And it was filed in September of 1948? A. But I don't know what date.

Q. September 23rd, on the back of it, it says, '48. Would that be right? A. Apparently that is the date on the back of it.

Q. And as of that time companies listed in here were properly part of this receivership; am I correct? A. Yes, sir; except one.

(2662)

Q. Which one? A. Except the Loraine, which was stricken out by order of the court.

Q. At what time? A. When the complaint was dismissed upon the ground it never should have been a party to the proceeding.

Q. When was the complaint dismissed? A. I think it is September 13th, if my memory serves me right.

Q. This paper is September 23rd, isn't it? A. Yes.

Q. And it includes Loraine Food Corporation, doesn't it, taxes due for $68,000, doesn't it? A. But that wasn't filed with me.

Q. Oh, this paper wasn't filed with you? A. No, not with me. It was filed somewhere. Where, I don't know.

Mr. Wessel: Well then I object to it.

Mr. Stryker: Well, it is produced here from the records of the court in this proceeding; appears to be no doubt about its being filed.

Mr. Wessel: I have no objection to it as a document that was filed.

The Witness: Well, all I said was, it wasn't filed with me, that is all.

Mr. Wessel: Have you any doubt that this was (2663)

filed?

The Witness: Just let me look at it a moment. I will tell you. (After looking) Not the slightest.

Mr. Wessel: And that was filed after the date that you said the final order was signed?

The Witness: That was filed September 23rd by the Clerk of the Court.

Mr. Wessel: That would be correct date of filing; is that correct?

The Witness: That apparently would be the correct date of filing, unless there was a mistake on the rubberstamp, but I doubt that.

Mr. Wessel: That would be ten or fifteen days after the final order; correct, sir?

The Witness: Apparently, sir.

Mr. Wessel: Then I won't object to it.

(Defendants' Exhibit NNN-58 for identification received in evidence.)

Mr. Stryker: Here is a document, a bill and order barring creditors. It has been described. It is in evidence, Mr. Foreman (handing).

By Mr. Stryker:

Q. Will you tell me in your words, Mr. Kohn, the story of the receivership from the time of the Government's (2664)

filing its claims on; what happened?

Mr. Wessel: Well, I don't want to prevent——

Mr. Stryker: I am trying to shorten it by the documents.

Mr. Wessel: I think Mr. Kohn is a lawyer—Mr. Kohn, I think you know what hearsay is and isn't, and I suggest, if counsel wants to speed it up, you answer the question, but please try and avoid hearsay and conclusions. You know what those are.

The Witness: So far I haven't said a word except I know of my own knowledge, except when I said I had seen the paper filed, but I wasn't in the case at that time.

Mr. Wessel: I have no objection to the question because I think the witness is competent to answer.

The Court: All right.

Mr. Stryker: Then if you will read the question, Mr. Reporter.

(Question read.)

A. May I refresh my recollection from some papers I may have?

Q. Yes, from anything you want. What do you want? A. When I was trying to prepare——

Q. What is that? A. When I was preparing the offer

to settle the entire matter, I inquired of the receiver and of his accountant, and of Mr. Ravin, his attorney, the nature of the claims which the United States Government had, so that I could incorporate them in my offer of settlement; and Mr. Nadel refused to give me the information, wrote me a letter to that effect, but he did give me a copy of a letter which he had sent to Morris H. Ravin, on August 6th, and which I hold in my hand, and which set forth the nature of the claims of the United States Government and of the State of New York, and against all of these companies.

Q. Now, refreshing your memory, if it does, from what you hold, I wish you would go right ahead, tell me the start of this receivership, especially with reference to the claims of the United States Government? A. Well, there were a large number of claims which were disputed.

Q. Yes. A. And one of the largest claims was disputed—if you hand me the report of Mr. Nadel right there on top of the table, I will read what he said about the largest claim.

(2666)

Q. That is in evidence; you can read it. A. I am reading from Exhibit 88, January 27, 1955. Will you tell me what this is, 88 what?

Q. That is in evidence. A. He says on the last two pages of his report, which is dated April 24, 1948:

> "On Exhibit D of this accounting report, I have prepared a consolidated statement of surplus as of December 2, 1947 resulting in a deficit as of December 2, 1947 of $33,641.63. This deficit is primarily caused by a federal income tax liability for the year 1946 of $104,701.35 as reflected by the consolidated income tax return filed by these affiliated corporations. No part of this income tax liability was paid by these corporations except the sum of $300 paid at the time of filing tentative reports.
>
> "On September 23, 1947, these corporations filed with the Internal Revenue Department an application for a carry-back loss indicating that the estimated amount of expected net operating loss for the year 1947 would amount to $350,000, thereby offsetting the net income previously reported on the consolidated tax returns of these corporations for the year 1946 in the amount of $261,753.36.

(2667)

"My examination indicates that the net operating loss of these affiliated companies as per their books and records for 1947 amounted to $196,402.83. These affiliated corporations have the further advantage of applying their net operating losses for the year 1948 against the net operating income shown for the year 1946."

Accordingly, when I drew my offer, I specifically provided in that offer that the right to carry back this loss resulted from these affiliated corporations owing nothing whatsoever to the United States Government, and I asked that the receiver apply to the court for instructions——

Q. Wait a minute. I show you Defendants' Exhibit NNN-2 for identification and ask you if that is the petition for instructions that you have just referred? A. Yes, sir.

Q. Now, go ahead with your narrative. A. Now my letter of August the 20th, 1948, is attached, signed by me.

Q. All right. A. I make the offer—this letter seems to have been transposed. The second page is at the end.

(2668)

Q. I don't care. It is the way it comes to me. A. Oh, all right. I ask:

"7. That you, as receiver, reject the following claims upon the ground they are erroneous and not due,"

and then I mention the numbers of the claims, 7, 14, 23, 24, 25, 28, 30 and 37, and then I say:

"8. There has been furnished a record of proofs of claim filed with Herman Nadel as follows:

"A. Division of Placement and Unemployment Insurance, Collector of Internal Revenue, American

Brands, social security taxes, withholding taxes, Collector of Internal Revenue, American Brands Corporation withholding taxes, Collector of Internal Revenue; American Agar Corporation social security, withholding taxes,"

and then at the end of that:

"The above claims consist in part of moneys withheld and known as withholding taxes.

And then e: "The Collector of Internal Revenue, federal taxes and surtaxes for 1946, on consolidated tax return of American Brands Corporation and affiliated corporations, $140,195.11. It is understood that if, upon this application coming on to be (2669)

heard, the amount remaining and required to pay the withholding taxes as set forth in paragraphs (a) to (d) is substantially insufficient, then and in that event the offer may at the insistence of the American Brands and affiliated companies be withdrawn. With respect to item (e), the American Brands Corporation and affiliated companies claim the right as set forth in the report of Herman J. Nadel," (two concluding pages)—that is what I have just read—"to make application to the Internal Revenue Department for a carry-back loss for the years 1947 and 1946 as against the net income reported in 1946."

Q. Let me interrupt you a minute. NNN-5 in evidence, is that the proof of claim that you referred to of the Government's? A. No, at the time the original claim—before it was amended was the one.

Q. What is the original? A. The original claim was $140,000 with interest and penalties that amounted to $140,000, and I asked that notice be given to the United States Government to appear and support its claim.

Q. Well, the amended claim for American Brands con-

(2670)

sisted of an item of $134,802.99 here, and—— A. Is that the original? No, that is the amended claim.

Q. That is what I am talking about. Have you seen the original claim yet? A. No. I just knew—I just saw that letter and knew that it was filed.

Q. I don't seem to have that. Well, at any rate, the amended claim was $134,802.99, plus $5,392.12 for interest; is that right? A. That would appear from the amended claim, but those figures, I think, were different than the original.

Q. They are approximately the figure of $140,000 that you mentioned. A. Approximately the figure is the same, yes.

Q. All right. Now, what did we last talk about, the petition for instruction; is that the last thing I had? What was the next step? A. The next step was an order to show cause directed to all the creditors was submitted, signed and sent to all the creditors.

Q. Including the United States Government? A. Including the United States Government, to appear and support their claim.

(2671)

Q. All right. I show you this NNN-4 for identification and ask you if that is the paper that you have just mentioned? A. Yes.

Q. What is the paper I show you; just describe it generally. A. Well, this is an order to show cause certifying

Q. As a lawyer of over forty years' experience—— A. Fifty years.

Q. Excuse me, over fifty years' experience, don't you know it is hearsay as to the truth of something stated by an agent or by Mr. Nadel to you?

Mr. Stryker: I object to his argumentative, incompetent, irrelevant, immaterial, what this gentleman knows about hearsay.

Mr. Wessel: I am going to the source of this (2694) witness's testimony on direct, that he has personal knowledge of where these documents are, and that is as relevant a subject as I know of.

The Court: Any other ground?

Mr. Stryker: I don't think that was had in that way for one thing, so I think this is just a waste of time. I think it is a phrase you have used once or twice, Mr. Wessel.

Mr. Wessel: Certainly.

Mr. Stryker: Well, I object to it as entirely irrelevant.

The Court: Overruled. You may answer.

Q. Mr. Kohn, when you were in Mr. Stryker's office recently, did they say anything about not bringing Mr. Nadel here as a witness? A. No, sir.

Q. Were you told to testify about where those books were, so that Mr. Nadel wouldn't have to be in that witness stand? A. I didn't know anything about that. As a matter of fact——

Q. All right. A.— I thought Mr. Nadel was going to go on first as a witness.

Q. You were told that? A. I understood so. I don't know where I got the impression from, but——

Q. Now, with regard to the report of Mr. Nadel, which

(2695)

which is Exhibit 88 in evidence, you testified that you based—and I am not questioning your testimony in that connection—you based your letter in August, offering to settle the receivership, upon the last two pages, in which Mr. Nadel made reference to anticipated and actual operating losses. A. Yes, sir.

Q. Did you take into consideration the last sentence of Mr. Nadel's report, which reads—and I am quoting—"All of the foregoing is subject to audit, examination and approval by the Internal Revenue Department." A. Yes, sir.

Q. You did know, in other words, that those losses had not been fixed? A. I put the thing in my letter in such form that if that claim was sustained, the offer could be withdrawn.

Q. In other words, at least as of the date of the receivership and when it terminated, these various questions as to carry-back losses had not yet been resolved in any formal and final way; is that correct? A. That's right; there had to be one more form filed. I think it was 843 or 846, if I am not mistaken.

Q. After that, there are a number of proceedings that take place, in which the revenue agents and others come in, and the agents say, "We don't think that is right," and the

(2696)

taxpayer says, "This is right," and so on? A. Agents always say it isn't right.

Q. Sometimes there is an adjustment and sometimes there isn't an adjustment. A. That's right.

Q. So that as of the date that you wrote your letter, the situation was fluid as to these carry-back losses; am I cor-

Q. Of the chancellor? A. Of the chancellor.

Q. Can you tell us what it provides? A. Well, I can go through it and brief it.

Q. Do it in a brief compass. We are trying to get these papers back to the clerk. That is why I am asking in this way. A. It sets forth matter was opened to the Court by Morris M. Ravin, the solicitor for Mr. Boyle, the receiver——

Q. All I am interested in at the moment, Mr. Kohn, is the part of the order that relates to the Government's claim. A. Oh.

Q. What happened with that; that is what I want to know. A. Well, the Government hadn't appeared.

Just one second, let me see what it says. It mentions everybody who has appeared, but the Government's name is not among them.

It said in the presence of Lester Sandlesc, solicitor for

(2675)

the complainant, Walter T. Kohn, of the New York bar, and Louis Goldberg, solicitor for the defendants herein, and in the presence of Klein & Klein, solicitors for Fay Kaminsky, and Leo Duzik, solicitor for Brill Equipment, Emanuel Margulies, solicitor for Abe Warshaw and Max L. Rosenstein, solicitor for Spacemakers of New Jersey, in the presence of Charles N. Kors and Michael G. Alenick, appearing for intervening creditors, and Murray Creiman, solicitor for Wallace H. Gibson; then it is ordered that the Walter's claim be expunged; that the Isabella Sugar claim and Spacemakers and Blue Ribbon Trucking Company be expunged; the Brill Equipment Company be allowed in reduced amount; Gibson in reduced amount; Pepsi-Cola in a reduced amount; Warshaw, reduced amount; Fay Kaminsky be allowed in a reduced amount; that the bill of complaint as to Loraine Food Corporation be dismissed.

It is ordered that the account of the receiver be approved and confirmed.

Then the fees and allowances are fixed.

That after making the aforementioned payments and allowances, the balance in the hands of the receiver be paid to the Collector of Internal Revenue on account of social

(2676)

security taxes and withholding taxes, as set forth in paragraphs (a), (b), (c) and (d) of the said offer annexed to the petition for instructions; and it is further ordered that after making the aforementioned payments the receiver file a statement of distribution with the clerk.

It is further ordered that upon the filing of the statement of distribution the receiver be discharged; that the offer of August 20th be annexed to the petition, upon which the foregoing order to show cause was issued, be accepted; the bill of complaint be dismissed upon condition that the defendants pay the general creditors, as set forth in Schedule B, 10 per cent of their claims, except as modified by the Court.

Q. In other words, your offer that you made was adopted by the Court? A. The offer was accepted.

Mr. Wessel: You haven't finished reading it. I don't think he is finished reading it, counsel.

Isn't there some handwriting at the bottom of the order?

The Witness: Sir?

Mr. Wessel: Isn't there some handwriting at the end of the order?

The Witness: Yes.

(2677)

Mr. Wessel: I am sorry.

A. (Continuing) That the books and records in the possession of the receiver be returned to the defendants upon pay-

ment of 10 per cent being made to the general creditors in accordance with this order.

Yes, sir, that was written in.

Q. Then the Government's claim for income taxes was disallowed? A. It was not allowed because it wasn't supported.

Mr. Stryker: If we could stop now, I think I could shorten this. I think we are at about the recess time, are we?

The Court: We will take a 10-minute recess now. Don't discuss the case.

(Short recess.)

By Mr. Stryker:

Q. Did the government dispute that all these companies were consolidated companies or a consolidated claim; did they dispute that? A. I didn't hear the question, sir.

The Court: Read it.

(Question read.)

Q. The receivership, of course; that is what I am talking about. Did they dispute that there? A. That was (2678)
right in my offer. It was set forth that the joinder of Loraine was a mistake and it should be dismissed. If you will let me have the offer I will read that part to you. I am quite sure that is in the offer.

Q. Have I got it? If I can find it. That is in Exhibit NNN-2 for identification.

(Handed.)

A. Item No. 5. The title of the proceedings to be amended so as to eliminate as one of the defendants the Lor-

aine Food Corporation which is not and never has been an affiliated or associated corporation, the name having been included erroneously in the title of the proceeding.

A copy of this letter was attached to the order to show cause which was sent to everybody.

Q. Now, did the Government ever appear from the order, final order? A. The Government never appeared or appealed.

Q. Never appeared or appealed? A. Or appealed.

Q. Either one. All right.

Was there finally an adjudication that the receiver be discharged of his duties by the Court? A. Will you let me have that other exhibit, please, the final exhibit, the final

(2679)

decree. I had it here a moment ago.

Q. Wait a minute, I will see if I can find it.

Here it is, I think, NNN-3 for identification (handing). A. Ordered that after the making of the aforementioned payment, the receiver file a statement of distribution with the clerk of the court; it is further ordered that upon the filing of the said statement of distribution, the receiver be discharged from his trust; it is further ordered that the offer of August the 20th, 1948, as annexed to the petition filed herein, upon which the aforegoing order to show cause was issued, be accepted, and the bill of complaint filed herein be dismissed upon condition that the defendant pay to the general creditors, as set forth in Schedule B, the 10 per cent of their claims.

And that was done, the petition was dismissed.

Q. I show you Defendants' Exhibit NNN-53 for identification and ask you if you can identify that document? A. Well, this is the final—the receiver's report of distribution reports the distribution of all the moneys remaining on hand in accordance with his report made on the 24th of

August. It shows the amount of money on hand and the
(2680)
payments which cover all of the moneys on hand.

The last item was Collector of Internal Revenue taxes, $1,448.58.

Q. That is the withholding taxes? A. That is the withholding taxes.

Q. And what is the balance in the hands of the receiver that he distributes? A. He finally distributed $12,240.18.

Q. Now let me take these a minute. I show you Defendants' NNN-3 for identification. I think you have already identified it as the final order, have you not? A. Yes.

Q. Now, in that order did it provide for the turning over of the books to the various corporations? A. That after the payment——

Q. Read the last part. A. That the books and records in the possession of the receiver be returned to the defendants upon the payment of 10 per cent being made to general creditors in accordance with this order.

Q. All right. Now, do you know whether those books and papers were turned over to the defendants? A. I know they were not turned over.

(2681)

Q. Did you take steps, representing them, to find out what had happened to the books and papers that the Court had ordered turned over to the defendants? A. I did.

Q. Have you some documents relating to that matter? A. Well, I have copies of the letters which I sent to the various people demanding them.

Q. Get those out for me, please, and then maybe I will do it rapidly.

(Handed.)

Q. You are showing me carbon copies of two letters, written by you to the people, to the addressee mentioned; is that right? Is there another? A. What's the date of that letter?

Q. June 2, 1950, and February 8, 1950. No, wait a minute, June 2, 1949, February 8, 1950. A. February 8?

(2682)

Q. That is the way I read it, yes. A. Yes, that's right.

Q. All right, and you are showing me another letter? A. Received from the receiver.

Q. A letter written by the receiver. A. Yes.

Mr. Stryker: Will you kindly mark these, Mr. Dilberian, for identification.

Q. While I am getting them marked, tell me as briefly as you can the story of your efforts to get the books and who you talked to and what you found?

Mr. Wessel: From your own knowledge. You do know the difference between hearsay, Mr. Kohn?

The Witness: Sir?

Mr. Wessel: I say, you know the difference between hearsay and your own information, I am sure.

The Witness: I hope so.

Mr. Wessel: Will you please do this to your own knowledge and not as to conversations as to things you learned and heard.

The Witness: Yes, sir.

Q. All right, go ahead. A. There came a time every payment had been made. One creditor, whose claim had been filed irregularly, made a claim, and I sent him his dividend, so that was competely finished. In that court in

(2683)

Jersey they have a special auditor, who is not accountable

Q. Do you recall having appeared on at least two occasions in this receivership?

Mr. Stryker: Could I just—I don't want to interrupt, but could I have clarified who the "he" was?

Mr. Wessel: I think counsel will have opportunity for redirect.

Mr. Stryker: If you don't want me to do it, (2705)

I won't do it. I thought it would be nice to clear it up.

Q. In September? A. What is the date of the first hearing in that testimony?

Q. Well, I am referring—— A. The 7th?

Q. I am referring now to certain occasions on which you testified, September 1948—you didn't testify, but you appeared and made statements. A. I may have made a statement but I didn't testify.

Q. No, you didn't testify. A. I couldn't, because——

Q. Do you recall having appeared and made certain statements on behalf of your clients? A. I was there on the 7th and on the 13th, yes, sir, and I was there on some other dates.

Q. How is your recollection so good on these dates? A. Because I looked at my diary last night, and my diary last night shows that the order to show cause, which was shown me this morning, was returnable for the first time on September 7th, and it was adjourned for a week to the 13th. That I remember.

Q. I see. So you were there on the—— A. 7th.

Q. And 13th. Does it indicate whether you were present on August 3rd? Do you have your diary with you? (2706)

to anybody, who checks all figures, and he asked me to give him a statement of the amount which had been disbursed; and I went before him and I made my complete report, and then I wrote a letter, copy of which I just handed to Mr. Stryker, to the receiver.

Q. You mean you wrote it not to me but to the receiver? A. Yes, to the receiver, and I wrote a letter to Mr. Nadel, asking for the books. Now, I got a letter from the receiver, which is there, and I had a talk with Mr. Nadel, in which he told me——

Mr. Wessel: Now you know that is hearsay, Mr. Kohn.

Mr. Stryker: Wait a minute. Let's stop here for a minute.

(Defendants' Exhibits PPP, QQQ and RRR marked for identification.)

Q. This PPP for identification is the first carbon copy that you handed me, isn't it? A. Yes, that is the letter of February 8, 1950.

Q. Is that a copy of it? A. It is a copy of the original which I sent.

Q. You identify it as such? A. Yes.

(2684)

Q. Written in the ordinary course of business in your profession? A. Yes, in my office, and mailed in the regular——

Q. And mailed in the regular course of business? A. Yes.

Q. Is the same also true of QQQ for identification, being a letter of June 2nd, nineteen—— A. Yes.

Q. 1950—no, 1949. A. That's right. That was the first letter I wrote.

Q. Naturally it would be. All right, would your answer be the same with regard to that letter? A. Yes.

Q. Then did you receive, in response to your letter of February 8, 1950, addressed to receiver, Mr. Boyle, receive a letter from him of which the original is RRR for identification? A. Yes, sir. This is the letter.

Mr. Stryker: I offer these documents thus identified, in evidence.

Preliminary Questions by Mr. Wessel:

Q. Mr. Kohn, is there any conceivable theory in which these documents can go into evidence other than as hearsay? They are hearsay, aren't they?

Mr. Stryker: One moment. I think that is (2685)

facetious.

A. Under the order of the court, I was entitled to the books.

Q. Are these hearsay or not, Mr. Kohn? A. No, sir.

Mr. Wessel: They are not hearsay. I have no objection.

The Court: All right.

Mr. Stryker: All right, let's have them.

The Court: Let me see them. I will make my own decision.

(After looking) Do you stand on your objection?

Mr. Wessel: I withdraw the objection and reserve the right to cross-examine this lawyer on whether or not these documents are hearsay, as to whether or not those documents were turned over to the Government.

Mr. Stryker: You will have a chance in a minute.

Mr. Wessel: I trust so.

The Court: All right, they are received.

By Mr. Stryker:

Q. While I am getting them marked, did you try to get those books and papers that the court ordered turned over (2686) to the defendants? A. Yes, sir.

Q. Did you get them? A. No, sir.

(Defendants' Exhibits PPP, QQQ and RRR for identification received in evidence.)

Mr. Stryker: Now, I am reading, Mr. Foreman, ladies and gentlemen of the jury—I will show it to you in a minute—letter of Mr. Kohn, carbon copy of the letter from his file that he wrote to Mr. Boyle, the receiver, on February 8, 19—wait a minute, I am wrong on the date. I didn't get the dates right.

Strike what I said.

I am showing you first—I will show you this in a minute—QQQ in evidence, a carbon copy of the letter written by Mr. Kohn to Mr. Ravin.

Q. Who is Ravin? A. The attorney for the receiver.

Mr. Stryker: It said:—(reads to jury.)

That is the first document. What is the date of that? June 2nd.

I think the next one in order is February 8, 1950, a letter addressed by Mr. Kohn to Mr. Boyle, the receiver. (Reads to jury.)

The next letter is March 3, 1950, which Mr. Kohn says is the original of the letter that Mr. Boyle wrote him, and it said: (reads to jury.).

(2687)

By Mr. Stryker:

Q. After the receivership had concluded, did you receive this document which has been marked long ago as YY for identification (showing to witness)? A. Yes, sir.

Q. Who gave you that document? A. Mr. Roth.

Q. That is dated, as I read it, 10/17/50; is that correct? A. Yes, sir.

Q. October 17, 1950. A. That was written on a desk pad, on my desk pad, my personal pad.

Mr. Stryker: All right, I offer the document.

Mr. Wessel: Same objection as before.

The Court: May I see it?

Mr. Stryker: Sure (handing).

The Court: All right, I will sustain the objection.

Mr. Stryker: What does your Honor say?

The Court: Sustained.

Mr. Stryker: I except.

Q. Mr. Roth has testified here, Mr. Kohn, that the last sentence of this paper might have been written in after he signed it; I ask you to look at that document and state whether there is a shred of truth in that suggestion made by Mr. Roth? A. The whole paper is in his handwriting.

(2688)

Q. Is there a shred of truth in his suggestion that some last part there was written in after he had signed it? A. No, it couldn't be. He wrote the whole thing, every part of it. There isn't anything on that except in his handwriting.

And also July 29th? A. One at a time. What is the first one?

Q. July 29th and August 3rd, 1948. A. July 29th?

Q. You do have that? A. "Ten o'clock, Bart Boyle, 1 Exchange Place, American Brands, Tuesday at two." I don't know whether it went on—Roth was there and Lawn and there. I don't know whether it went on that day. Let's see, Tuesday, Tuesday the 2nd—yes, that was adjourned to Tuesday, August 3rd, at two o'clock. I don't know whether there was any hearing on on the 29th.

Q. Well, now, on August 3rd, 1948, do you recall a good deal of discussion between counsel and the receiver and yourself as to whether or not the receiver was going to sue Mr. Giglio, Mr. Livorsi and Mr. Roth for $195,000? A. Was there anything in the record there on that?

(2707)

Q. I would like to ask for your own recollection, sir. A. I don't remember that. I have no recollection of that.

Q. Well, now, see if the—— A. Well, six or seven years ago, I can't be positive.

Q. Would you deny that on August 3, 1948, Mr. Ravin, who was counsel for the receiver, as you have already testified, said that the receiver should sue Giglio, Livorsi and Roth for the $195,000 they owned the corporation; do you recall that? A. I don't recall it, but if it is in there, that is one of the blessings of having a stenographer present, to take it down.

Q. Let me see if this would refresh your recollection, a statement by Mr. Ravin:

> "In answer to your Honor's question, my answer would be that as the record stands now, Giglio, Livorsi and Roth owe the corporation $195,000. It would be the receiver's duty" ——

A. Giglio, Livorsi and Roth?

Mr. Stryker: All right. Now I offer it.

The Court: Same objection?

Mr. Wessel: Same objection.

The Court: Same ruling.

Mr. Stryker: Same exception.

Q. Mr. Kohn, passing to another subject, did there come a time in the year 1950 when Mr. Lawn asked you to represent him and others with respect to certain informations that had been filed in this court?

Mr. Wessel: I take it this is only offered against the defendants Livorsi, Giglio, and American Brands Corporation, and not with respect to the defendant Lawn, who has just rested; is that correct?

Mr. Stryker: I am offering it generally for what he did in this matter.

Mr. Wessel: Because, as I understand it, the defendant Lawn has just rested the case.

Mr. Stryker: That is right.

(2689)

Mr. Wessel: Therefore, the jury should consider this only in connection with the other defendants, if that is correct.

Mr. Stryker: Everyone is charged here with a conspiracy and it relates to all of them, whether anybody has rested or not.

Mr. Wessel: Well, I think my point is clear. Counsel should indicate his offer, the nature of his offer of his testimony.

The Court: Go ahead.

Mr. Stryker: Is there a ruling before the Court?

The Court: I said, go ahead. I have overruled the objection. I don't know whether there was an

objection, but whatever there was, I have overruled it.

Mr. Stryker: All right, sir, thank you.

Q. Did you represent the defendants in those informations? A. Generally, yes, sir.

Q. Will you tell his Honor and the foreman and the ladies and gentlemen what you did in connection with those informations?

Mr. Wessel: I object. It is completely irrelevant if your Honor please.

The Court: Sustained.

Mr. Stryker: It is part of the history of this case.

(2690)

The Court: Whether it is part of the history of this case or not, we have been over it and——

Mr. Stryker: This is a different part.

The Court: All right.

Mr. Stryker: Your Honor takes the same position?

The Court: Yes.

Mr. Stryker: I respectfully except.

Mr. Wessel: I should make it clear that my objection is also as to form, because the question is too broad. If counsel wants to limit something, we will then see whether it is relevant.

The Court: I only discussed the one ground raised. I recognize your other point.

Q. Were you subpoenaed by the Government to testify in this trial? A. Yes, sir.

Q. Were you told to hold yourself in readiness for a 24-hour notice to testify here? A. That was put in writing.

By Mr. Wessel:

Q. I know you would like to read the whole thing, Mr. Kohn—— A. No——

Q. —but at this time—and I will give you an opportunity to do so, I assure you—at this time, is your recollection refreshed in any way?

Mr. Stryker: Pardon me; I submit that this witness has been practicing law for many years and is entitled to at least respectful conduct, and the comment, "I know what you would like to do," is not a question; it is an observation. It is not fair.

Mr. Wessel: I apologize for it and I withdraw it.

Mr. Stryker: Thank you.

Q. Now, is your recollection——

(2711)

Mr. Stryker: Strike that.

Q. Do you now recall, Mr. Ravin, the attorney for the receiver, saying, with regard to the $195,000 owed to the corporation by Giglio, Livorsi and Roth, that it would be the receiver's duty to institute suit to recover that? A. I remember now, after reading that, that he may have said something like that.

Q. Now, after that happened, did you then come in with a group of documents which you produced to the Court to show that they didn't owe that money? A. I don't know. If I look at the entire testimony, I can tell. I certainly must have answered him.

Mr. Stryker: While you are doing that, could I have marked for identification the document which Mr. Wessel has shown to the witness, just mark it for identification. I would like to have it.

Q. Were you ever called by the Government to appear and testify in this trial? A. Not yet.

Q. Well, the Government has rested, so you—— A. Well, they could call me in rebuttal.

Q. Oh, yes, but up to date they haven't. By the way—— A. I was also served by your office with a subpoena.

(2691)

Q. That's right, but you came here, I asked you to come? A. Yes.

Q. Only one other thing—— A. No, I have a written subpoena.

Q. From me. A. I refused to appear without a written subpoena.

Q. All right. Now, did you meet me coming back from lunch today on the street? A. I saw you on the street, yes.

Q. And did you start to say something about the case and I did say to you that I didn't care to discuss the case with you while you were on the witness stand? A. It was just a passing pleasantry. I didn't talk to you at all about it.

Q. You didn't talk, but did I say that to you? A. That is what you said. I didn't even start to talk to you about it.

Q. I haven't talked to you, nor has anyone on my side talked to you since you took the stand this morning? A. No, sir.

Mr. Stryker: That is all.

The Court: All right, Mr. Wessel.

Mr. Stryker: Your Honor, I tell you what I

(2692)

would appreciate if I could. It is so hard for me——

The Court: What is that?

Mr. Stryker: I have one very short witness, I think. I would love to get him on and get him about his business.

The Court: Mr. Stryker wants that marked.

Mr. Stryker: The one you have been talking about here, the page or two.

Mr. Wessel: Page 120.

Mr. Stryker: Our exhibit for identification.

By Mr. Wessel:

Q. Now, Mr. Kohn, I am going to show you five photo- (2712)
static pages from the books of the Loraine Corporation and ask you whether or not you recall having introduced these five pages into evidence in a hearing before the receiver in this proceeding?

Mr. Wessel: For the record, I will identify them as accounts Nos. 14, 16——

Mr. Stryker: Turn on the light for him, Mr. Wessel.

Mr. Wessel: I think I had better get the book.

The Clerk: Is this entire document to be marked for identification?

Mr. Wessel: Yes.

(Marked Defendants' Exhibit SSS for identification.)

Mr. Wessel: Would you strike the last question.

Q. I show you, sir, Exhibits 79-A14A, A14B, A14C and A14D, and ask you if those are not pages of the books of the Loraine Corporation which you introduced photostatic copies of in the course of the receivership? A. Frankly, I have no recollection on that subject, no independent recollection.

Mr. Wessel: If the witness is the one I have seen here in court, he is not a short witness.

The Court: What is his name?

Mr. Stryker: All right, if you don't think so.

Mr. Wessel: Mr. Petello, I take it. He is not a short witness.

Mr. Stryker: All right.

Mr. Wessel: I am sorry, but——

The Court: All right.

Cross Examination by Mr. Wessel:

Q. Now, Mr. Kohn, you are a lawyer? A. Yes.

Q. Have a good deal more experience than I am. A. Yes.

Q. Isn't it a fact that you have no personal knowledge as to whether or not the Government got those documents from Mr. Nadel? A. I just so happen to know that they did.

Q. Where did you find it out from? A. I found it out in conversations with some of the agents.

(2693)

Q. Now, if the agents tell you something, is that or isn't it hearsay? A. No, I had two photostats of so-called forthwith subpoenas which were given to me by Mr. Nadel, to show that two officers of the Government had come into his place and had escorted him to New York with the books.

Q. Now let me ask you this, sir—— A. (Continuing) And I asked the agent about that and the agent told me yes.

Q. What the agent told you is what you are basing your testimony upon, is that correct? A. The entire story.

Q. What the agent told you, what Mr. Nadel told you; is that correct? A. It is supported by what Mr. Nadel has told me.

Q. Now, does your diary contain anything about this subject? A. On what date was that?

(2713)

Q. It would be on the same day, August 3rd. A. August the 3rd? No.

Q. 1948. A. No. Just I was there before Bart Boyle from 2:00 o'clock to 3:30, and then I took the train to Deal.

Q. Now, do you recall the report of Nadel showed loans receivable from Mr. Roth in the amount of $18,500? A. I remember that.

Q. Do you remember introducing into evidence in the course of the receivership a series of checks from Mr. Roth to Mr. Giglio, and to Mrs. Giglio, in which those payments, in which that loan by Mr. Roth and the corporation was paid to Mr. Giglio; do you recall that? A. Very dimly. I would like to see the record of that, because I am not sure it was done just that way.

Q. Do you recall doing anything about the checks of Mr. Roth's? A. Sir?

Q. Do you recall doing anything about those checks? A. Well, I remember there was something about the checks, that when money had to be paid and Mr. Giglio wasn't in New York the checks were drawn to Roth or he drew the checks to himself and cashed them.

There was something in the case about that, if I am not

(2714)

mistaken.

Q. And then gave the money to Mr. or Mrs. Giglio? A. And gave the money to—for payroll and things like that.

Q. Not to Mr. or Mrs. Giglio? A. That I don't remember.

Q. Isn't it the fact that on August 3, 1948, you introduced into evidence a number of checks of Mr. Roth's total-

ing $18,500, drawn to the order of William J. Giglio, and endorsed either by William Giglio or Margherita Giglio and deposited in their bank accounts? A. I have a faint recollection of something like that, but I would like to see the testimony to check it for correctness. I don't want to do any guessing.

Mr. Wessel: I think it is a good time to recess, if your Honor please.

The Court: All right. We will recess now. Don't discuss the case among yourselves or with anybody else.

10:15 on Monday.

Mr. Stryker: Now, on all these things here, do you want to use these papers I have produced any more, Mr. Wessel? If not, I don't know what to do with them.

(2715)

The Court: I think we can let the jury go while we figure out about the papers.

(Jury out.)

The Witness: Well, is there any way in which the receipt for that particular testimony could be honored? He gave me a receipt and promised to return it to me forthwith. Is there any reason why I can't get it back——

Mr. Stryker: I don't know what he is saying, but——

The Witness: —and read it?

Mr. Stryker: Your Honor——

Mr. Wessel: Mr. Kohn, this is not your book.

The Witness: That is not the——

Mr. Wessel: That is not your book. I have no idea where yours is, if you, in fact, did have one.

rect? A. Therefore, I asked the Government to be present and attend and prove their claim.

Q. Yes, I understand that. However, I still want to refer to the question. A. Yes.

Q. As of August or September 1948, the situation as to whether these were proper carry-back losses or whether the corporations were even properly consolidated, was all one of fluidity, if I can coin a word, maybe? A. Well, the claim had been made; it had not been disallowed; I wanted the Government to come up and do one thing or the other, either say "We won't" or "We will," and if they say, "All right, we will," we would make the settlement of the other claims, the other payments, and we could go on with that proceeding. But the Government did not show up.

Q. Incidentally, you have had a good deal of bankruptcy experience, I understand? It is, of course, the fact that a tax claim of the Government is not discharged in

(2697)

bankruptcy; that is true, isn't it? A. Correct.

Q. And it wouldn't be discharged in a receivership either? A. Correct.

Q. So that no matter what either a Federal Court or a State Court were to do, it wouldn't dissolve a Federal tax claim?—A. Right, but they could say the Government has no claim.

Q. They could say that, but it wouldn't stop the Government—— A. If the Government doesn't show up and the Government defaults, if the Government submits itself to the jurisdiction of the court by filing a claim, and then when the court sets a day for trial and it does not show up, that decision by default is just as much res adjudicata as though it had been decided.

Q. Let's take the regular Federal bankruptcy, and you have had a good deal of Federal bankruptcy experience;

you are a member of the State Bar in Jersey? A. Federal bar.

Q. Federal, not State. A. Not the State. I was admitted especially in this case.

Q. But you are both Federal and State in New York. A. Yes.

Q. Let's say in the regular Federal bankruptcy proceeding, notice of course is sent to the Government, and there may be a tax claim. A. Yes.

(2698)

Q. And the Government files its claim in the regular course? A. Yes.

Q. Is that claim ever barred? A. No, sir.

Q. Never. In other words; it can't be barred. A. If the claim is fixed, but if the claim, if it should be made, the claim is made that there was a carry-back, and therefore the Government had no claim, and the Government says, "You are right, no claim, we don't appear,"—default. That is the end of that claim.

Q. Well, I am coming to that. Maybe I had better get to that right now since you are jumping me a little bit. A. All right.

Q. In other words, if the final decree, let's say, of the Federal bankruptcy court says, "Government has no claim," and the Government has appeared and hasn't contested that just like anybody else, the Government would be barred; that is correct, isn't it? A. I agree with you, the Government will be barred.

Q. And if the Government submits itself to the jurisdiction of a State court and comes in and files a claim, and the State court said, "There is no claim," and the Government doesn't say, "You are wrong," again it would be barred because the State court would also have jurisdic-

(2699)

tion, provided the Government has submitted itself to its jurisdiction? A. By filing a claim amending the claim, yes, sir.

Q. So in other words, you have to look to what the State court or Federal court does to see whether or not that claim has been barred; am I correct about that? A. Quite correct.

Q. Now, if I may pass from that for a moment. You did examine the report of Mr. Nadel, I take it, quite thoroughly in connection with your work? A. Thoroughly, yes, sir.

Q. And when you did so, were you aware of any portions of the tax law relating to the taxes of these various corporations? A. Yes, sir.

Q. Specifically, were you aware of Section 141 of the Internal Revenue Code, on consolidations? A. I think I checked it. I would like to look at my work papers to see.

Q. I don't want to get technical or detailed, but do you recall having looked at Section 141 and finding that it provided among other things that in order for there to be a proper corporate consolidation, there would have to be a relationship of parent-subsidiary, with the parent owning

(2700)

95 per cent of the shares? A. That's right; at least 95 per cent, so it would entitle it to file an affiliated report.

Q. That is correct. A. But all the reports had been affiliated reports, and there had been no objection.

Q. Yes, I understand that. A. Except the Loraine, which had never been in.

Q. Now I wanted to come to that. You are beating me to it, Mr. Kohn. A. I am sorry.

Q. Which is all right, but let's come to Loraine now. Loraine was owned 50 per cent by Mr. Damaro and 50 per cent by Mr. Giglio; is that correct? A. I haven't the slight-

est idea. I don't know of my own knowledge. I don't know.

Q. Didn't you have any discussions—— A. I am not basing—all I know was, I was told that Loraine was improper; everybody admitted it was improper; so my office stated that Loraine should be stricken out and nobody objected, but nobody.

Q. Weren't you advised that Loraine was owned by different persons that owned the various corporations that were properly in the receivership? A. I was told that other people owned it. It wasn't affiliated.

(2701)

Q. Well, now, what other people were you advised owned it, and if you can't remember all of them, give me some of them. A. It is lucky I remember all the names so far. My memory for names isn't so good.

Q. Well, it was more than Mr. Giglio; in any event some other persons besides Mr. Giglio, is that correct, that owned Loraine? A. I am not positive. I don't remember. That is the first time I said I don't remember, and I don't.

Q. Have you ever heard the name, Louis J. Damaro? A. Yes, I have heard that name.

Q. Did you meet him at any time in connection with this corporate receivership? A. No, sir; I met him in other matters.

Q. Incidentally, did Mr. Angelo Paliotto—— A. Yes, I met him with Mr. Paliotto, in connection with the Metuchen River airport, which they had a contract to build for the Government.

Q. That was in connection with DuBois Associates? A. DuBois Contracting Company, yes.

Q. Mr. Giglio had an interest in that company, did he not? A. I never heard of it until this moment. I didn't

know, and I still don't know. I don't know whether you intend to tell me that, but I didn't know it.

(2702)

Q. If I may come back to Nadel's report—I will come to Loraine in a moment—this company, when it went into receivership, in the consolidated statement, dated as of December 2, 1947, had total assets, total assets, of $461,000 odd; am I correct about that? A. That's right; half and half.

Q. Now—— A. Half current and half capital, approximately, if my memory serves me rightly.

Q. Pretty close; that is correct. Now, do you recall the amount of the claim of the company that threw them into this receivership? A. No, sir; I don't.

Q. Would $3,500 be about right? A. That sort of fits in with my recollection—, something like that.

Q. You examined this—— A. They weren't thrown into bankruptcy. This really corresponds to what we know here as an equity conservation suit, that is, a suit brought for the purpose of conserving the assets, so that no one creditor gets it as against others, and then they appoint a custodial receiver to make sure that the assets remain—that the watchmen don't steal it.

Q. Now when you studied Nadel's report, did you note the schedule, which I am trying to find, which relates to cash withdrawals from the various corporations? A. Yes,

(2703)

sir.

Q. Did you inquire about those cash withdrawals? A. The money wasn't there. That simply meant I had to get along with what was left.

Q. In other words, you didn't——

Mr. Fraiman: Exhibit H.

A. Quite frankly, I was more interested in the mechanics of trying to get the entire matter adjusted. Everybody was pulling in every direction. There were about twenty lawyers, and everyone had his own interest.

Q. Well, you were aware, I take it, then, of schedule H, which shows the total of checks drawn to cash in the year 1946, in the amount of $84,000-odd? You were aware of that? A. Yes, sir.

Q. And you were aware of schedule I, which shows the total of checks drawn to cash in the year 1947, for American Brands Corporation only, of some $18,000-odd; right? A. Well, offhand, yes, that——

Q. Were you also aware of the almost $200,000 in loans receivable on the books of these various companies? A. I had read that all in connection with the letter of Mr. Nadel and the statements that had been made to me, whether in the report of Nadel, or the statements made to me that what appeared to be loans were really repayments of ad-

(2704)

vances made that had been used to finance the companies.

Q. Advances by whom? A. Everybody interested.

Q. Well, would that include Louis Roth, for example? A. I don't know. I knew it included Giglio. I don't know whether Roth really advanced any money. I thought he was more of a bookkeeper and accountant.

Q. I see. Didn't you testify in this—not testify, but didn't you appear and make statements in this receivership proceeding on behalf of the defendants Giglio, Lawn and Livorsi? A. Anything that I said was all in the record, which is mentioned in that letter, and that receipt.

Q. Do you have a copy of that record? A. No, he took my only one.

Q. And you haven't seen it since? A. I haven't seen it since.

Mr. Stryker: Just a moment. Pardon me, Mr. Kohn.

I submit the same procedure that was suggested to me should be proper. If he wants to refresh his

(2708)

recollection, the proper way is to show him a document.

Mr. Wessel: I am not refreshing this witness' recollection, counsel. I am cross examining.

Mr. Stryker: Is that it? Then I object to it as incompetent, irrelevant, immaterial, what somebody else said.

If there is some question about what he said or did, and Mr. Wessel has a document, I submit the proper procedure is to do just the way I did with, well, for example, the hearings before Judge Skelley Wright, and with Roth.

The Court: The way you did with respect to which witness, Mr. Lubben or Mr. Leone?

Mr. Stryker: Roth was the one I had in mind.

The Court: All right. I see. Show it to him, Mr. Wessel.

By Mr. Wessel:

Q. I want to show you, sir, the statement of Mr. Ravin which appears at page 120 of the minutes. A. May I look at the page before to see——

Q. I would appreciate, sir, if you would just look at this page for the moment and see if it refreshes your recollection——

Mr. Stryker: Won't you let him see the pages?

(2709)

Mr. Wessel: I'd rather not at this time.

Mr. Stryker: I submit, in fairness, if he has the document there, the witness should be allowed to see whatever pages relate to this matter, and not just be flipped with one page, told he can't look at another.

The Court: Well, we'll see.

The Witness: Your Honor, on this page it says: "Mr. Kohn: I have them."

I don't know what that means.

By Mr. Wessel:

Q. I am not asking you about that. I am asking whether or not you recall Mr. Ravin, who was the attorney for the receiver, saying, with regard to the $195,000 owed by Giglio, Livorsi and Roth to the corporations, it would be the receiver's duty to institute suit to recover that.

Now, do you recall that? A. May I look to see what my answer was to that on the next page?

Q. I am only asking you, Mr. Kohn, what Mr. Ravin said, if you heard it on that occasion. Now, you don't have to see what you said. Maybe you deny that. A. May I look at the front of the page to see if I was there at that meeting?

(2710)

Q. You can see the words "Mr. Kohn" right above, can't you? A. Yes.

Q. You have already read that, haven't you? A. I don't know what it means.

Q. You don't recall? A. "We just can't accept them." I don't know what that means. "That was the reason for my interrupting Mr. Kohn's remarks."

The Reporter: I can't hear you.

The Witness: I am just reading to myself.

The Witness: Well, I surely got a receipt for one. I couldn't have fabricated it.

Mr. Stryker: I don't know whose book it is, but——

The Court: Mr. Kohn, I guess you can go and come back at 10:15 Monday.

(2716)

The Witness: Is there a place where I could leave these books here so I don't have to carry them down to the country and back again?

Mr. Stryker: We'll take care of them for you.

The Witness: Will you?

Mr. Stryker: Leave them here. We have already a load enough, but we will take care of yours.

Judge, the papers that Mr. Wessel showed, I don't know what they are at all, but I think I have a right to examine them, now that they have been shown to the witness. I would like to have that opportunity.

Mr. Wessel: Counsel will have his opportunity before he gets to redirect. I do not want my cross examination interrupted by anybody reading the very documents I am using to cross examine on.

Mr. Stryker: I don't know why you are so particular about that in view of the fact that you wanted to examine one of my witnesses on cross examination while he was on the stand.

The Court: Well, let's not start tracing back.

Mr. Stryker: I think it would be common fairness, and I believe it is within the rule, having

(2717)

identified that, the witness evidently having no recollection, and I haven't any copy of it, never have seen it to my knowledge, to let us see what it is; that is all.

The Court: Well, let's pass on that when we get through with this subject on cross. I don't understand that it is completed yet, and I don't see any prejudice for your not having them right now.

Mr. Stryker: Well, then, maybe that will give me a little bit of time.

Now, on these other things here, your Honor, I don't know whether Mr. Wessel wants to use them or not. If he doesn't, I thing the substance of everything I have wanted has been in evidence and I will be very glad to turn them back to Mr. Leoni.

The Court: Did the jury see all these documents?

The Clerk: With the exception of the last two; they didn't see 5 and 58.

The Court: You took back a couple of documents before they finished looking at them.

Mr. Stryker: I think that was this——

The Court: I don't know.

Mr. Stryker: I don't remember, Judge; I really

don't.

What do you do, do you keep these, the originals?

The Clerk: Yes.

Mr. Wessel: I am going to cross examine, I think, about some of those documents; at least, one of them has some handwriting on it.

Mr. Stryker: If he wants to, he has a right to. All I am interested in is that I don't break faith with the gentleman we dragged in from Trenton. I want to be sure what he gets back is what he gave.

The Court: Frankly, I don't understand why you didn't get authenticated copies of the documents you wanted to use. Have you got those there, Mr. Wolfram?

Mr. Stryker: We have some.

Mr. Wolfram: Some came in the mail today. We didn't have time to bring them into court this morning. That's why we had to put him on. I think we have some of the ones in evidence now. I don't know whether we have them all.

Mr. Stryker: Maybe we could settle that and let Mr. Leoni go home with his papers.

What I want to be sure is he gets back what he

(2719)

brought.

The Court: Well, what I want to be sure is that we don't have a situation where 11 jurors have seen one document and one juror hasn't.

Mr. Stryker: If there is anything like that, I agree with you. I can, of course, do this: I can give them to Mr. Leoni and ask him to come back, but he is a busy clerk and I would be glad to prevent that.

The Court: Mr. Stryker, you have them in now. What have you got in evidence, five?

Mr. Stryker: I don't remember; I think four or five.

The Clerk: Three, your Honor.

Mr. Wessel: Why can't we keep those three.

The Court: I think we will keep those three, if Mr. Leoni will permit us to do so; and give him a receipt for it, Mr. Dilberian.

The Clerk: Yes.

Mr. Stryker: And get the rest back.

The Court: You will get your authenticated copies; replace the originals and give him back the originals on Monday. How is that?

Mr. Stryker: We did have trouble getting these.

(2720)

I don't know what came in—it came in while I was on my feet. Mr. Wolfram, who has an encyclopedic knowledge of the papers, may tell me. I haven't.

The Court: You folks with your various stages of knowledge should get together and straighten this out.

Mr. Stryker: Let me get Mr. Leoni, the latter, the second, in here and see if I can straighten this out with him and Mr. Wessel, and not annoy you with it. I don't see why you should be bothered.

The Court: All right. That sounds like a very sound solution.

Don't take any of the exhibits away from the court before the jury has seen them all.

Mr. Stryker: That is just what I am talking about. I want to be sure they are here.

(Adjourned to February 14, 1955, at 10:15 a. m.)

(2721)

New York, February 14, 1955,

10:15 o'clock a.m.

Trial resumed.

The Court: Just before the jury comes in, I wanted to ask counsel, in connection with requests to charge, it would help me if I could have a brief summary of your version of the facts relating to the key charges—I mean, relating to the particular crimes charged as distinguished from general charges. General would be the part of every criminal charge.

Now, I think it probably would be better if I take those summaries ex parte from each of you; in other

words, give me such as whatever you wish. It is just for my help, and it is not necessary, for instance, for Mr. Stryker to disclose at this time what the balance of his defense is or for Mr. Wessel to outline his summation, either way. Just for an example, one of Mr. Wessel's charges, say, relates to counts 7, 8 and 9. Well, all right; it would help me without all of the details, if I could just have his idea of the outline of what he has proven with respect to those three counts. It will enable me, I think, to make my dis- (2722)
cussion of the law a little more understandable to the jury. That is all I need it for.

Mr. Stryker: Judge, I think your request is very good, and I certainly will comply with it to the best of my ability if you will give me time.

The Court: All right.

Mr. Stryker: You can see with—what have we got, three thousand pages of testimony, something like that, and I don't know, a couple hundred exhibits—of course I have had some notes kept as we have gone along, but to do that, so as to be intelligible to you and to be accurate, so you can rely on it, I will need a little bit of time, that is all. I want to do it. I should like to do it, if you will give me just an opportunity.

The Court: All right, Mr. Stryker. I don't want you to add to your difficulties. If putting down page citations is going to—I think that should greatly add to the time taken—I don't need that; all I want is really your rough general views on it.

Mr. Stryker: If you will give me a chance, I will do better than that. I will give you pages, and then you can see whether I am right or not, and I

think I have got, in a rough sort of way, what you
(2723)
want, from the help I have had from Mr. Wolfram and others, who have tried to help me, but I would like nothing better than to do just what you say, only I will have to have a bit of time on it, won't I?

The Court: Well, I don't know how fast the trial will move from this point on, and I certainly wouldn't want to hold up the course of the trial by this request.

Mr. Stryker: I wouldn't want to, but I will work, if necessary, all night, but somewhere along the line summing up is coming up, and to sum up, what is it now, six weeks' trial, I think, to get a kind of intelligible statement will require an awful lot of sweat on my part.

The Court: Don't let my request add to that and don't take time to get page citations. If there is some point of fact that escapes me, I can ask you about that, in particular, if I think it is important.

Mr. Stryker: I will tell you, Judge, I think in doing this, I think I will be able to, I think so, at least in major instances, give you page citations.

The Court: All right.

Mr. Stryker: And I should like to prepare just
(2724)
such a statement for you. I should like nothing better.

The Court: That will be a big help if you can do it.

Mr. Stryker: Just give me some kind of time to do it. I have got to work on the summing up; the requests to charge, I think, are pretty nearly ready—no?

The Court: Let me put it this way, Mr. Stryker: I am not asking counsel for this. I would be receptive to it if I got it.

Mr. Stryker: Judge, your request is very welcome by me. All I need is the hourage to do it.

The Court: All right.

Mr. Wessel: May I make one correction in the record; page 2607 of the record, with reference to the grand jury proceeding in 1953, I said "It didn't appear he (referring to Leone) was there." I meant that it doesn't yet appear in this record that he was there. I think I should state for the record that Mr. Leone and Mr. Kilsheimer——

Mr. Stryker: What's the page, Mr. Wessel?

Mr. Wessel: 2607. Mr. Leone and Mr. Kilsheimer presented this case to the 1953 grand jury.

(2725)

I can't say who was in charge, though I think it was Mr. Kilsheimer.

The Court: I see. All right. I think we can get the jury in now.

Mr. Stryker: Your Honor, would you hold it a minute? We have a motion here that is short. Mr. Wolfram will state it.

Mr. Wolfram: If your Honor please, Judge Palmieri entered an order on October 21, 1954, that the Government furnish the defendants with a bill of particulars, and I am quoting, "of the source and amount of income on which it is alleged in the indictment that a tax was due to the United States, the amount of tax that it is alleged was due, and those portions of the income tax returns upon which the indictment is based that the Government claims are false."

Now, the bill of particulars that the Government served in connection with that order makes no mention of the alleged falsity of the distributive shares of the partners, set forth in the partnership information returns of Tavern and Eatsum, and on behalf of the defendants I now move to strike all of the testimony of the Government witnesses and exhibits relating to a reallocation of the distributive shares of the partnership income from Tavern and Eatsum.

(2726)

Mr. Wessel: May I state in connection with that, the defendants made a motion for reargument—I should say this is the first time they have ever objected to the bill of particulars served—they made a motion for reargument, saying that they couldn't figure out how this distribution was made by the bill of particulars, and in their affidavit they set forth that that was their difficulty. I replied in an affidavit, I said, "If you just sit down and subtract and add, you will find out how this distribution is worked out."

Then they inquired of Mr. Present on cross-examination last week as to this bill of particulars, and Mr. Present responded, "Well, in section number one of the bill of particulars it doesn't say anything about distribution, but if you go down to 4 and look at Giglio's personal share of Eatsum profits, it does pick up that half of the total, less Lubben's share, so it is just a question of arithmetic."

Now when they asked for a new bill of particulars on rehearing, Judge Palmieri denied it because of the fact that they could figure this out for themselves very easily.

The Court: All right, I will deny your motion.

Mr. Wolfram: Exception.

(2727)

The Court: All right, get the jury in.

(Jury in box.)

The Court: Friday, I think one of the jurors did not see one of the exhibits, if I am correct—two of the jurors. That exhibit was photostated and inadvertently a page was left out of the photostat. So we will have to defer your further examination until we get a photostat of the missing page. We won't neglect you.

WALTER T. KOHN, resumed the stand.

Cross Examination Continued by Mr. Wessel:

Q. Mr. Kohn, as I understand your direct testimony on Friday afternoon, it is your interpretation as a lawyer, based on your experience, that your offer to settle, plus the final order of the Court in September 1948, in effect barred the Government from ever thereafter asserting their claim for taxes, on the grounds that they should have objected when they were in court in September 1948; is that fair? A. That is correct.

Q. Putting it a little differently, I suppose, but still the same thing, the Government's failure to object in September 1948 stopped it from thereafter ever complaining about their not being paid; is that correct? A. I wouldn't make

(2728)

it as broad as that.

Q. Would you cut down my statement then to make it accurate? A. It was my point that having raised the ques-

tion in the offer that the sending of that notice to the Government, as I remember it, both at the Custom House in New York and at their office in Newark, that their failure to appear rendered the question res adjudicata that their claim was barred.

Q. Well, now, let's look at the facts in September, 1948. No claim for a carry-back loss had yet been filed, had it? A. I understood it had.

Mr. Wessel: May I have defendants' exhibit of the 1947 tax return?

The Witness: I would like to see the Nadel report.

Mr. Wessel: And the Nadel report.

Q. You will notice—and you testified to this, I believe, on Friday—that the Nadel report refers to a possible carry-back in the last two pages. A. It says, "On September 23, 1947, these corporations filed with the Internal Revenue Department an application for a carry-back loss, indicating that the estimated amount of expected net operating loss for the year 1947 would amount to $350,000 thereby offsetting the net return previously reported on the consolidated tax

(2729)

returns for these corporations for the year 1946 in the amount of $260,753.36. My examination indicates that the net operating loss of these affiliated companies as per their books and records for 1947 amounts to $196,402.83. These affiliated corporations have the further advantage of applying their net operating losses for the year '48 against the net operating income shown on the year 1946."

Now that report bears date of April 24, 1948.

Q. Did you take a look at that claim which was filed September 23, 1947? A. I saw it for the first time on the afternoon before Friday—on Thursday afternoon.

Q. Take a look at Exhibit 90 in evidence and tell me if that is what you saw for the first time on Thursday or Friday—Thursday afternoon? A. No.

Q. That is not? A. No, sir.

Q. You will notice that that is a paper filed September 23, 1947, isn't it? A. I don't think I ever saw that paper.

Q. Now let me ask you this, Mr. Kohn: do you think on September 23, 1947, before the end of the fiscal year

(2730)

1947, a claim for a carry-back loss could be filed for the whole year '47? A. It could be filed for the proportionate share—it could be filed for the length of time the corporation was in business for '47.

Q. And you think there is such a paper in existence? Am I correct? A. I don't know, but I was looking at the law this morning; I had checked the law very carefully; and it is extremely complicated with respect to the way in which this thing had to be carried back; and I understood that there was an accountant who was doing this particular thing and had filed every paper except one that should have been filed, an 846, I think it was, and I think that was subsequently filed.

Q. You have seen that paper, too, I take it? A. No, I had not. I hadn't seen any of the papers.

Q. What was the paper you were shown Thursday afternoon or Wednesday, whenever it was last week? A. You showed me an amended claim that was filed in September, after the petition had been dismissed, which I had heard about but had never seen before.

Q. No, I am asking you, sir. You referred to a claim filed with the Government, or a carry-back loss filed with

(2731)

the Government, which you had seen last week sometime; am I correct, or am I wrong? A. When I was getting out

these papers, I asked the receiver to give me a statement of what had been filed, and he had his accountant furnish me with a copy of a statement which sets forth these various claims, which I have in my bag. I did not personally make the investigation as to that tax report. I simply incorporated that in my offer and stated if the amount was greater, the offer—if the amount was correct, or if the amount were greater in so far as the withholding was concerned, the offer might be withdrawn.

Q. Who was it that furnished that to you, Mr. Nadel or—who was that? A. I don't know. I could look at it and see.

Q. Why don't you look at it? Is it in your brief case? And while you are looking, will you see if you have a letter there, copy of a letter of your own, January 14, 1949, and another dated January 17, 1949? A. Were those the letters that I brought here?

Q. No, they should be in your files. A. I haven't the files. These are only some extra copies of some papers that I happened to have. I thought I had turned over everything, but it would appear that——

(2732)

Q. Turned over to whom, Mr. Kohn? Mr. Kohn, you thought you turned over everything to whom? A. To Mr. Lawn.

Q. I see. Go ahead. A. This is a copy of a letter sent by Mr. Nadel to Mr. Ravin, that gave me the information that I incorporated in my offer.

Q. May I see that, please? A. Yes. There are some notations of cases and things in my handwriting on there.

Mr. Wessel: Let this be marked with the next exhibit number for identification.

(Marked Government's Exhibit 186 for identification.)

Q. This Exhibit 186 is the paper that you based your—— A. The offer on.

Q. —your belief that there was in fact a claim filed with the Government? A. No, that was the amount of the claim which had been filed. That is all I know. I had never seen the claim.

Q. Well, as I read this letter, and perhaps you can correct me, Mr. Kohn, it merely furnishes to you information of the various claims filed by the Government in the receivership. A. Correct; that's right.

(2733)

Q. It doesn't say anything about any request for carry-back loss having been filed. A. No, no, this simply gave the list, and I incorporated that list on my offer.

Q. Now do you know whether or not in September of 1948, when the receivership terminated—— A. That is, I think——

Q. —there had been filed with the Government any request for a carry-back loss? A. The only information I have is what was contained in Mr. Nadel's report.

Q. And Mr. Nadel's report doesn't have anything about that subject, does it? A. Yes, it does.

Q. Does it say that a claim for a carry-back loss had been filed? A. Yes. It says "On September 23rd these corporations filed with the"—"1947"—and I came into it in 1948.

Q. Now, I think we talked about this before. Is Exhibit 90 the paper that was filed in September 1948, September 23rd, 1948? A. I don't know. I never——

Q. In other words——

Mr. Stryker: Just a minute. Won't you let the witness finish his answer?

A. (Continuing) I don't know. I never saw that paper.

(2734)

Q. In other words, you didn't bother to look for or to see the particular paper that Mr. Nadel was referring to? A. My dear sir, Mr. Nadel was an accountant appointed by the court, disinterested. I never saw the man, I didn't know him. I saw these papers and I took what he said as correct. I took this letter as correct and I took his report as correct.

Q. Now let's go a little deeper into it, Mr. Kohn. A. Yes.

Q. You are saying, based now on over fifty years of experience, that in your view there may have been a paper filed September 23, 1947 with the Government, constituting a claim for carry-back loss for the year 1947; am I correct? A. That is correct; on September 23rd these corporations filed, 1947, these corporations filed with the Internal Revenue Department an application for a carry-back loss, indicating the estimated amount of expected net operating loss for the year '47, which really amounted to $350,000.

Q. Do you know what it amounted to? A. I don't. He says here, the way he computes it, it was $196,000 but what it amounts to I don't know.

(2735)

Q. Now that piece of paper that you are reading from, Mr. Nadel's report, this particular paper is on September 23, '47, and so forth, an application indicating that the estimated amount of expected net operating loss would amount to—that is future, isn't it? A. Yes.

Q. That doesn't refer to a piece of paper which says "We did have such a loss," did it? A. No, that's right, but the law says that you have got a right, a corporation has a right to state that their estimated loss is going to amount to that. I have all those sections.

Q. Then after that you file a return, don't you, this being Exhibit 110, which is the return showing a carry-back loss? A. I never saw that.

Q. You know corporations must file tax returns? A. Certainly.

Q. During what period were you attorney for Mr. Lawn and Mr. Giglio Mr. Kohn? A. I think it began the end of July and ended the middle of September.

Q. This is 1948? A. 1948.

Q. I am referring to your being attorney for them with respect to the informations in this lawsuit. A. Yes.

(2736)

Q. You appeared for them, didn't you? A. Yes, it came much later. This was in '50, I think.

Q. That's right, and you prepared and filed papers for them, did you not? A. I prepared papers for Mr. Lawn, and I acted in concert with two other or three other attorneys, who were the attorneys for the other partners. Mr. Giglio had his lawyer and Mr. Roth had his lawyer. Mr. Roth's lawyer was a former major or colonel in the Army, and he went to see his son in Germany, and in his absence I took care of that; and Mr. Giglio had a lawyer who asked me to argue some of his motions in court, and I appeared for them all at various times.

Q. That was just after the informations were filed for a period time? A. That was after the informations. The only man that I really represented there was Mr. Lawn. I brought him down and surrendered him.

(2737)

Q. Now take a look at this tax return of the American Brands Corporations for 1947 and tell me if that wasn't filed while you were attorney for these gentlemen? A. I don't know.

Q. Look at the receipt. A. Regardless of the date, I never saw that paper. I don't know who prepared it. It says here——

Q. And you don't know anything about—— A. Just wait one minute. There must be an affidavit by somebody who prepared it, who prepared the return. I can't read the name. Whose name is that?

Q. Looks to me like Louis J. Roth. A. I never saw that paper. I never saw that in my life, ever. I never saw this in my life, and I never saw the amended report. The amended report that you showed me, I had seen—no, I saw that here; you showed it to me.

Q. You filed a series of affidavits for Mr. Lawn and Mr. Giglio and others in this court, didn't you? A. I filed one for Mr. Lawn.

Q. And that was in connection with the informations? A. With the informations, yes, sir.

Q. Now let me ask you whether or not in one of those

(2738)

affidavits you didn't state, for Mr. Lawn—— A. I didn't state anything.

Q. Didn't you read these affidavits? A. I read the affidavits. I prepared it. I understood it was correct, but there is no affidavit of mine that I remember anywhere in these papers.

Q. Perfectly correct, sir. Let me ask you whether you didn't cause to be written for Mr. Lawn an affidavit, in part of which you said——

Mr. Stryker: One moment. I object to it, irrelevant, immaterial. The Government has rested, and Mr. Lawn has rested. This is no part of the cross examination. It is irrelevant to the issues as they stand.

The Court: Do I understand you want this man's testimony limited to the other two defendants?

Mr. Stryker: That is correct.

The Court: Both direct and cross?

Mr. Stryker: That is correct.

Mr. Wessel: I understood that, too, if your Honor please, and I am cross examining him on his statement that in September of 1947 a carry-back loss had been filed with the Government.

Mr. Stryker: As I understand the interroga-

(2739)

tion thus far, Mr. Kohn made no statements in any affidavit. Am I correct? You made no affidavit?

The Witness: I made no statement. I didn't have any personal knowledge. The thing I took it from was this disinterested accountant's report that had been appointed by a receiver, confirmed by a Court. I didn't know the man.

Mr. Stryker: Clearly irrelevant.

By Mr. Wessel:

Q. Let me ask you this, Mr. Kohn: Didn't you tell the receiver in open court on September 13, 1948, that the reason you wanted the books back was in order to settle the claim of the Government? A. I wanted the books back to turn over to an accountant that they had hired, the books, so they could prepare them.

Q. So that what; so that the Government could be paid and you could work out the tax claim? A. No, no, so that the accountant would be able to look at the books and get the figures, and I said, we were entitled to the books and they should give them back to us so the accountant could prepare the report and put in the correct figures, because otherwise it was only guess work. The order said——

(2740)

Q. Didn't you tell—— A. The order said we were entitled to the books.

Q. Didn't you tell the receiver, in the presence of a dozen other attorneys, on September 13, 1948, that "The books will be needed in connection with the payment of federal taxes, because in the proposed offer it is provided that we have to take care of the federal taxes in the amount of $100,000"? A. I shouldn't be a bit surprised that I may have said that. I won't deny that I said it. We were entitled to the books back.

Q. So that you could take care of the taxes which you had to take care of; correct? A. No, I didn't have to. The accountant took care of that. They had hired a Dr. Wiener, if I am not mistaken, and he said that he couldn't prepare the proper reports and returns without the books, and they asked me to get them.

Q. So, in other words, Mr. Kohn, after this final order was filed, you knew you still had to undertake, or your clients, the liability of paying the Government $100,000, didn't you? A. If there was a claim—I was very careful in my direct testimony to say, if there was a claim we were

(2741)

not prepared to pay it. If there was no claim, we were free.

Q. Didn't you tell the receiver, and all the other attorneys in court, and there were about a dozen of them on that day, that "We have to take care of the federal taxes in the amount of $100,000"? A. I don't remember saying the amount. I remember saying we had to take care of the federal taxes, particularly those withholding taxes were very important; they had to be paid.

Q. And thereafter, thereafter, sir? A. The receiver collected—the receiver turned over to them $1,400, and if the United States Government had appeared there and ob-

jected to every claim that was paid to attorneys and administration, they would have gotten the whole $12,000.

Q. And thereafter, Mr.—what $12,000? A. The money that was distributed there.

Q. Those were administration expenses, weren't they? A. Government taxes come before administration expenses.

Q. They do, Mr. Kohn? A. In very—a great many cases.

(2742)

Q. You name one case where Government taxes come before administration expenses, please, sir; just one case, and you are a bankruptcy lawyer with over 40 or 50 years' experience. A. O-m-a-r, Inc.

Q. O-m-a-r, Inc., is what? A. At 400 Fifth Avenue. The Government came in and took possession of all of the assets, and sold them out, and kept them as against withholding taxes, and there wasn't anything for administration expenses.

Q. Mr. Kohn, am I correct that it is your view that in this receivership back in 1948 that ended in September of 1948, the Government could have taken the moneys which the receiver paid out to people like, for example, Mr. Nadel, and Mr. Ravin and other people, the Government could have gotten that money? A. That was my impression—that is my impression of the law then and now.

Q. And that is what you are saying, the Government was barred from getting by virtue of not having filed—— A. I say the Government did not do its duty.

Q. Did you or did you not state, in open court, Mr. Kohn, that "The books will be needed in connection with the payment of federal taxes because in the proposed offer

(2743)

it is provided that we have to take care of the federal taxes in the amount of $100,000"?

Mr. Stryker: One moment.

A. I would say that my recollection accords with that, except that I did not say an amount. It couldn't be $100,000.

Q. It couldn't be? A. Under any circumstances. The amount was different.

Q. What was the amount? A. Whatever the amount may have been, I couldn't have said $100,000.

Q. And didn't you thereafter have considerable correspondence with both Mr. Ravin, the attorney——

Mr. Stryker: Mr. Wessel, would you mark the page read from. I may want to read from it.

Mr. Wessel: The whole book has been marked. But I will mark the page.

Mr. Stryker: That particular page you read from, so I can find it.

By Mr. Wessel:

Q. Didn't you thereafter, Mr. Kohn, have considerable correspondence with both Mr. Ravin and Mr. Nadel, in which you asked for the books back, so that you could compromise the Government's claim? A. No, I didn't compromise; so that it might be——

(2744)

The Court: He asked, did you have correspondence with Mr. Nadel.

The Witness: Oh, I beg your pardon, sir.

The Court: Go ahead.

A. Yes, I did. Those two letters that were introduced, as well as others.

Q. As well as others. And in those letters, didn't you say that you wanted the books back so that you could compromise the claim of the Government? A. Let me look at the letters again, please.

Q. I am only asking you whether or not you did that, Mr. Kohn. A. I wrote letters and I asked for the books, but I don't remember whether in the letters I said so that I could compromise the claim. That I don't remember.

Q. You recall having written a letter to Mr. Nadel on January 17, 1949, saying in part, "What I was particularly anxious to know is how much remains for distribution, and I will see if I can't make some kind of an arrangement with the Federal or State Governments"; did you say that? A. I may have said that, yes, sir.

Q. Even up to 1949 you were still trying to work out (2745)

some kind of an arrangement to pay the Government's tax claim? A. I won't deny that.

Q. Why were you trying to——

Mr. Wessel: Strike that.

A. Everybody has a right to buy his peace, regardless of whether there is a claim or not.

(Marked Government's Exhibit 187 for identification.)

Mr. Wessel: I ask that these papers be marked for identification.

By Mr. Wessel:

Q. Incidentally, Mr. Kohn, didn't you appear in Washington before T. Lamarr Caudle in connection with this case? A. I did. In view of the fact, though, that all that direct testimony was stricken out on your motion, I don't know whether that is proper cross examination. Is it?

(Marked Government's Exhibit 188 for identification.)

Q. I am sure Mr. Stryker will object if he wishes to. Now, Mr. Kohn, I show you Exhibit 188 and ask you if those aren't photostatic copies of the checks that you submitted to the receiver in the hearing in August, 1948, August

(2746)

3, 1948? A. I don't see any marks on here that they were marked as exhibits.

Q. I asked you whether they were photostats. A. I don't know, and I am under oath, and I don't and I won't testify to something that I don't know. I think they may be——

Q. Now supposing I see, Mr. Kohn, and ask you to refresh your memory, and ask you whether you didn't tell the receiver, with regard to checks of Mr. Roth's to Mr. Giglio in the total amount of $18,500:

"I will read them off: October 1, 1946."

Would you look at those checks.

A. Yes.

Q. Perhaps you would like to look at your—— A. October what?

Q. At the hearing on August 3rd, and then tell—— A. Was that before the Court or the receiver?

Q. Before the receiver, I think. Why don't you look at it, Mr. Kohn? A. Yes.

Q. Do you want to read the whole—— A. No. I just got the first page to see. That was a receivership hearing. That was not before the Court.

Q. Doesn't the receiver act for the Court, Mr. Kohn?

(2747)

A. Sir.

Q. Doesn't the receiver act for the Court? A. In the peculiar way in which they run these equity suits in Jersey, the receiver acts as though he were a United States Commissioner, acting under 21A. In federal courts they would have a commissioner under 21A, but in this case the receiver would hold these hearings, put people under oath, and ask for information.

Q. In any event, you'd tell the truth whether it was before the receiver or before the Court? A. Yes, sir, yes, sir.

Q. Read that, then, please, sir. A. May I look at one page before this?

Q. Certainly. A. Well, Mr. Roth wasn't available. He hadn't been under subpoena. They had furnished me with some loose-leaf ledger sheets, photostatic copies.

Q. While you are looking at that—— A. Yes, and also some checks.

(Marked Government's Exhibit 189 for identification.)

By Mr. Wessel:

Q. Tell me whether or not Exhibit 189 aren't the ledger sheets you introduced in evidence on that day. A. (2748) "I offer ~~in evidence~~ photostatic copies of ledger sheets of Loraine Food Company."

Q. This is what you were saying, Mr. Kohn? A. This is what I was saying—one, two, three, four, five sheets. One, two, three, four, five sheets. But I don't see any marks on here.

Q. I didn't say those were the originals, Mr. Kohn. I am asking you whether they are photostatic copies of pages which you introduced in evidence? A. I can't tell.

Q. All right, go ahead; continue reading and see whether the checks are the ones you introduced in evidence at that time? A. Yes.

Q. Again, you—— A. This was a very hotly contested case. This was no picnic.

Here are six checks, payment of $18,000, made by Roth to Giglio with the endorsements.

Q. Why don't you compare these checks—— A. Just a second.

Q. —and see whether it is the same. A. If those were the same checks, even though they were photostated, they would have to be photostated with the mark on them, that is, if these are the exhibits in court:

(2749)

Q. Unless these were photostated before the checks were introduced; is that correct? A. Well, I don't know.

Q. Just see if those are the same checks? A. Well, it might have been done that way or they might never have been introduced. These might be photostats of checks never introduced. I will look at the numbers and see.

Q. Why don't you look at them and see, Mr. Kohn. A. All right. Here is one, the first one here is October 1, 1946, $2,000, Manufacturers Trust Company.

Q. You don't know whether that is the same check or not, do you? A. It is the number, and the amount is correct. The number, October 1st.

Q. Let's see if it isn't described in a little more detail down at the bottom; see if that doesn't describe the check in a little more detail, including who endorsed it. A. Yes. And then Mr. Rosenstein, who was the attorney for the creditors—I refer to them—I ask that they be marked, the first dated, marked, October 1, 1946, is drawn to the order of William J. Giglio, in the sum of $2,000, against the account of Louis J. Roth, payable to Manufacturers Trust

Company, 407 Broadway, endorsed by Giglio and (2750)
Margherita Giglio, and deposited by her in her account.

Well, this check seems to fill the bill, except that there is no notation on it that it is an exhibit.

I should say that it would seem to be the check that was mentioned. I don't know whether it is or it isn't.

The endorsement on the check doesn't show to whose account it was deposited.

"Mr. Rosenstein: Check dated October 1st to William Giglio"—which is correct, "Gilio" or "Giglio"; I don't know?

Q. I don't know, Mr. Kohn. A. The $2,000 check was marked D5A for identification, and that doesn't appear on here.

Next check, October 16, 1940—October 16, 1946, drawn on the Chase National Bank, Peninsylvania Branch, in the sum of $4,000, against the account of Louis J. Roth, to the order of William Giglio, and a similar endorsement, William Giglio and Margherita Giglio.

This is what Mr. Rosenstein says:

"And it might be interesting to Mr. Kohn as well as the Receiver to note the endorsement of (2751)
both names, and the ink, the written endorsement are obviously by the same person."

Q. What did you say next? A. It didn't look like that to me, but this is——

Q. What did you say next? A. What did I say next?

Q. In response to his comment. A. "Mr. Kohn: Now, if your Honor please, I object to any such statement."

Q. And the statement you objected to was that the handwriting on the back of the check was the same for two people? A. Same for two people.

Q. And who were the two people that you were referring to? A. Looking at these two checks, the first check is signed William Giglio, entirely different from William Giglio on the second check. And Margherita Giglio seems to be different on the endorsement on the second check.

Q. So you had considerable discussion at that time, in front of the receiver, as to who endorsed these checks? A. No, I didn't. I just said it just struck me that it looked differently, and I said, "I object to any such statement."

(2752)

Q. All right. Just look at the rest of the checks, if you can, with the transcript in front of you, and see whether or not it refreshes your memory that those were the very, or those are photostats of the checks you introduced? A. Except for the fact that they haven't got the exhibit on them.

December 13, next check——

Q. I don't know whether you want to take my word for it or not, Mr. Kohn, but I have compared these checks with the transcript and I find, except, as you say, for the exhibit mark—there is none—the checks seem to be the same checks which you introduced in evidence.

Would you accept that statement for the time being? A. I will accept your statement for the time being.

Q. You do recall having introduced into evidence $18,500 worth of checks from Mr. Roth to Mr. Giglio? A. Well, if these checks amount to that amount, that is correct.

Q. Why don't you add up your own amount, as you stated it before the receiver? A. There is three—all right, three and four.

Q. No, here we are. Read your own comment on (2753)
page 127 and see if that doesn't total $18,500, which is the exact amount of the loan receivable account on the balance sheet of Mr. Nadel, as due from Mr. Roth. A. For the checks that I produced, yes. I don't know that these are the same checks. I will take your word that they are, and take your figures that they are, subject to check, but I think that is correct.

Q. Mr. Kohn, do you recall the total amount that you paid to these various creditors? A. No, not from memory.

Q. You paid 10 per cent of their claims? A. Yes, sir.

Q. Was that around $12,000 or $13,000 that you paid out? A. Oh, no, that was entirely separate and distinct.

Q. How much did you pay out? A. I don't remember offhand. The $12,000 was a balance of $22,000 that remained in the hands of the receiver. I paid an entirely different sum.

Q. You don't know how much you paid? A. I don't know exactly how much.

Q. You paid 10 per cent of the claims of the creditors; am I correct? A. Which had been allowed, excepting those which were expunged.

(2754)

Q. The total amount of accounts payable was $80,000 odd, correct, sir, on the consolidated balance sheet? A. That is the statement that they had. Whether that was correct after the Court struck out a great many of the claims——

Q. In other words, it might have been less than the $80,000? A. Might have been less, might have been more.

Q. You think there might have been more claims? A. I don't know. I didn't take my figures from this. I took my figures of the debts, if I remember correctly, from the custodial receiver's report as to debts.

Q. Did you pay out over $25,000? A. No, I did not.

Q. So it was something less than that figure, whatever it was? A. Oh, yes.

Q. Now there were on the books of these various companies loans receivable of $195,000. How did you work out a settlement with creditors for $25,000 when there were that many assets? A. The assets had been, as I understood it, erroneously stated to be debts that were due, inter-com-

(2755)

pany debts when, as a matter of fact, loans had been made, and instead of being marked back, "Payment on account of loans," they had marked it there as debts. That is, the theory would be, if I may endeavor to explain it to you by an example——

Q. Go ahead. A. You loan me $10,000, and I pay you back 10, so I owe you nothing. When they organized the company, if there $10,000 due to one of the men, they didn't want to put their claim in as compared to other creditors, so they just dropped their claim, and when the money was paid out, it was paid out as though it were a loan to them, when, as a matter of fact, it was a repayment of the indebtedness.

Q. And that was the theory on which you proceeded in this receivership? A. That was the theory under which I had proceeded.

Q. Now on this hearing on August 3, 1946, you recall having introduced some ledger sheets and some checks; correct, sir? A. Yes.

Q. Did you also seek to establish that the Loraine Food Company and the Eatsum Food Products Company were 100 per cent owned by Mr. Giglio? A. I knew nothing about that.

Q. Well, I show you page 113 of the transcript and

(2756)

ask you to read that and see if that isn't what happened on that day. A. "The first matter rose in connection with a report of Mr. Nadel, Exhibit B, on page 2, to indicate that there was a loan made to Roth. It has been the contention of the defendant companies that the total of these accounts, loans receivable, were a mutual debit and credit.

"I think the statement on the other side, under the heading of 'Liabilities,' where it says 'Loans due to affiliated companies,' which arose out of an error on the part of Mr. Nadel, when he thought the Eatsum Food and Loraine were affiliated companies. Neither of these two companies are affiliated companies, and I have proof here to show that."

Q. And that was the checks and those ledger sheets we referred to before, that was the proof? A. I don't know whether that was the——

Q. Go ahead. A. In connection with the Eatsum Company, that was the limited partnership under the laws of the State of New York, and I have a photostatic copy which has been furnished to me by the County Clerk, and the clerk of the Supreme Court, a photostatic copy of the notice of formation of a limited partnership, of Eatsum Food

(2757)

Products, giving the names of David G. Lubben and William J. Giglio as general partners and six limited partners.

"Mr. Ravin: I don't like the proceedings at all, sir. I don't like the opening remarks of Mr. Kohn, that he couldn't produce Mr. Roth because he isn't under subpoena.

"Mr. Kohn: Because he isn't in town."

Mr. Stryker: One moment, just a minute. I don't think, Mr. Kohn, we care for the record, unless its relevency is established, the reading of the record.

The Witness: I am sorry; I shouldn't have said it. I withdraw the rest of it.

Mr. Stryker: That's all right.

By Mr. Wessel:

Q. Just bear my question in mind, whether it isn't the fact that you sought to establish on August 3, 1948, that Eatsum Food Products Company was wholly owned by Mr. Giglio and that Mr. Livorsi had no interest in it, and that Loraine Food Products Company was wholly owned by Mr. Giglio, and that neither Howard Lawn nor Louis Damaro had any interest in it. See if that isn't what you did on that day. A. All I know is what I was told, and I

(2758)

may be gullible, but I believed what was told me and I made this statement.

Q. I am asking you what you said to the receiver? A. That is what I said.

Q. Do you have any independent recollection, independent of that? A. No.

Q. Would you look at it and see if you can refresh your recollection as to what you told the receiver? A. This refreshed my recollection as to what I may have said.

Q. What does it refresh your recollection as to; tell us, please? A. That Nadel, when he thought that Eatsum Food and Loraine were affiliated companies, and then all of the creditors consented that—the Eatsum Company had never been, I don't think was a party, was an affiliated company, but the Loraine Company was taken out completely.

Q. Let's see if we can follow this through on Mr. Nadel's balance sheet. A. Yes.

Q. Mr. Nadel's balance sheet, Mr. Kohn, shows a total of loans receivable, and special drawings in the amount of

$195,852.54, doesn't it? A. Where is that? Those are assets.

(2759)

Q. Yes, that is an asset. In other words, Mr. Giglio, Mr. Livorsi, and Mr. Roth owed the companies $195,000, according to this consolidated—— A. $167,257——

Q. Plus special drawings? A. Plus special drawings of $11,000.

Q. All right, all right, excuse me. A. But the loans receivable were to Giglio, Livorsi and to Roth.

Q. Well, let's drop out the others, then, and drop out special drawings, and you get loans receivable of $160,000? A. 167,000. That is according to his figures. Those were his figures.

Q. Over in the liability column, there is listed:

> "Due to affiliated companies, Eatsum Food Company and Loraine Food Company, $205,000";

isn't that so? A. Yes, sir, that is correct, that is the way he figured it.

Q. Now what you sought to do, if I understand you, by introducing these various documents into evidence, was to balance off this due to affiliated liability—due to affiliated companies liability against the loans receivable; is that correct? A. That was my understanding.

(2760)

Q. The theory being that the money that had been loaned by American Brands Corporations had in fact gone to these other—come from these other companies? A. That was my understanding.

Q. And the basis upon which you proceeded was that Eatsum Food Products Company was wholly owned by Mr. Giglio; that Mr. Livorsi had no interest? A. No, no, no, it wasn't necessary to go that far.

The loans receivable due affiliated companies represented mutual debits and credits to offset the one against the other.

Q. And the way you proved that was to show that neither Loraine nor Eatsum were affiliated companies, but were in fact wholly owned by Mr. Giglio; am I correct? A. I never said that.

Q. Well, then, supposing we look through this and see if you didn't say that. A. I don't remember that I ever said that. This is now seven years ago, but my memory is fairly good.

Q. Now on page 125, didn't you offer into evidence the dissolution agreement of Eatsum Food Products Company and state that under that dissolution agreement Mr. Giglio had paid out all of the special partners and general partners,

(2761)

and became the owner of the entire Eatsum Food Corporation personally; didn't you say that? A. I produced an agreement, that is all I did. I produced an agreement that said that.

Q. And you made the statement—— A. I produced the agreement, and quoted from the agreement; yes, I produced the agreement.

Q. Didn't you then introduce into evidence the Lorraine Food Company sheets we have referred to, and didn't you say to the receiver:

> "I think the statement on each ledger sheet, loans receivable to W. Giglio shows these loans were made to his account and the money made payable to him"?

A. That is what I said.

Q. You did say that? A. Yes, sir. I didn't say that he owned the company. I said here is an agreement, and this is what the agreement says.

Q. This wasn't an agreement, of course? A. I didn't make it of my own knowledge. None of those statements were made of my own knowledge.

Q. This is all based upon things you were told? A. Of course.

Q. And who was it that hold you these things mostly?

(2762)

A. Roth. I never saw Livorsi. Roth, Giglio. Usually Roth. He knew all about the books.

Q. And he is the one that gave you these five ledger sheets, isn't he? A. Of course. He gave me the sheets and he gave me the checks.

Mr. Stryker: Keep your voice up.

A. Sir. Yes, he gave me the checks, and he gave me the ledger sheets.

Q. Did anybody ever tell you that Mr. Livorsi was a 50 per cent partner in Eatsum? A. No, sir.

Q. Did anyone ever tell you that Mr. Damaro was a stockholder in Loraine Food Corporation? A. I never knew it and I don't know it now, except that you tell it to me.

Q. I haven't told you anything, sir. I have asked you a question. A. All right.

Q. Did anyone ever tell you that Mr. Lawn had an interest in the Loraine Food Corporation? A. No, sir.

(2763)

Q. Incidentally, Mr. Kohn, where did this money come from that you paid out to the general creditors, ten per cent? A. I don't remember.

Q. You did get some money from some place? A. Oh, yes.

Q. It wasn't your own money? A. Oh, no.

Q. It wasn't money you got from the receiver, was it? A. No.

Q. So it must have come from your clients must it not? A. I don't know where it came from. I knew it was a check that was deposited in a special account. No other checks were deposited against those withdrawn the various checks, to pay the creditors.

Q. But that money must have come from your clients, must it not? A. That was the strangest it was somebody else's check; it wasn't their checks. They didn't have any money.

Q. Didn't they turn it over to you? A. Yes, they turned it over to me. Where they got it from——

Q. Either Mr. Lawn, Mr. Giglio or Mr. Roth; correct? A. One of the two or three. I think it was Roth. I am not sure.

Q. And he gave you a check in the amount of approximately how much? A. I don't remember.

(2764)

Q. Well, it was under $25,000? A. Oh, yes, yes.

Q. Was it over $10,000? A. Yes, it was under $10,000.

Q. Under ten? A. Under ten.

Q. Was it over $1,000? A. Oh, yes.

Q. And that money was not part of the assets of the American Brands Corporation, was it? A. It was very clearly set forth in the offer that not one dollar of money in that account was to be used for the purpose of paying creditors. That money came from completely outside source.

Q. And wasn't it provided in the offer that the money in the hands of the receiver was to be used to pay administration expenses and then taxes? A. What is that? The money that was to be paid out by the administrator was all set forth to the penny in the order of the dismissal, and this was a separate provision, that ten per cent should be paid to every creditor.

Q. And that money that it had, that the receiver was to pay out, was to go primarily for administration expenses, and then $1,400-odd to the Collector for withholding taxes? A. That is correct.

Q. I am going to show you, Mr. Kohn, Exhibit 79-A-14A, through 14D, and ask you whether you recognize the

(2765)

handwriting of either of the top columns on those various ledger sheets? A. The top who?

Q. Well, you will notice the name of the various companies appears in the first line, and underneath that the words "Loan receivable loan payable to William Giglio." A. It looks like a different handwriting.

Q. Can you tell me whose handwriting that is? A. I can't, no, sir. I never saw these sheets before this minute.

Q. But you saw photostats, did you not, sir? A. I don't know. Are these the photostats of those sheets?

Q. Do you recall whether they were or not? A. I don't know.

Q. Let me ask you this question: Was any handwriting put on any of the Loraine ledger sheets which you offered in evidence, in your office? A. Never. Well, may I just limit that last statement?

Q. Certainly. A. Never in my presence. Roth was in the office almost every day during this period. Whether he made a change or not or somebody else, but never in my presence or to my knowledge.

(2766)

Mr. Wessel: Could we take our morning recess, if your Honor please?

A. (Continuing) I don't think the books were ever in my office, to be frank with you. I don't remember ever having a single book of any of those companies at my office.

The Court: All right, we will take a recess now. Don't discuss the case.

(Short recess.)

(Jury in box.)

The Court: Mr. Foreman, ladies and gentlemen: I told you that we had one of the exhibits photostated and a page had not been photostated. So that there will be no misunderstanding, that was done by the Court and the Court's photostater who neglected to put in the page.

All right.

By Mr. Wessel:

Q. Mr. Kohn, it has been pointed out to me on Exhibit 188 that if you open up the photostated checks you will see the exhibit mark inside. Now I show you that exhibit again and ask you whether those are in fact the checks you handed up to the receiver on August 3, 1948? A. I see the handwriting here, but I don't see anybody's initials on them. It would look as though somebody might have copied

(2767)

it, I don't know, but that doesn't look the way exhibits usually would look. They would have the name and the initial of the stenographer on them.

Q. And this still doesn't appear to you to be the exact checks you handed up that day? A. I say very probably, they probably are, but I am not positive and I am under oath and I am taking no chances.

Q. In any event, sir, that hearing was on August 3, 1948? A. Sir.

Q. That hearing was August 3, 1948; am I correct about that? A. August——

Q. 3rd, 1948. A. I don't know. I will look at my diary. The one that I remembered was the 13th, and the week before that, I think, was the 7th of September.

Q. I show you Exhibit 191 for identification and ask you if it wasn't on August 3, 1948? A. Yes, it had to be, because those two——

Q. That you handed up the checks from Mr. Roth and the Loraine ledger sheets? A. Yes, that's right. That was the hearing of August 3rd, Chancery chamber, before the receiver. The one before the Judge took place in September.

(2768)

Q. Now, August 20, 1948, you submitted your offer? A. Yes, sir.

Q. On August 20, 1948, you submitted your offer to this receiver, am I correct? A. I think that is correct. I am not sure.

Q. And in paragraph 5 of your offer you said:

> "The title of the proceedings is to be amended so as to eliminate as one of the defendants the Loraine Food Corporation, which is not and never has been an affiliated or associated corporation, the name having been included erroneously in the title of the proceedings."

A. That was my understanding of it.

Q. That is part of the offer. A. Yes.

Q. Then in paragraph 6 you also said, as part of your offer, that the statement of account which appears in Exhibit B, page 2 of the report of Herman J. Nadel, the certified public accountant, should be corrected so as to eliminate under the head of liabilities, the words "due to affiliated companies," and in place thereof the words should be "Loans payable," so that the same shall be a counter account against

loans receivable, and shall show a balance of $269.19 due, by the American Brands Corporation and affiliated companies to Loraine Food Corporation, Eatsum Food Cor-
(2769)
poration and/or William Giglio, and that the account entitled, "Assets" after the words "Loans receivable," it should appear that these loans receivable represent payments made on account of loans payable.

That was part of your offer too, wasn't it? A. Yes, sir; and that represented my understanding of the situation.

Q. Isn't it the fact, Mr. Kohn, that it is your opinion that if these companies had been liquidated without the receivership, there would have been enough money to pay everybody in full and leave something over? A. According to the best of my understanding there was just nothing there, nothing.

Q. I ask you, Mr. Kohn, if it isn't your view, as a man of over fifty years' experience, that if the companies had been liquidated without the receivership proceeding, there would have been enough money to pay everybody in full and leave something over? A. No, sir.

Q. Do you recall having testified before the Treasury Department on August 29, 1951? A. Oh, they had me there for hours.

Q. You do recall having testified there? A. Oh, yes, they served me with a subpoena and had me there for hours.
(2770)

Q. At that time you were examined by special agent Mahon and by special agent Twohig, am I correct? A. Yes, that's right.

Q. And you were under oath? A. Yes.

Q. You objected at first to being put under oath, did you?

Mr. Stryker: Mr. Kohn, will you keep your voice up? It is difficult back here.

A. I may have. I don't know whether I did or not, but I may have.

Q. I ask you whether you recall being asked the following question and giving the following answer:

"Q. We are talking about creditors; we are talking about people who had been doing business with the American Brands. A. It is my recollection, and I may be wrong, but it is my recollection that if this would have been liquidated without this court proceeding, there would have been enough money to pay everybody in full and leave something over."

Do you recall having so sworn? A. I may have said that, yes, sir.

Mr. Wessel: No further questions.

(Government's Exhibits 190 and 191 marked (2771) for identification.)

Redirect Examination by Mr. Stryker:

Q. As I understand it, Mr. Kohn, these companies had no choice about going into this receivership; they were put into it; is that right? A. Yes.

Q. Now, you have been cross-examined about the debts due to the corporations in the receivership being offset by the debts due from the corporations in receivership; you have been cross-examined about that? A. Yes.

Q. Did not the Government come into this receivership after due notice was served upon it? A. No, sir.

Q. I say, did not the Government file claims in this receivership and receive due notice? A. Oh, yes; yes, sir.

Q. Keep your voice up, Mr. Kohn. A. Yes, sir.

Q. Did the Government make any such contention as is implied by the questions of Mr. Wessel to you? A. No, sir.

Q. The Government had notice of the receivership proceedings, did it not? A. Of course. Otherwise they wouldn't have filed their claims there.

(2772)

Q. And they could have raised that issue if they had chosen to, could they not? A. Yes, sir.

Q. And the Government could have maintained, if it had wished to, that the debts due the corporation should be paid in full: it could have made that contention? A. Yes, sir.

Q. And it didn't. A. It didn't, and all the other attorneys might have made the same contention.

Q. And they didn't. A. They didn't.

Q. And they were attorneys for other creditors? A. Yes, sir.

Q. Was there a final order in the receivership which adjudicated that the debts due to the American Brands and associated companies by Giglio were offset by the loans from Loraine and Eatsum to American Brands? A. It had to be; because otherwise they would have been creditors and entitled to receive payment.

Q. Now, I am told—and I am not sure that I am right—I have an exemplified copy of one of these original papers that Mr. Leoni brought. I show you this exemplified copy and ask you if you can—I see it is headed "Petition for Instructions"—if you can identify the papers. Better put on the light. Just give me a description of that paper. There are three different papers. Just identify them all.

(2773)

A. Yes, that is the paper to which was attached my offer of August 20th, yes, sir.

Mr. Stryker: I offer this. I happen to have this exemplified copy of the document. I offer it. Presumably there is no objection.

Mr. Wessel: I have no objection, but I am sure it is the same as one in evidence.

Mr. Stryker: It has a seal on it. I didn't do it. I am sure it is right, the seal of the court.

Q. While Mr. Dilberian is marking that—— A. It is a court record. You can't mark it. You have to put a slip on it.

Q. That is not an original. It is our copy. A. Oh; that is exemplified.

Mr. Stryker: Yes.

Can you mark that in the meantime?

Mr. Wessel: This seems to include a great many different documents, I think, which are in evidence, but I have no objection anyway.

(Defendants' Exhibit TTT for identification received in evidence.)

(Defendants' Exhibit UUU marked for identification.)

(2774)

Mr. Stryker: (To jury) I will show the other one to you as soon as the Judge is through looking at it.

Q. What is UUU for identification? It is an exemplified copy of some of the papers that were produced here in court. Just give us a general description of it.

Mr. Stryker: I would like to be shown the paper Mr. Wessel read from, some testimony or some statement made by the witness before the Treasury. I would like to see that.

Mr. Wessel: I never showed it to the witness, if your Honor please. I had asked him whether he had been asked a question and given an answer. He said he thought he had.

Mr. Stryker: But he read from a paper here in court. Whether he showed it to the witness here or not, makes it available to me, I should think, on redirect.

The Court: No, I won't permit that.

Mr. Stryker: Exception.

Mr. Wessel: The record should show, however, that I turned over to counsel all the minutes where this witness was present at the receivership.

The Court: Yes.

Mr. Stryker: Not in the Treasury Department, not before the Treasury Department.

(2775)

The Court: That is right.

Q. Can you identify that, Mr. Kohn? A. Yes, sir.

Q. What is it? A. This is the affidavit of mailing, the order to show cause, signed by A. Dayton Oliphant, as the Clerk, and Henry T. Kays, as the Vice Chancellor, which was granted on the basis of my offer, and which was sent to every creditor.

Q. Including the Government? A. Who is, according to the list which was attached, and that list—Collector of Internal Revenue, Newark, and Collector of Internal Revenue, Second District, New York. That is a photostatic copy of it.

Mr. Stryker: I understand it. Mr. Foreman, ladies and gentlemen——

Mr. Wolfram: Wait a minute. That is not in evidence.

Mr. Stryker: I am sorry. I offer it in evidence.

Mr. Wessel: I was under the impression that was part of the exhibit the clerk has now.

Mr. Stryker: I don't know. I can't tell you. I don't think so, but I can't tell you.

The Witness: The petition and the schedule—don't put that down—that is the only difference.

(2776)

Mr. Wessel: There is a difference. I have no objection to it.

(Defendants' Exhibit UUU for identification received in evidence.)

Mr. Stryker: Did your Honor finish with the other one?

The Court: Yes.

Mr. Stryker: (To jury) This is TTT in evidence, exemplified copy. Petition of Boyle——

Q. He was receiver, was he? A. Yes.

Mr. Stryker: (To jury) Claims and——

Q. What is this letter here, in there? A. What is that?

Q. What is that? A. This is——

Q. Is that the offer? A. That is a copy of my offer, but it is transposed. The last sheet is second. This should be transposed.

Q. They have got it mixed up with the copy, but it is all there? A. No, it is that way in the original. I found that out.

Q. Is it? A. Yes.

Mr. Stryker: (To jury) Here is the final order.

Q. Is this the final order of the Chancellor, is it? A. Yes.

(2777)

Mr. Stryker: I won't stop. There you are, Mr. Foreman (handing).

The Court: Do you want this one now?

Mr. Stryker: Not until you are through with it, your Honor.

(To jury) This, Mr. Foreman, is the affidavit of mailing to creditors, and I call your attention particularly—I guess it is the last page or next to the last page, mailing to the Collector of Internal Revenue, Newark, and Internal Revenue, New York (handing).

Q. You knew, did you not—you testified here that you needed the books in order to compute and file returns for the Federal taxes. A. Well, the accountant whom they employed wanted the books, and they asked me under the order to get them back.

Q. And—— A. I made every effort to get them back.

Q. Did you get them back? A. No, sir.

Q. You knew that the carry-back application had been filed, did you not? A. I understood that, yes.

Q. You knew that further papers would have to be filed in order to wipe out the tax liability, that is, in connection with the carry-back? A. Well, I was told that there was one further paper, if I am correct, of form 846,

(2778)

or some number like that, that had to be filed in addition to the other papers, and I was told everything was in order except that one paper.

Q. And that is what you wanted the books for, wasn't it? A. Yes, sir.

Q. That is what you wanted the books for? A. Yes, sir—well, I didn't want the books. The accountant told me, and I recognized, that he needed them, so I asked for them.

Q. I understand, all right. And that is why you made the statement that Mr. Wessel read to you at the hearing, that they were needed in connection with the payment of Federal taxes because of the proposed offer. A. Well, it would have been more accurate to say in computation of it rather than payment.

Q. All right. A. But that is what I meant, yes, sir.

Q. Now, Mr. Kohn, going to another subject, you were asked by Mr. Wessel about your appearance, appearances, in connection with the informations that were filed in 1950. A. Yes, sir.

Q. I am directing my attention to the questions that Mr. Wessel asked on cross-examination. A. Yes, sir.

(2779)

Q. You did appear, as you have testified, for the defendants, all of them, in connection with those informations? A. Yes, sir.

Q. Will you state what you did? First, were you paid anything? A. No, sir.

Q. They don't hear you. A. No, sir. They didn't have it.

Q. All right. Will you tell the Court and the foreman and the ladies and gentlemen of the jury what you did in behalf of the defendants in connection with those informations filed way back in 1950?

Mr. Wessel: Objection.

A. I appeared——

Mr. Wessel: Objection, Mr. Kohn. Just a minute.

The Court: I think I will sustain it, Mr. Stryker.

Mr. Stryker: Well, your Honor, Mr. Wessel has just gone into it to some extent, and you will remember that I tried to ask the same questions on direct and they were excluded, and I would of course not have pursued it here again in view of your Honor's order except for the fact that Mr. Wessel went into it, and I submit that that being so, it is open for me to get the whole story.

(2780)

Mr. Wessel: If counsel will ask a proper question, we will then see whether it is relevant to my question.

The Court: Yes, it is a much broader question.

Mr. Stryker: My question isn't proper. All right, I will make it clearer.

Q. Did you on behalf of the defendants appear in court on these informations? A. Yes, sir.

Q. About how long was that after the informations were filed, if you can remember? I think they were filed September 15, 1950. A. Well, I could look up in my diary and see.

Q. Well, give me your—— A. I don't remember the exact date.

Q. How long, a few days? A. Well, I brought Mr. Lawn down to the district attorney's office, surrendered—United States Attorney's office, and surrendered him, arranged to get all the other defendants in court on a day fixed.

Q. Now the day fixed was a few days after the informations were filed? A. Yes, sir.

Q. Did you appear in court on the day fixed? A. Yes, sir.

Q. What did you do on that occasion? A. The court (2781)
fixed the bonds; the bonds were produced and the defendants were released.

Q. And then did you do something in connection with these informations after that? A. Yes, sir.

Q. What was the next thing you did?

Mr. Wessel: Object to the form of the question.

Mr. Stryker: All right.

Q. Did you then make some motions in the case? A. Yes.

Q. What was the nature of those motions? A. Well, I think the first motion was to dismiss the informations for insufficiency, on the ground they didn't set forth a crime.

Q. Yes. A. And the second was a motion for a severance, so that they should be severed.

Q. Yes. A. And the third, I think, was a motion for a bill of particulars of some twenty-odd items, all of which, most of which were involved in connection with this, the filing of a proof of claim, the carry-backs, that is to say, the profit having been made, so much in one year, and the losses in two years.

Q. I see. A. That the losses would wipe out the profits, and no tax was to be paid.

Q. After you made those motions, what was the next (2782)
thing that happened in this case after that?

Mr. Wessel: Object to the form of the question.

Mr. Stryker: All right, withdrawn.

Q. After you made those motions, was any order entered by the court? A. No, sir.

Q. Will you explain to the Court and jury why no order was entered?

Mr. Wessel: Object to the form of the question.

The Court: Sustained.

Mr. Stryker: I see I have to be very precise.

Q. Well, what was the next step after you made these motions in connection with these informations?

Mr. Wessel: I think that is again too broad and I object.

Q. Did you take a further step, or did you do something further in connection with those motions? A. Yes, sir.

Q. What did you do?

Mr. Wessel: I object.

The Court: Wait. Mr. Stryker and Mr. Wessel, could I talk to you up here for a second?

(Discussion at the bench off the record.)

Mr. Stryker: I think that question is proper. I think your Honor does.

(2783)

Q. What was it, Mr. Kohn?

The Court: All right, go ahead.

A. The Government asked for an extension of time to argue the motions.

Q. Then what happened? A. And I said I would grant it provided the day of the trial was also adjourned.

Q. What happened then? A. I think there were four, five, six, possibly eight or ten adjournments, all on the

same basis. Finally, we went before the court and made a stipulation before the court that the motions were adjourned without date, the trial was adjourned without date, with either side to bring it on, on ten-day notice.

Q. And this is February 1955, and the Government never did bring it on? A. That's right; all the stipulations are on file in the court.

Q. Mr. Kohn, isn't it a fact, from your experience as a lawyer in this particular field, that whenever a company is forced into a receivership, assets shrink in value? A. Yes, sir.

Q. You are smiling because it is so obvious; that is so? A. Yes.

Q. Now, there was an asset here consisting of the Fairmont Avenue plant, on which Agar had spent a great deal

(2784)

of money; do you remember that? A. I have an indistinct recollection of it, yes.

Q. And you know that the plant was sold for a nominal sum, don't you?

Mr. Wessel: Objection. The witness testified on his direct that he was not there at the time of either the sale of the Fairmont Avenue plant or the Tavern plant or the Agar Michigan plant.

Mr. Stryker: Judge, I am just asking for his knowledge.

Mr. Wessel: He said he didn't know.

I object to his calling for hearsay.

The Court: Let's not go on with it if the witness is going to rely on somebody else's statement.

The Witness: (To the Court) I went to look at the plant and——

Q. Will you look at the receivership report in evidence and see—maybe I can find it——

Mr. Stryker: I am going to pause a minute, because one of the questions depends on the document the jury is examining, so if you will just pardon me a moment, I will wait.

The Court: Maybe the jurors will let us have it back. This time we will see to it that you get it

(2785)

back before the session is over. They will want it back when you are through with it, Mr. Stryker.

Mr. Stryker: All right.

Q. Well, I show you—I guess I have it now— Exhibit TTT in evidence, defendants'—exhibit TTT in evidence, and ask you if it does not show——

Mr. Wessel: Objection.

Mr. Stryker: Just reading from the document. It is in evidence.

Mr. Wessel: I am sure it is. The objection, if your Honor please, is that this witness has no information. If counsel wants to read that to the jury, he can go ahead and do so. The jury is in fact looking at the document.

The Court: All right, you will do it that way.

Mr. Stryker: I will do it that way. The question I was asking was about the sale of this—what is the name of it, the Fairmont plant?

Well, here, the item, I will read it, Mr. Foreman —"Aster Engineering Corporation proceeds of sale of American Agar Corporation, $15,000." That is what I was referring to. I am sorry I took another exhibit from you, from one of the ladies of the jury. It is so hard to handle all these things (handing to jury).

(2786)

Walter T. Kohn—By Defendants—Redirect

Q. Did the Government approve of the sale——

Mr. Stryker: I misspoke.

Q. Did the government oppose the sale of any of these plants?

Mr. Wessel. Same objection. Hearsay.

Q. To your knowledge? A. To the best of my knowledge, from the records, no.

Mr. Wessel: I move to strike out the answer on the ground that it is obviously hearsay, as based upon this witness's direct testimony.

The Court: Strike it out.

Q. Well, have you found anything in these records, is there anything in these records showing any opposition to the sale by the Government?

Mr. Wessel: Same objection.

The Court: Same ruling.

Mr. Stryker: Exception.

Your Honor, I may have one or two questions more here. I have got a witness that has been here——

The Court: Let's not get this any more complicated than it is.

Mr. Stryker: He is quite annoyed by my holding him. I think Mr. Kohn will wait.

The Court: I am not interested in whether your

(2787)

witness is annoyed. Finish up with Mr. Kohn. Let's keep this as clear as we can for the sake of all concerned.

Mr. Stryker: Will you pardon me a minute?

The Court: Yes.

(2787a)

Q. Mr. Kohn, Mr. Wessel read to you from some papers purporting to be testimony before the Treasury Department. I have not——

Mr. Wessel: Object. Counsel is testifying.

Mr. Stryker: Isn't that what you said it was? Am I not quoting you correctly?

Mr. Wessel: I asked a question.

Mr. Stryker: I think counsel asked a question whether he testified before the Treasury Department; am I not right?

The Court: He asked whether he testified, whether he said certain things, but I don't think counsel ever asserted that he did testify to that or that he was reading from a transcript, as I recall.

This witness said that he could have said that, and I think that was the end of it.

Mr. Wessel: I think I asked whether you were not asked the following question and gave the following answer on such and such a date before the Treasury Department.

Mr. Stryker: That's it. That's what I am asking about.

Mr. Wessel: I didn't say I read from a paper.

(2788)

Q. Counsel stood here, when he asked the question that I asked you, and he held a paper in his hand. I don't know whether he read from it or not. In that he asked you whether you said something—I haven't the paper so I can't be exactly accurate what he said—something to the effect that if these companies hadn't gone into receivership, they could have paid off or something like that; do you remember the question? A. I do.

Q. I have paraphrased it poorly, but that is the best I can do without the document. Remember that?

You have in mind what I am talking about? A. Yes, sir.

Q. Well, will you explain that answer to the Court and jury. A. Well, a great many concerns, when they go into receivership, and it is for sale, and it goes to a public auction, or an auction under the supervision of the court, the prospective bidders get together and make a joint bid, and there is no competition, and sometimes things are thrown away, very often they are thrown away, and after I had gone through this report, that was my belief, that the assets which were there had all been sacrificed.

(2789)

Mr. Stryker: All right, that is all.

Mr. Wessel: Thank you, Mr. Kohn; that is all.

The Court: All right, step down.

The Witness: All through?

The Court: All through.

(Witness excused.)

The Court: Next witness.

Mr. Stryker: Mr. Petillo.

JOHN A. PETILLO, called as a witness by defendants, being first duly sworn, testified as follows:

Direct Examination by Mr. Stryker:

Q. Mr. Petillo, you have been subpoenaed by me or my office, the defendants? A. Yes.

Q. To appear and testify and produce such records as you have in regard to the matter that I am going to ask you about; that is right, isn't it? A. Yes.

Q. Were you also subpoenaed by the Government? A. I was on call.

Q. Did they give you one of these—I am beginning to learn the procedure—a subpoena with a stipulation that you would come on call of something to that effect? A. That's right.

(2790)

Q. About when was that, Mr. Petillo? A. That was for around the middle part of December.

Q. And have you been called by the Government to testify in this case? A. No, sir.

Q. Now, do you know Mr. William Giglio, one of the defendants in this case? A. I do.

Q. He sits over there, does he? A. That's right.

Q. Can you point him out? A. The fellow at the far left there (indicating), dark hair.

Q. Left as you sit? A. That's right.

Q. Now, did there come a time, to your knowledge, when Mr. Giglio filed a personal petition in bankruptcy in the United States District Court for the District of New Jersey on or about April, 1950? A. In May of 1950 I was appointed by the Court as trustee in bankruptcy.

Q. You were appointed by—that would be by what, United States District Court? A. The United States District Court, yes.

Q. And you say about May you were appointed as

(2791)

trustee? A. That's right.

Q. Now, as trustee, was it your duty to gather together all of the assets of the bankrupt for payment, if it was possible to make payment, to creditors? A. Everything that I could possibly do under the circumstances, yes, sir.

Q. Now, was Mr. Giglio personally examined by you? A. Yes, sir.

Q. Were creditors notified? A. Well, not by me. That is a procedure of the court.

Q. Well, that was done? A. Evidently it is done in every case, it has to be done by law. I can't vouch for what the court did.

Q. Did you locate any assets of Mr. Giglio, did you find any? A. Yes.

Q. What did you find? A. Well, the only assets I finally located was a washing machine and the clothes that he owned.

Q. What? A. The clothes he wore.

Q. Were those assets subsequently sold? A. That's right.

Q. Do you recall at all what they realized? A. $100. That included, of course, any interest he might have in other matters which the final report will show.

(2792)

Q. Now, in bankruptcy—I take it you have had experience as a lawyer in bankruptcy matters, otherwise the court wouldn't have appointed you trustee? A. That's right.

Q. I neglected to ask you, you are, of course, a member of the bar of the State of New Jersey? A. That's right, sir.

Q. You have been practicing your profession there for some years? A. About 15 years.

Q. Fifteen years. Now, in bankruptcy, in a bankruptcy proceeding, is there a procedure for opposing the discharge of a bankrupt who has concealed or secreted his assets, is there such a proceeding? A. There is.

Q. Now, did you, while you were a trustee, receive a communication from the Treasury Department? A. No. I don't recall receiving any communication from the Treasury Department.

Q. Well, did you receive a request from Mr. Twohig? A. Mr. Twohig was in to see me personally.

Q. Would you be able to identify Mr. Twohig? A. If it is Mr. Twohig. The gentleman there in the brown suit (indicating).

(2793)

Mr. Stryker: The record may show that the witness has identified Mr. Twohig.

Q. Now, can you tell me at all about when it was that Mr. Twohig came and called upon you while you were trustee? A. Not exactly, but I was appointed in May 1950, and he came in after that for a period of two or three months.

Q. Now, did Mr. Twohig ask you to hold up the discharge in bankruptcy while the agent investigated? A. Well, I cannot hold it up. The procedure is that we have to—unless some creditor holds it up, the procedure is, by the trustee, that if everything is completed, he will notify the court and the court will then discharge.

I was requested by Mr. Twohig not to send in a letter stating that everything had occurred and been completed until I hea.d from him further.

Q. And did you comply with that request, and not file the report for some weeks or months? A. That's right, that's right.

Q. Did you hear anything further from Mr. Twohig or any Government agents? A. Well, I don't recall the conversation. He was in about, oh, three or four times.

(2794)

Q. All right. Did Mr. Twohig ever appear and object to the discharge of the bankrupt? A. Well, he didn't, no. It was not his procedure to object.

Q. What? A. I say, it wouldn't be up to him to object. He told me, hold it up until he heard from his office, something to that effect, to enter objections.

Q. And after that, did he enter any objection? A. None that I know of. They would be filed with the court. If any objections are entered they are filed directly with the court.

Q. What finally happened? Was there a discharge in bankruptcy granted by the United States District Court for New Jersey? A. There was.

Mr. Stryker: That is all.

Cross Examination by Mr. Wessel:

Q. Incidentally, of course, Mr. Petillo, a discharge in bankruptcy doesn't discharge federal taxes, does it? A. That's right.

Q. Now, you went out to Mr. Giglio's home, didn't you, in connection with trying to locate assets? A. That's right.

Q. And when you got there you found a Magnavox, (2795)

do you recall? A. No, I don't know what you are—only time I went out to his home, the one home where he lived, in Port au Peck, at the direction of the court to go out, and bring the appraiser to appraise the washing machine, and the clothes. That is the only time I had ever been to his home. I didn't know him before that.

Mr. Wessel: I ask that this paper be marked for identification.

By Mr. Wessel:

Q. Incidentally, have you brought your file with you? A. I did.

Q. Would you see if you have in your file a letter, dated June 6, 1950, from the firm of Quinn, Doremus, McCue & Russell, with an attachment? A. I have.

Q. Would you look at that and tell me what pieces of equipment were in Mr. Giglio's home? A. Well, this is a

list of supposed assets that belong—supposed to belong to Mr. Giglio, which I tried to locate, and they gave them to me, but we were not able to prove to the court satisfactorily enough—I have an original copy—that these assets belonged to him, and I might go on to say that these assets

(2796)

were under a restraint order for rent.

Q. They included a DuMont television set? A. I have the copy here.

(Marked Government's Exhibit 192 for identification.)

By Mr. Wessel:

Q. I will show you Exhibit 192, Mr. Petillo, which I think is the copy of that letter. A. That's right. These were copied from my file.

Q. Tell me what assets were out at that house. What were the major pieces of furniture and equipment at that house? A. Oh, just regular furnished home.

Q. Well, it was nice, though, wasn't it? A. Yes, I'd say it was.

Q. He had a television set and a couple of phonographs? A. Yes.

Q. They were nice pieces of equipment. It was a Magnavox and not a cheap radio, for example; am I correct? A. I don't know exactly the name, because, after all, finding out that these were not assets of his, not being able to prove they were assets of his, I was not allowed to get the appraiser to look at them.

(2797)

Q. That letter came from Quinn, Doremus, McCue & Russell? A. That's right.

Q. Were you advised that they were attorneys for Mr. Giglio? A. No, I didn't—I approached them, because I

thought they were attorneys for the landlord, and I wanted to see—knowing the landlord, I wanted to see if they could locate some assets for me.

Q. Mr. Giglio also had a good many insurance policies, didn't he? A. That's right.

Q. And you inquired into those, I take it? A. I did.

Q. You determined it was his wife who paid the premiums, didn't you? A. That's right.

Q. And therefore the asset wasn't one of his? A. That's right.

Q. Didn't you report to the referee in bankruptcy a letter dated July 26, 1950, that Mr. Giglio told you that his wife paid the premiums and that in every other matter he said the same thing, that is, the asset belonged to his wife? A. That's right.

Q. Wasn't that the result of your investigation, that

(2798)

substantially all of Mr. Giglio's assets belonged to his wife? A. That's right.

Q. Now, you had occasion to inquire into one share of Heparin stock that Mr. Giglio owned? A. I did.

Q. And you were advised that that was pledged to a Eugene Kohn? A. It was pledged as security for a loan.

Q. Yes. That is to Mr. Giglio, the security loan? A. No, the security loan was to the corporation.

Q. Well, don't you have an affidavit from Mr. Eugene Kohn, in which he says that that stock is held as collateral security for a loan of $2,400 to Giglio? A. If that is correct—I am mistaken if that is the letter. I know it was security for a loan.

Mr. Wessel: I ask that this paper be given the next exhibit mark.

The Witness: I could look at that. I have all those letters here.

(Marked Government's Exhibit 193 for identification.)

By Mr. Wessel:

Q. I show you Exhibit 193 and ask you whether you (2799)
did not in fact learn that that was pledged for a loan to Mr. Giglio? A. I don't recognize this. I would like to find my letter on it. I don't recognize that.

Q. All right. A. What's the first name, Kohn; who signed that?

Q. E-u-g-e-n-e, Eugene Kohn, K-o-h-n.

Well, don't look too long, Mr. Petillo.

Did you learn that Mr. Giglio's wife held almost 250 shares of the same company? A. No, I did not. I didn't know that.

Q. Did you know what the address of that company was? A. I wrote to the company. I wrote to someone.

Q. Was it 101 Fairmont Avenue? A. That sounds very familiar.

Q. Jersey City? A. That is it. I am quite sure. I wrote to someone there at the company and got an answer on it.

(Marked Government's Exhibit 194 for identification.)

By Mr. Wessel:

Q. I show you Exhibit 194, Mr. Petillo, and ask you if that isn't a certified copy of various papers taken from the (2800)
district court bankruptcy file, from Mr. Giglio? A. This seems to be the copy of the schedules in bankruptcy, of which I have a true copy here.

Q. I see. Would you look at your own copy, and note the date on which the schedule was signed by Mr. Giglio.

Mr. Stryker: There is a light there, Mr. Petillo.

A. The date that this was to be signed by Mr. Giglio and sworn to was April 24, 1950.

Q. Now, in the course of your investigation, did you find that just a few days before that Mr. Giglio had sold his 1949 Pontiac coupe for $1,400 cash? A. Yes, I had a letter from a person saying that in April, April 11th, if I am not mistaken, he sold his coupe for $1,400.

Q. That is 13 days before, and do you know what the amount of the lien or mortgage on that car was, if any? A. No, I didn't go into it any further, except what's set forth in the schedules, which says that he received $527 over and above the existing lien.

Q. Do you have a letter there of June 13, 1950, Mr. Petillo? A. From whom or to whom?

(2801)

Q. June 13th, from yourself to the Hon. Charles H. Weelans, Referee. A. Yes, I have.

Q. Now, does that refresh your memory that this furniture wasn't under a lien at all, but that Mr. Giglio told you that the furniture belonged to his father, his sister and his wife, referring to the first paragraph? A. Yes, sir.

Q. And as a result of what Mr. Giglio told you, you saw no need to go over to his house because there was nothing to look at except his clothing? A. I wrote to the court to that effect, as to whether that was a statement—see, I wasn't present when he filed in bankruptcy, and when he was questioned. I was appointed trustee after the first meeting of the creditors, and I wrote to the referee, and the referee wrote back, if I am not mistaken, to the effect that he had stated household goods, and he said, "Well, he says to me that he did not have it"—because we didn't have any money for a 21A examination, and he

consented to answer any questions, so I asked where the furniture was that he had reported in the schedules, and he said he didn't have any, and I said, "Well, what about this furniture that I hear about in this inventory?" which you marked exhibit 192 for identification.

(2802)

He said that wasn't his, and that he did not have any furniture, and that what he had said in court did not refer to this, but just to what he had told me.

So I wrote to the referee to that effect, to see if we could get the testimony that I did not hear the first day in court because I wasn't appointed, and the referee wrote back as to the statements made, and I further stated that he denied that to me.

I further stated he denied it to me.

Q. Well, did you learn from the referee that Mr. Giglio was paying $300 a month rent at his home? A. No, I didn't learn that from the referee. From the schedules I gathered, I think it was $900 for three months back. I got that somewheres.

Q. Now, would you take out your copy of the schedule filed by Mr. Giglio and, incidentally, signed and sworn to by him as every other bankrupt signs and swears to. A. That's right.

Q. Did you note that in item 2(d) he said that he had received no income from his trade or profession during each of the two years preceding the filing of the petition? A. That's right, none.

Q. Did Mr. Giglio tell you that he was to received and

(2803)

was receiving income from Heparin in 1950 of over $28,000? A. No, sir. He said he was working there as a regular employee, but had no money coming.

Q. He didn't say he had any money coming? A. That's right.

Q. Did you note at his home——

Mr. Wessel: Strike that.

Q. Did Mr. Giglio tell you that he had nine deductions or exemptions on his tax return? A. No.

Q. Did you notice the number of people living at his home? A. Well, as I say——

Q. Independent memory. A. I went to the one home, not the one involved in this inventory, because he moved during the bankruptcy, and I went to the second place, which was at Port au Peck.

Q. Did he tell you—that is where he still lives; is that correct? A. I don't know. To my knowledge, yes. I haven't seen him in two or three years.

Q. Did he tell you that he was supporting eight persons besides himself? A. I gathered that, yes, sir.

(2804)

Q. Did he tell you where he got the money to do that, if he only had $400 in assets? A. No. I am sorry, I don't mean he told me he supported eight people. I gathered that there were about eight or ten people living in the house.

Q. Did he tell you whether or not he supported them? A. No, no.

Q. Did you ever see a a copy of his income tax return? A. No, sir.

Q. Well, then I take it you didn't inquire of him as to how he could support them? A. Oh, I didn't go into all those questions as to how——

Mr. Stryker: Just a minute, just a minute.

Mr. Wessel: I will withdraw the question.

Mr. Stryker: All right.

By Mr. Wessel:

Q. Now, you say the assets were sold at public sale in the amount of $100; is that correct? A. It was a private offer, accepted by the court.

Q. Was that sale—— A. Of course, it was public in that no one else appeared on the return date to make any other bid.

(2805)

Q. Who bought it? A. His wife.

Q. Did anybody tell you that the sale was handled by Mr. Lawn's father? A. The sale wasn't handled by him; it was handled by me.

Q. I am talking about the public offer. A. No, the public offer came from his wife, through his attorney, the attorney for the bankrupt, and a check came from Mr. Kohn, attorney for the bankrupt.

Mr. Lawn had nothing to do with this. This was in the United States District Court.

Q. Now, the schedule which he filed in the court, of course, listed all his debts, am I correct? A. Supposed to.

Q. And all his assets? A. That's right.

Q. Did he include as an asset a loan from Howard Lawn in the amount of $15,000? A. I think there is something to the effect of——

Q. Referring to an asset now. A. If you see it, point it out to me and I will look at it.

Q. I haven't been able to find it. I am asking you, sir. A. I saw Mr. Lawn's name here as—on Schedule A5, accommodation paper, shows, well, that has Mr. Lawn's name as a partner or a joint contractor.

(2806)

Q. That is, that he and Mr. Giglio jointly endorsed a note in the amount of $4,545; is that correct? A. That is what that should indicate.

Q. Did you find any other asset of Mr. Giglio's to the effect that Mr. Lawn owed him $15,000?

Well, Mr. Petillo, I don't want to take—— A. I don't see any——

Q. If you had found such an asset, you would have collected it, wouldn't you? A. Oh, certainly.

Q. So you didn't learn—— A. I'd certainly enjoy going after it if I found it as an asset.

Q. You didn't ever learn of any $15,000 asset? A. No, no.

Q. Now, referring over to page 1, the first page of the schedule, somewhere in the schedule it is stated that Mr. Giglio had not been known by any other name for the prior six years. Do you know where that is? A. Well, 1(c) asks where he resided six years previous to this filing of the petition.

Q. Well, I am inquiring now as to the question of a bankrupt, whether he has been known by any other name during the six years preceding the filing of the petition. A. I know these schedules pretty well, but I can't recall any

(2807)

question in the schedules to that effect.

Q. Well, I may be wrong. Under item 2(c), you will note the number of businesses which the bankrupt is supposed to have been engaged in in the six years preceding filing of the petition. Did he ever advise you that he had been employed by Filmcraft, the Filmcraft Company? Were you ever so advised? A. No, sir, not that I know.

Q. Were you ever advised that he had been so employed by the Cinetec Company? A. No, sir.

Q. Were you ever advised that he had been employed and had an interest in the Van Dyk Industrial Corporation? A. No, sir.

Q. Were you ever advised that he had been employed by Bronx Home Products, a partnership? A. No, sir.

Q. Were you ever advised that he had been employed by DuBois Associates? A. No, sir.

Had you been advised of those facts, would you inquire in connection with whether or not he had any stock interests? A. No, sir, it wouldn't be my duty to go into his employment, previous employment.

(2808)

Q. But you would have inquired as to stock interests or other assets that—— A. That he had at the time, yes, sir.

Q. Well, now, finally, sir, over on Schedule A3, the list of debts, did you note a debt which was called "Partnership Dissolution Debt to David G. Lubben" in the amount of $25,000? A. Yes, sir.

Q. And that debt was extinguished by this bankruptcy, was it not, sir? A. That's right.

Mr. Wessel: No further questions.

A. (Continuing) I want to find the name, though, provided it was in here. You say it is down here on A3?

Q. A3, yes, sir. A. I might add to that; that would be extinguished if according to law Lubben had received a notice from the court. If they did not receive notice, and did not know of the notice, or of the bankruptcy, then under the law there would not be—they would not be discharged, he would not be discharged from that debt.

So I take for granted the court sent a notice which we have nothing to do with, to every creditor listed in the schedules.

(2809)

Redirect Examination by Mr. Stryker:

Q. You run a pretty careful court out there, don't you, United States Court? A. I think Referee Weelans is a great man.

Q. All right. Now let me ask you, is there not a statement somewhere in the schedule referring to Mr. Giglio's insurance, that states that there was no asset because he had loaned up to the loan value of the policy, or something like that? A. That's right.

Q. Correct me if I am wrong in my statement. Will you give it to me correctly. A. You want me to read it?

Q. Yes. A. This is from the schedule which he filed.

Q. Yes. A. Showing four insurance policies, and then the paragraph says "That the cash surrender or loan value of the above policies have been exhausted by virtue of a loan in the aggregate sum of $1,200, which the debtor has received from Prudential Insurance Company of America, and also for loans with which to pay the accruing premiums on said policies."

Q. All right. Now, this home that you visited, you found there, did you not, eight people living with Mr. Giglio, (2810) his mother, his brother, his father, sister, and their children? A. Well, I didn't find them when I visited, but I knew from questioning there.

Q. And whose home was that? A. That was the residence of Mr. Giglio.

Q. That was the one gave as a residence? A. That's right.

Q. Do you know who actually the landlord or the tenant of that place? A. No, no, I did not know that.

Q. Did you know that Mr. Giglio had been dispossessed from the house in which he lived at the time the bankruptcy petition was filed? A. That is what I had heard, that he was dispossessed.

Q. Yes, dispossession for non-payment of $900 in rent; you learned that? A. I learned that from the schedule, the amount due.

Q. The house that you visited was not the house from which he had been dispossessed, but was the house to which he had moved after he was dispossessed; isn't that so? A. That's right.

(2811)

Q. Did you learn that this was a furnished apartment, in which Mr. Giglio did not own the furniture? A. No, I did not learn that the one he moved into was a furnished house. I just knew that it wasn't—I found out it wasn't his furniture. I didn't know who it belonged to.

Q. Did the Government try to collect any assets from Mr. Giglio in this bankruptcy? A. Well, I wouldn't know how far the Government went.

Q. As far as you are trustee, you have no knowledge of their trying, have you? A. All I know is that they came in to see me four or five times.

Q. And you complied with the request and held it up for some considerable months; isn't that so? A. I did.

Mr. Stryker: That is all.
Wait a minute, wait a second.
Mr. Wessel: Just one last question.
Mr. Stryker: Pardon me.

By Mr. Stryker:

Q. Did Mr. Giglio tell you that most of the companies Mr. Wessel has mentioned here were wiped out in the receivership two years before that? A. No, I never went into any conversation with reference to those.

(2812)

Q. Did he tell you about that? A. I don't remember any conversation.

Mr. Wessel: Just one last question, sir.

Recross Examination by Mr. Wessel:

Q. This $900 rent was owed to Mrs. Gracia Hall, care of Quinn, Doremus, McCue & Russell, and Howard Lawn had been a partner in that firm, had he not, at one time?

(2813)

Mr. Stryker: I object to it. This witness——

Q. Correct?

Mr. Stryker: One moment, I object to the question. It is really—I don't want to characterize it, but it isn't——

Mr. Wessel: It is your witness, sir.

Mr. Stryker: Yes, but it is not redirect examination; has no relevancy at all whether Mr. Lawn had been a member of some firm and had something else. I can't see any point to it at all.

Mr. Wessel: Well, the record shows what it shows.

The Court: I think the record is pretty clear on that subject anyhow. All right.

Mr. Stryker: Thank you.

The Court: Thank you.

(Witness excused.)

Mr. Stryker: Your Honor, I lack three minutes of time. I don't think you want to start another witness in three minutes. I hope I will get the benefit of three minutes, too.

The Court: All right, we will make it 2:05, just because of that eloquent plea. Don't discuss the case.

(Recess until 2:05 p. m.)

(2814)

AFTERNOON SESSION

Mr. Stryker: If your Honor please, I served a subpoena the other day on Mr. Brudner, I think his name is, the Internal Revenue, to produce certain papers. Mr. Wessel tells me he has them. I take it from that that I need not bring the witness, I won't disturb him, to offer them, if you will let me have them, Mr. Wessel.

Mr. Wessel: Well, I don't really know—I haven't seen the subpoena. I was called up about——

Mr. Stryker: Here is the subpoena. There it is (handing).

Mr. Wessel: I have those documents here. May I hand the subpoena up to the Court? I don't think it is relevant to this proceeding (handing).

May I hand them to the Court, and if the Court directs me to produce, I will do so.

The Court: All right. Well, I guess I had better hear you both up here, then. All right.

(At the bench.)

The Court: Mr. Stryker, what I don't get is the relevancy of what the Government did at the receivership proceeding. That is what I am missing.

Mr. Stryker: Well, there has been a great deal (2815)

of evidence as to what happened in that receivership, a matter which was referred to in the Government's case.

The Court: I understand that.

Mr. Stryker: All right. That is just preliminary. Now, what the Government did and what it failed to do, being given an opportunity to do it, being given notice of the proceeding, the right to object or to take

any position it wanted to do is an issue in this case. It bears upon a good many points:

One, on the good faith of this prosecution;

Two,——

The Court: I don't see how it bears on the good faith of the prosecution.

Mr. Stryker: Well, in my judgment it will. And it bears on the question of whether or not the Government, having submitted itself to the jurisdiction of a court of competent jurisdiction, and being given an opportunity to assert the position that it takes here, failed to do it, and that there was an adjudication based upon the proofs before the Jersey court and the failure of the Government to oppose.

Mr. Wessel: I am not even questioning that, although in summation I will explain what happened in the receivership. The proofs of claim that

(2816)

counsel has subpoenaed, I think, at least the last of them, is in evidence, in evidence through the witness Leoni.

Mr. Stryker: Some may be, I don't know.

Mr. Wolfram: The original isn't. The amended one is, Mr. Wessel.

Mr. Stryker: I think the amended one is in and not the original, as I recall it.

Mr. Wessel: I don't see what difference it makes, because those were all before you when the witness was here, and you didn't even want them.

Mr. Wolfram: No, he never produced the original

Mr. Stryker: The original was not produced, Mr. Wessel. It wasn't in that file, as I recall it.

Mr. Wessel: I will be glad to produce the original.

The Court: All right.

Mr. Stryker: That disposes of one.

(Handed.)

The Court: Okay, all right.

Mr. Stryker: What else have we got?

Mr. Wessel: I want to mark it, Mr. Stryker.

(2817)

Mr. Wolfram: And then, if your Honor please, the notices that the Government received from the receiver, or from anyone in the receivership, are important, too, bearing on the issue of the knowledge that the Government had at the time of these receivership proceedings.

Mr. Stryker: You remember the evidence, affidavits of mail goes to them. This simply supplements that by showing they received the notices; that is all.

The Court: Yes.

Mr. Wolfram: That is all we want.

Mr. Stryker: That is all we really want, isn't it?

Mr. Wolfram: Yes.

The Court: Maybe we can keep the number of documents going in before the jury to a minimum.

Mr. Wessel: That is my concern.

(Marked Defendants' Exhibit VVV for identification.)

(Mr. Wessel produces documents.)

Mr. Wolfram: May I have these marked, Mr. Wessel?

Mr. Wessel: Yes.

(2818)

Subject to correction, that is complete. If there is anything else you have knowledge of——

The Court: If you find any more, as you go through, you can produce them.

(2818a)

(The following took place in the hearing of the jury:)

(Defendants' Exhibits, VVV, WWW, XXX, YYY, ZZZ, AAAA, BBBB, CCCC, DDDD, and EEEE marked for identification.)

Mr. Stryker: If your Honor please, these documents are from the files of the Internal Revenue Department, furnished in response to our subpoena, first turned over to Mr. Wessel, identified before your Honor at the bench. I have tried to dispense with calling this witness. I think under the circumstances I don't need to; and on the basis of our discussion of the facts, I offer them all in evidence.

Mr. Wessel: No objection.

The Court: Received.

(Defendants' Exhibits, VVV, WWW, XXX, YYY, ZZZ, AAAA, BBBB, CCCC, DDDD, and EEEE for identification received in evidence.)

Mr. Stryker: (To jury) These, Mr. Foreman, and ladies and gentlemen, are from the original files of the Internal Revenue Department and show that the Government was advised of the pendency of this receivership. The first exhibit is VVV. That is the original claim that the Government put in. When

I had the file here the other day from the record I did not have that particular paper. I have got it (2819) now from the Government and I put it in. These other letters are letters from the Government, showing that they were advised of the proceeding and relate to the filing of proofs of claim. (Hands to jury.)

While they are quite voluminous, I imagine you wouldn't care to have me stop, and that the jury can look at it as we go along.

The Court: No, I think we can proceed, Mr. Stryker, while the jury examines those.

Mr. Stryker: Call Mr. Hennessey.

Mr. Wessel: May I just state, in examining those documents, I think the jury should note that even after the date of discharge, which was September 1948, it was the Government's view in any event that there was a tax claim still outstanding.

The Court: All right, the letters speak for themselves.

Mr. Stryker: Mr. Hennessey.

Could I have, Mr. Wessel, the Hennessey papers that were turned over for the Government?

JOSEPH W. HENNESSEY, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

(2820)

Direct Examination by Mr. Stryker:

Q. Mr. Hennessey, where do you live, sir? A. I live at 102 Western Avenue, Morristown, New Jersey.

Q. What is your present employment? A. I am employed as plant engineer.

Q. A little louder. A. I am employed as plant engineer of Purolator Products, Incorporated.

Q. What is the Purolator Products Company, Inc.? I don't know. A. They are the manufacturers of oil filters.

Q. Of oil what? A. Oil filters.

Q. Oil filters. About how many people does the Purolator people employ? A. About two thousand.

Q. Do they have more than one plant? A. Yes, they have three plants.

Q. What is your function there in the Purolator Company? A. As plant engineer I maintain all of the real property and the plant property.

Q. About how many men do you supervise there? A. About a hundred.

Q. You are not a graduate engineer but a practical engineer; is that correct? A. Yes, sir.

Q. How many years of engineering experience have (2821)

you had? A. About thirty.

Q. For whom did you work in 1946 and 1947? A. Worked for the American Agar Company and American Brands Company.

Q. Where did you do your work? A. At the Fairmont plant in Jersey City, and the American Brands Michigan plant.

Q. What was your position at the American Agar plant, Mr. Hennessey? A. I was the assistant plant superintendent.

Q. What were your duties at the Agar plant? A. Well, my job was to develop an equipment list necessary to the installation of a pilot plant. That included the services to operate the plant.

Q. Let me digress a minute, Mr. Hennessey, to show you this paper—(Marked Defendants' Exhibit FFFF for identification.)—FFFF for identification, and ask you if you can identify this paper? A. Yes, sir.

Q. What is that paper? A. This was a notice I received from the Internal Revenue Service to appear at a certain place at a certain time with any information or data that I may have pertaining to American Brands and American Agar.

Q. And in response to that letter did you appear? A. (2822) Yes, sir.

Q. And produce a number of documents? A. Yes, sir.

Q. Left them with the Government? A. Yes, sir.

Q. Were you also given a subpoena to appear at any hearing for the Government? A. Yes, sir—for the Government?

Q. Were you given a Government subpoena? A. No, sir.

Mr. Stryker: I will offer FFFF for identification in evidence.

Mr. Wessel: I can't see what conceivable relevance a letter from Mr. Twohig to Mr. Hennessey, asking Mr. Hennessey's cooperation in an official investigation, can add to this proceeding. I object to it as completely irrelevant, completely immaterial, and adding nothing to this witness's testimony.

Mr. Stryker: I think it is very important as showing the cooperation of the defendants and their obedience to any directions of requests of the Government.

Mr. Wessel: Could I have a question on the voir dire?

By Mr. Wessel:

Q. Are you a defendant in this case, Mr. Hennessey? A. No, sir.

(2823)

Mr. Wessel: Then I still object to it.

Mr. Stryker: It isn't a matter of great moment, but it bears on this and on the production of the papers.

The Court: Mr. Stryker, I think we have enough documents without that. I sustain the objection.

Mr. Stryker: All right.

Q. I show you, Mr. Hennessey, Government's Exhibits 173, 174, 176—is there a five?—177, 178, 179, 180, 181, 182, 183, 184, 185.

Mr. Stryker: There is one I don't seem to find a number to. Just a minute. 182? Is there a 182?

The Clerk: You called that.

Mr. Stryker: There is a 182, that is right.

Q. Just be kind enough to tell me what those papers are, if you can identify them, what they are? A. These are drawings, work sheets.

Q. First, are these the papers that you produced in response to the Government's letter? A. Yes.

Q. Will you keep your voice up a little, Mr. Hennessey? A. Yes, sir.

Q. It is hard sometimes to hear you. You produced them and left them with the Government? A. Yes, sir.

Q. Now, will you tell us what those papers are?

(2824)

Mr. Wessel: I object, if your Honor please. I don't see what relevance this has to this proceeding.

If counsel wishes to elicit testimony about a technical subject, I think he should do so in a proper way without asking what those papers are.

(2824a)

Mr. Stryker: Well, I appreciate the admonition about the proper way. Up to this point, I had thought I had followed the rules of evidence, and my first point is to establish the documents, as to what they are. Otherwise they are not admissible, if I don't lay the foundation.

Mr. Wessel: That is bringing out the contents of a document without their being in evidence.

Mr. Stryker: You know I am not asking that. I am asking him to identify them so as to lay a basis, a foundation to put them in evidence, that is all.

Mr. Wessel: I think counsel should ask questions in just that form.

The Court: Go ahead. Identify the documents, but don't tell us what they contain.

In other words, your drawing of something—fine.

Let me see what you have there.

All right; give us the title.

By Mr. Stryker:

Q. I am not asking you to read anything inside the documents, each one. Tell us what it is so I will know, and have a basis to offer it. A. This is a list of work on conversion for the syrup campaign.

(2825)

Q. That is what? A. A list of work for conversion for the syrup campaign.

Q. Will you identify each one as you go. A. 185.

Q. Suppose we take them—— A. In order?

Q. Yes, I think it would be more orderly, wouldn't it? A. 173, I believe is the first.

Q. All right. Now just give me a general statement about what it is so I will have a basis to offer it. I am not asking you to give the contents of the paper. A. This is a typical drawing of an ion exchange unit.

Q. At what plant? A. Michigan plant.

Q. All right, now, as we do that—— A. That is 173.

Q. What? A. 173.

Q. Let's put the ones you look at down here. Can you do that and then go through it number by number and tell us what they are? A. Yes, sir. 174 is a description of water treatment necessary to the operation.

Q. At which plant? A. This is at the Michigan plant.

Q. All right, go ahead. A. 175 is also on the operation (2826) of the water softening.

Q. Tell me the plant each one relates to. A. This is the Michigan plant.

Q. All right. A. No. 176, there are a few notes in my handwriting, pertaining to certain phases of the operation itself.

Q. In Michigan? A. In Michigan.

Q. All right. A. 177 is a legend or a key to the chemical ingredients of the treatment in this operation, and also the Michigan plant.

No. 178 is a form, daily summary report of the quantity of material processed and produced, and a record of the various processes.

Q. In which plant? A. At Michigan.

179 is an inventory of stainless steel pipe and pipe fittings, used at the Michigan plant.

Q. Go ahead. A. No. 180 is a list of pumps and motors used in this program at the Michigan plant.

No. 181 is a complete list of the equipment the manufacturing equipment, the service equipment, and also the real property of the plants in Michigan.

No. 182 is a list of pipe purchased for the Michigan

(2827)

plant.

No. 183—well, this is a list, I believe it was primarily made up to identify the various pieces of real property, manufacturing equipment and service equipment owned by the company.

Q. Which plant is that? A. That would be all companies.

Q. All companies? A. That would be all of them.

Q. All right. A. No. 184 is a description, a physical description of the Zeolite portion of this operation.

Q. Michigan plant was that? A. Michigan plant.

I believe 185 is a duplicate of the first one, one other here.

The Court: I think you started with 185.

The Witness: That's right, sir.

A. This is a list of work necessary to converting the Michigan plant from a crystal to a liquid operation.

Q. I will hold these for a minute and ask some more questions.

Mr. Hennessey, will you describe the American Agar

(2828)

plant and all the installations that were made there. Just give us your description. A. Yes, sir.

Q. Generally. A. The plant itself was situated on a plot about 160 by 100, roughly 16,000 or 17,000 square feet.

Mr. Wessel: I don't want to interrupt. I would like to know which plant it is that the witness is referring to.

Mr. Stryker: I would, too.

A. This sir, is the Fairmont plant in Jersey City.

Q. Do that. I agree with Mr. Wessel, so we keep the plants separate in our minds. A. All right, sir. I shall first talk about the Fairmont, the Jersey City plant.

Q. Tell us about that and then go to Michigan. A. There was one three-story building of brick and timber construction. There was a—well, each floor of which contained about 5,000 square feet of area. There was a two-story building; oh, I have forgotten the approximate dimensions, but there were approximately 1,500 square feet on each floor.

There was a boiler room of approximately 2,500 square feet. There was an open area between the three-story and

(2829)

two-story buildings which we enclosed for a total, I believe, of 21- or 20,000 square feet of operating area.

When I first went there, and in developing this equipment list, it was determined that there were certain structural modifications necessary, and I hired for a great part of this work outside contractors. Specifically, that open area that I mentioned between the two- and three-story buildings, we put up brick walls and frame room, and for the second floor installed heavy iron grating.

It was necessary to oil-fire one of the two 150-horsepower boilers that we had there, and in so doing it was necessary to install a new stack for additional draft. We hired an outside rigger to do that.

For the purposes of our operation it was necessary to buy and install a cooling tower, a wooden cooling tower on the roof of the three-story building.

Other alterations were necessary on the first floor. To support the tremendous weight that we were to put on that floor in the way of filters, it was necessary to add heavy iron girders to beef up the floor.

There were drains to be installed, concrete floors to be (2830)
poured in the basement and in part on the second floor.

There were certain chutes and other means of transportation between floors that had to be installed.

The equipment itself consisted of a number of tanks, wooden vats, heavy filters, other mechanical equipment, such as carbon columns, evaporators and so on.

Now, as this was a liquid system, a wholly enclosed system, each phase of the operation had to be connected with the other by pipe. As this was a pilot plant, we used——

Q. What does a "pilot plant" mean, Mr. Hennessey; I wouldn't know? A. Well, "pilot plant" is a miniature of the normal producing plant.

Q. I see. It is sort of an experimental plant; would that be right? A. Yes, sir. It is a plant on a miniature basis.

I also had to select from our working personnel certain members for the supervisory staff, and we had to instruct them, and we had to install the equipment and initiate the process, continue it.

Q. How many men were employed there during 1946, (2831)
for both construction and operation, about? A. About a hundred, on a shift basis.

Q. Well, tell us what those men did over and beyond—just give us a quick view of what they did in connection with the work that you have already outlined. A. First, when the equipment was received and placed, they helped in the piping of the main supply systems——

Q. May I interrupt you, Mr. Hennessey? There are two aspects of my question. One is construction and the other is operation, and will you divide those two categories and give us a brief statement under each, please? A. Yes, sir.

Q. All right. A. Probably most of these 100 men did at one time or another assist in the construction work that we ourselves performed around the plant. As we received equipment and connected it, they helped in that, and gradually, as we put this equipment to work, started the process, they then came over and became members of the operating program.

Q. Now we have got that; go ahead and tell us about the operation, what does that operation mean, and what was done? A. The operation itself was a conversion process, a recovery process.

(2832)

Q. Well, I am not an engineer so you will have to translate it into very simply terms for me to get. A. It was a process concerned with molasses.

Q. Well, tell us all about that. A. Molasses, just plain, ordinary blackstrap molasses, is a by-product of the sugar refinery business.

Molasses, itself, contains practically all of the impurities which are necessary to be extracted in the process of making brown sugar fit for human consumption and for making clear crystal sugar pure, and there are many impurities.

Q. Let me interrupt you a minute. This blackstrap molasses, the by-product of sugar refining, was that or was it up to this time largely waste material? A. Yes, sir.

Q. All right, now go ahead. A. It is a waste material in that there are very few uses for it, I understand. I believe that some of it is used as an additive for cattle food; some I believe is used in making rum, and still more is highly refined, and that is the product that we can buy in the corner grocery——

Q. Lots of it goes—— A. —as food.

(2833)

Q. —to waste—— A. I think that practically all of it——

Q. —blackstrap? A. —goes to waste, yes, sir, that's right.

Q. Go ahead. I interrupted you. I am sorry. A. The product itself, blackstrap molasses, represents, I believe, approximately one-fifth of the sugar output. In other words, the process or the refining of sugar is about 80 per cent efficient.

Blackstrap molasses, in general terms, represents about the other 20 per cent.

In a gallon of blackstrap molasses there is approximately six to six and a half pounds of residual sugar.

It was this sugar that this process was designed to recover.

Molasses itself is rather difficult to handle. It is transported in bulk, and for ease of handling it is heated. We had ourselves shipped in in tank cars and pumped into—and insulated in a heated vat somewhere in Englewood, I think it was, I am not sure.

From that point it was trucked in, oh, 2,000-gallon or so lots to our plant in Jersey City.

(2834)

There we had several tanks, I think a couple of 3,000-gallon or so, another 2,000 to receive this raw product. That raw product was pumped from its location in the tanks in the yard to the top floor of this three-story building. It

(2834a)

was pumped into vats and stainless steel tanks and treated, a chemical treatment, about which I know very little, from a chemical standpoint.

I do know, however, that the molasses was diluted with water. There were chemicals added; it was necessary to heat it; and in adding the chemicals very close quality control had to be held. From that point—and by the way, it took, I think, some six hours in the process at this particular point; while it was heated for the chemical process it had to be cooled, brought to approximately room temperature or cooler, to allow certain impurities to settle out. As these impurities settled out with the cooling process, the improved liquid was floated to the top, of course. At the end of this process it was necessary to decant the liquid.

Q. To do what? A. Decant, or pour off the top.

Q. I see. A. That liquid to the filters below, on the next floor below.

Now, we had a battery of these tanks, because the chemical treatment happened to contain an acid, at this point it was necessary to use stainless steel tanks, mix the whole thing with stainless steel mixture, mixers, or agitators. It was necessary to install stainless steel coils for the heating and stainless steel decanter or swing joint.

(2835)

and stainless steel piping and valves which would withstand the corrosive effect of the acid. I believe that at one time it was very difficult to obtain stainless steel, either in tanks or the various accessories and we did resort to wooden vats, which are not attacked by this particular acid mix.

Now, while we had pipes running to these several vats from the raw material source, we also had to bring steam, hot water power to the mixers, and so forth.

From this row of vats we had our standard liquid line and we also had a drain. Now each one of these, from each of the tanks, had to be manifolded or brought into one line. These were separately valved.

Q. What does that mean, manifolded? Tell me. A. If you can picture a drain, a pipe from the bottom of the tank, with a valve in it, from that valve there is a short piece of pipe to a longer pipe. This longer pipe is then connected to each one of those vats in like manner, something similar to the manifold of an automobile engine. That was so arranged so that while one tank as being drained of the process fluid through the regular liquid line, another tank could be drained of the sediment through the drain lines. This battery of tanks were connected likewise to provide raw material to each one at any given time by

(2836)

valving hot water for the mix or stream to the coils. It took about six hours for this initial process, the cooling and the settling out, and during that time the filters which were to receive the liquid were prepared on the first floor.

Now, these are huge, heavy castiron frame filters. It was necessary at the time of each filtration to line each of, I think about 40 castiron plates, at 36 inches square, it was necessary to line them with clean canvas or duck, heavy duck. These were all put together and tightened up, it was necessary to furnish what we call a pre-coat.

Q. What is that? A. It is a form of material intended to aid in filtering process. It is a form of earth, a very fine powdered substance. It is mixed wet and pumped into the interior of the filter.

When this battery of filters was so arranged, the cooled fluid from the vats on the top floor was dropped to the filters on the first floor. I have forgotten the time element involved in filtering the liquid at this point. However, it had to be heated on the way down. It was necessary to bring it up to, I believe, around 190 degrees temperature before putting

(2837)

it into the filter. That meant a heating exchanger in

between the vat and the filter. That, of course, the heat exchanger, was heated by steam. It is merely a coil of suitable material surrounded by steam, and as the liquid courses through, it picks up heat from the surrounding steam.

At this point——

Q. Just let me interrupt you a minute there, will you, Mr. Hennessey? Were there other engineers engaged on this plant besides yourself? A. Oh, yes.

Q. Will you give me some of the names of some of them? A. Mr. Schwartz, Dave Schwartz; Mr. Lyfszyc, and Mr. Warshaw—well, there were a number of them.

Q. Were there also chemists engaged in this plant? A. Yes, there were.

Q. Can you recall the names of any of them? A. I believe Mr. Warshaw was a chemist.

Q. Do you remember Dr. Van Dyk, a Hollander? A. Yes.

Q. He was one? A. Yes, he was.

Q. And Mr. Kroll? A. Mannie Kroll.

Q. Do you remember him? A. Yes.

Q. And I think you have mentioned George Lyfszyc,

(2838)

haven't you? A. Yes, sir.

Q. How about Mr. Capdeville? A. Oh, yes.

Q. Do you spell that C-a-p-d-e-v-i-l-l-e, is that right? A. Yes.

Q. Was there a Mr. Barth, a chemist, working on that? A. Yes.

Q. And a Mr. Harris? A. Carl Harris.

Q. Was there a Mr. Gordon working there, too? A. No.

Q. William Gordon, in this plant that you were in? A. No, not in my time.

Q. Now, when to your knowledge did American Brands first do work on the ion exchange process? A. I don't know at first. They were already in that program when I went there.

Q. When did you go there? A. In February of '46.

Q. How long did you remain out there in that Jersey plant? A. Until about November of '46.

Q. Did there come a time in or about that month of November '46 when you went out to the Michigan plant? A. Yes, around the 1st of November or something.

Q. In what capacity did you go to the Michigan plant? A. Plant superintendent.

Q. What was this plant in Michigan to which you

(2839)

went? A. It was a beet sugar refinery.

Q. How long did you remain there, approximately? A. Until April of '47.

Q. Will you tell us what you did in this plant by way of construction, modification, procurement or installation? We are now in Michigan. A. Yes, sir. The run at the Michigan plant was different from the Fairmont plant, in that we had a batch operation in Jersey City, whereas this was to be a continuous operation.

Q. How big a plant was this place out there in Michigan? A. Oh, the main building was a four-story building; the ion exchange was five stories—I think there were roughly around 140,000 square feet in the whole plant. It had warehouses, boiler house, and so on.

Q. How many men were employed out there in Michigan? A. The same number, about a hundred.

Q. About a hundred? A. Yes.

Q. And were there chemists there, too? A. Yes, sir.

Q. Will you give us—we don't want to take the jury too long—a thumbnail picture at least of what this Michi-

gan plant did, what you did there, and what was done under your supervision? A. The beet sugar refinery was, of

(2840)

course, a crystal process. Ours was a liquid sugar process.

Q. Go on. A. The batch operation in Jersey City required to fill the whole system, I would say, in the neighborhood of 30,000 gallons, between the vats and the filters and the second treatment tanks, the second filtering, the carbon columns, the ion exchange, the evaporators, and the final product tank, and so on.

The system at Michigan——

Q. Tell the jury and me what the object of all this work was, and this reconstruction in this plant? What were you trying to do out there? A. We were trying to modify the crystal plant in such a manner that we could produce liquid sugar at this point.

Q. And produce it from what? A. Molasses.

Q. Blackstrap molasses? A. That is right.

Q. All right, go ahead. A. The plant itself was about 25 years old. It so happened that the flow of the crystal was just about opposed to the flow that we desired. Therefore it meant going into the plant and reversing most of the flow that we found there and in dealing with an installation 25 years old we were really in trouble. We would take one piece of pipe out here and we were immediately in trouble

(2841)

in two places, trying to fit a new fitting, a new pipe fitting, to an old piece of pipe. There was a vast amount of work to be done there. For example, there was no suitable receiving point for the raw material. We had to prepare a site for and install two 120,000 gallon tanks to hold the raw material. We had to modify a number of the tanks, the additional tanks required to make this a continuous process.

There were a great number of pumps to be overhauled. There were—because the sugar process, the sugaring operation, crystal operation, had just been completed, it was necessary to overhaul nearly all the equipment that we were to use. I think it totaled something like 80 pumps and around 75 motors of various sizes. Whereas in the Jersey City plant we were working in two and three inch sixes of pipe, in this plant we were working in fours to sixes. Whereas in the Jersey City plant we were handling quantities of basically 500 gallons, at this plant we were handling basic quantities of around 5000 gallons. As I said before, the whole system ran, to completely fill the system on a continuous flow basis, it took around 200,000 gallons of liquid.

Now, there were there a great many of these first

(2842)

mixing vats necessary, that I mentioned, but we did have to have additional capacity for that we bought redwood vats of four, five hundred or 5000 capacity, and again fitted them with 4-inch and 6-inch sizes of stainless steel coil, piping, fittings, valves, and so on.

There were a number of those vats, I think about a half a dozen.

At that particular time it became very difficult to get pipe. I know I had to make a couple of flying trips to Chicago to get stainless. At that time, too, the Little Inch was being installed in upper Michigan, and I think that the Central Michigan Transmission Company, I think that was the name of it, they had, say, obtained or procured just about all of the pipe available around there. In many instances we had to wait weeks for pipes, fittings, and valves, particularly the specialty type. There was one time when we even had to truck pipe and fittings from New York.

The personnel at the Michigan plant were used to the crystal operation and were valuable to us. Even the weather played tricks with us. There were times during heavy

snowfall when we had to house and feed and sleep these men in the plant for four and five days at a time. It became necessary, because of the huge quantities that we were

(2843)

using, to treat our effluent, or the waste product from this molasses operation. It required a rebuilding of the plant facilities to do that. Each one of the filters, huge rotary filters that we used there, had to be completely reconditioned after the crystal run, and that was true of practically every piece of equipment there. We spent weeks, as I said before, in waiting for equipment.

Q. Well, did you bring some of the personnel from Jersey out to Michigan? A. Yes, sir.

Mr. Wessel: I don't mean to interrupt, but I think on both this answer and the prior answer on the Jersey plant, counsel interrupted the witness. I don't know whether he had finished or not, but I just wanted the record to reflect those answers as being interrupted.

Q. Are you finished, Mr. Hennessey, or hadn't you finished? A. I am not sure what the question was.

Q. If you hadn't finished, for goodness sakes finish. I thought you had, but Mr. Wessel thought you hadn't.

Mr. Wessel: I don't care if he finished or not. I just want the record to show that the witness

(2844)

paused with regard to either the Michigan plant and the Jersey plant, and I don't care whether he finished or not.

Q. Is there anything that you described about the Michigan plant that you left out, or that I interrupted you on?

If so, please tell us. A. I am sure there is something I left out. I just don't remember everything in detail from eight years ago.

Q. I am not interrupting you now, in asking you whether you brought a considerable number of personnel from Jersey out to Michigan, am I? A. Yes, sir; you did.

Q. "Yes, sir," you brought them out, not that I am interrupting. A. Yes, sir.

(2845)

Q. Going back to the Jersey plant for a moment——

The Court: If this a good time to interrupt, Mr. Stryker, we will take the recess.

Mr. Stryker: Just one question.

By Mr. Stryker:

Q. Going back to the Jersey plant for a moment, was Mr. Gordon leaving the Agar plant just about the time that you began your employment? A. Yes, sir, he was.

Mr. Stryker: Now I think we can take a pause, if your Honor so agrees.

The Court: All right, we will have a recess now. Don't discuss the case.

(Short recess.)

By Mr. Stryker:

Q. Mr. Hennessey, it is suggested that I cut you off somewhere. As a matter of fact, how long would it take you if I had the patience and could impose on the jury to tell the whole story in all details as to the balance of this Michigan plant, how long do you think that will take you? A. Gosh, I don't know. I would guess a couple of days, possibly.

Q. Well, I am not going to impose on the Court to that

(2846)

extent.

Now, did you tell me or not, I forget, whether you transported some men out from the Jersey plant to the Michigan plant? A. Yes, sir.

Q. About how many? A. Oh, about 50, I would judge, I think.

Q. You had how many working out there, altogether? A. I really forgot. I think there were over a hundred. I don't know how many.

Q. Now, you mentioned something about the floor space area or floor in this Michigan plant being, as I recall it, 140,000 feet per floor; is that right? A. Per floor? Oh, no. The total floor area was around 140,000 square feet as compared with 20—or 21,000 in Jersey City.

Q. For the whole plant? A. Yes, sir.

Q. Well, now, let's see. Were the expenses of all the men brought to Michigan from Jersey paid by the company? A. Yes, sir; that presented a problem, too.

Q. What? A. That presented a problem, too. In this small town of about 1,500 or so we filled up a couple of hotels there, and had quite a job placing all of the men.

(2847)

Q. Now, what finally happened, what ended the research and development operations? A. Just when we had started filling our system, to produce liquid sugar, it was stopped, overnight, just like that.

Q. About how much money was spent by the companies in Jersey and in Michigan, together? A. $750,000 to $1,000,000, in my opinion.

Q. Why did the operation stop? All of a sudden it stopped. Tell us why. A. Bill Giglio ran out of money.

Mr. Stryker: You may examine.

Cross Examination by Mr. Wessel:

Q. Didn't it stop because of the end of sugar rationing? A. Sir?

Q. Didn't the research work in Michigan end because of the end of sugar rationing? A. I don't know just when sugar rationing was over, sir. I don't know.

Q. Wasn't this quite an expensive process, sir? A. The equipment was expensive, yes, sir.

Q. Excuse me? A. The equipment was expensive.

(2848)

Mr. Stryker: Mr. Hennessey, you keep dropping your voice.

The Witness: I am sorry, I will try to speak a little louder.

By Mr. Wessel:

Q. Well, in the free market sugar was selling for around five cents a pound, wasn't it? A. I don't know, sir. I didn't have anything to do with the business end of this——

Q. You wouldn't know—— A. —operation.

Q. —this procedure, this process of extracting sugar from blackstrap molasses was not commercially feasible when there wasn't rationing; you wouldn't know anything about that? A. I am afraid I am not in a position to express even an opinion on that.

Q. In any event, you do know that this thing ended about April of 1947? A. Yes, sir.

Q. And do you know when sugar rationing ceased? A. No, sir, I do not.

Q. Do you know how much money Mr. Giglio had in April of 1947? A. No, I don't know that, sir.

Q. You are basing the fact that he ran out of money,

(2849)

your statement about that, on something he told you? A. Well, it may be an assumption on my part, but here we were ready to produce, and it was stopped.

Q. You don't know why? A. A lot of money sunk in there.

Q. You don't know why, or do you have some information on which you base your conclusion? I am not questioning your testimony. A. I would be led to believe that, because I recall that we had to keep the men, the Jersey men, the men from this area there a couple of extra days, while Bill got on the telephone and talked to New York and practically begged someone in New York for money to pay off these men, to get them paid off and get them transported home.

Q. Now, let me ask you this question: You are basing your conclusion, then, upon a conversation you heard Mr. Giglio participating in on the telephone; is that correct? A. Yes, sir.

Q. Is there anything else you are basing your conclusion on? A. Only by reason of the fact that just when we were about to make a complete success of this venture, when all the ground work had been laid, all the labor, and

(2850)

all this sweat and the tears that were put in it, very suddenly it is cut off, just like that, very frustrating experience.

Q. Wasn't that just about the time when, in your own experience, you saw in the newspaper that sugar rationing had ceased? A. Sir, I don't recall when sugar rationing ceased.

Q. Do you recall that there was sugar rationing, let us say, during the war? A. Yes, sir.

Q. Do you recall approximately when it went off? A. No, sir.

Q. Not at all? A. No, sir, I do not.

Q. Do you know where Mr. Giglio was living in 1947? A. No, no, I don't know where he was living.

Q. Did you ever see his home? A. No, I have never been to his home.

Q. You don't know of your own personal knowledge, then, whether or not he had funds available to him? A. No, sir, not of my own personal knowledge.

Q. Now, you also said that in your opinion this operation, and I think both in Jersey and in Michigan, cost between $750,000 and $1,000,000, am I correct, sir? A. Yes, sir.

(2851)

Q. Upon what do you base that statement? A. I believe I can justify it. We had at the Jersey project around 100 men who would average $75 a week.

Q. Is that what you were getting paid, sir? A. No, sir.

Q. How much were you getting paid? A. I think it was $150. We had those men and that payroll for a period of 40 weeks. It would be approximately $7,500 a week. We had a like number or even more men at the Michigan plant for a period of, let's say, 20 weeks, and maybe close to half that number we paid their expenses, which must have been darn near as much as the salary they were receiving.

Q. Let me ask you this question, sir: Would you accept whatever the books showed as to the cost of these two operations as being accurate?

Mr. Stryker: One moment. I object to it. The witness has neither expressed nor vouched any knowledge of the books. He is testifying here as an engineer, as to what he saw and what he did.

Mr. Wessel: I will withdraw the question.

I ask that this book be marked with the next exhibit number for identification.

(Marked Government's Exhibit 195 for identification.) (2852)

By Mr. Wessel:

Q. I show you Government's Exhibit 195 for identification, Mr. Hennessey, and ask you if it doesn't refresh your recollection that at least during the early time when you worked for 'Agar you received a salary of $75 a week? A. Yes. When I first went there.

Q. Oh, you do recall that, $75 a week? A. Yes.

Q. And later on you went up to $150? A. Yes, sir.

Q. And you were pretty much in charge, am I correct, sir? A. At the Michigan plant, yes, sir.

Q. How about at the Jersey plant? A. The latter part of it, yes.

Q. And your son was working there, too, am I correct? A. Yes, sir.

Q. Now, during a part of the time did you say Mr. Gordon worked at the Jersey plant? A. I think he went out just about the time I came in.

Q. That would be in February? A. Yes, sir.

(2853)

Q. And he didn't stay there after February of 1946? A. No, sir.

Q. Or at least you didn't see him do any work in the Jersey plant after February of 1946? A. That's right, I did not.

Q. Did you ever see him do any work? A. No.

Q. Where did you learn that his name was Gordon? A. It seems to me that on the first day I wa there it was the last day he was there; and someone around the plant told me that this man was Bill Gordon.

Q. Well, in fact, didn't he change his name from Goldenberg to Gordon about two years after that? A. I knew nothing of the man at all.

Q. You don't know whether he called himself William Goldenberg as of that date, do you? A. No, sir.

Q. He was a practical engineer like yourself, am I correct, sir? A. I don't know anything of him. I have never met the man.

Q. You don't know, then, what he was paid? A. No, sir.

Q. Do you know what Mr. Capdeville was paid? A.

(2854)

No, sir. He was a chemist.

Q. Mr. Van Dyk? A. No. They were in the chemical department.

Q. In any event, you didn't receive $500 a week? A. No, sir.

Q. You haven't got a criminal record, sir, have you? A. No, sir.

Q. Now, working on these various companies, sir, with you, you said that your son was there; Mr. Schwartz you mentioned. A. Yes, sir.

Q. How was he related to Howard Lawn, do you know? A. I don't know. I am pretty sure there was a relationship. What it was, I don't know.

Q. Now, do you know that Sam Livorsi worked for these companies? A. Yes.

Q. And how was he related to Mr. Frank Livorsi? A. I believe he was his brother.

Q. Do you know what his salary was? A. No, sir.

Q. How about Raymond Giglio, did he work for these companies? A. Yes.

Q. What was his salary? A. I don't know.

Q. How was he related to Mr. Giglio? A. I believe

(2855)

he was his brother.

Q. Eugene Bracker, did he work for these companies; Eugene Bracker, B-r-a-c-k-e-r? A. I don't believe I remember that name.

Q. Well, if I referred to him as the brother-in-law of William Giglio, would you know whether or not he worked for the companies? A. Oh, Gene, yes, I remember him.

Q. Joseph Giglio, did he work for the companies; father of Mr. Giglio? A. I don't know.

Q. Chales Gazzola; did you ever hear that name; brother-in-law of Frank Livorsi? A. Gee, there were a great many men there. I don't remember the name.

Q. Richard La Grange, brother-in-law of William Giglio; did you know him? A. Oh, Rich, yes.

Q. Remember him? A. Yes.

Q. He was the brother-in-law of Mr. Giglio? A. I believe he was.

Q. Giuseppe Livorsi, brother of Frank Livorsi; do you recall him working there? A. No, I don't.

Q. Did those men go out to Michigan with you, the ones I have just mentioned? A. Sam and Raymond and

(2856)

Reiss did.

Q. I neglected to ask you about Dominick Gangi; did you know him? A. I don't recall him.

Q. Brother-in-law of Mr. Livorsi; did you know about him working there? A. I am sorry, I don't remember by name.

Q. Now, this $750,000 to $1,000,000 estimate, sir, is that based upon your consideration of the number of persons that worked there and the investment in things such as pipes and machinery and so forth that you described? A. That's right, sir.

Q. Do you recall whether or not you bought anything from the P. J. Delehanty Company for the Jersey plant?

A. Delehanty, I think, is a heat exchanger—made a heat exchanger.

Q. Yes. Do you recall having bought one for the Jersey plant at about $2,000 or $2,200? A. I don't recall. We got so much equipment.

Q. Do you recall purchasing anything from the Brownrigg Company for the Jersey plant? A. I remember the name Brownrigg. I think they did some trucking for us, but I don't recall specifically anything that we bought from them.

Q. Now let me ask you this, sir: You left in about (2857)

April of 1947, am I correct? A. Yes, sir.

Q. And between that time—where was the next job that you worked? A. Purolator Products, Inc.

Q. When did you go there? A. In September of that year.

Q. Did you have a job between April and September of 1947? A. No, sir, I did not.

Q. Did you continue working for Mr. Giglio during that period? A. No, sir, I did not.

Q. Where did you work? A. I didn't.

Q. You were out of a job then? A. That's right.

Q. Now, after, let's say, May of 1947, when did you next see either Mr. Giglio, Mr. Lawn or Mr. Livorsi, or have any communication with them of any kind? A. I think it was the other—I am not sure just when it was.

Q. Well, do you recall anything up to, let's say, 1953, between 1947 and 1953? A. I may have seen Bill. I am sure I didn't see Mr. Lawn or Mr. Livorsi.

Q. Do you recall when you saw Mr. Giglio? A. No, I don't.

(2858)

Q. In any event, sir, when you produced these documents to Mr. Twohig and Mr. Mahon, you did so voluntarily on

your own; is that correct? A. Yes, sir.

Q. As a good citizen should? A. I did it voluntarily, sir.

Q. You were not told to do so by Mr. Giglio and Mr. Lawn or Mr. Livorsi; is that correct? A. No, sir.

Q. Now, did you hear of the Heparin Company, H-e-p-a-r-i-n? A. Yes, sir.

Q. Did you ever hear of the International Tank Service Company? A. No, sir.

Q. Do you know where the Heparin Company had its place of busines? A. I know at one time it had its place of business in our old Fairmont building.

Q. That is 101 Fairmont Avenue? A. Yes.

Q. Do you recall when that was? A. I don't recall. I know that is where I saw Ball. I stopped in there one day and looked over the job, the process.

Q. Well, that was after, of course, 1947, wasn't it? A. It was after 1947, but I don't know what year.

(2859)

Q. Would it have been before 1950? A. It might have been around 1950.

Q. And he still had that half million dollar plant, didn't he? A. I don't know.

Q. That is, I should say, he was still working there, wasn't he?

Mr. Stryker: One moment. I object to that question.

Mr. Wessel: I withdrew it, sir.

Mr. Stryker: Oh, you did?

By Mr. Wessel:

Q. He was still working at that half million dollar plant, wasn't he? A. I don't know in what capacity.

Q. This Heparin Company was still at the half million dollar plant; right? A. The Heparin Company was at the Fairmont Avenue plant then.

Q. And the Fairmont Avenue plant is one of the two plants in which all this money was poured, isn't it? A. Originally, yes.

Q. Did anybody ever tell you that that plant had been sold to Mr. C. B. Astor for $15,000? A. No, sir.

(2860)

Q. Anybody ever talk to you about a receivership proceeding in which Mr. Astor had bought that plant for $15,000.

Mr. Stryker: One moment. Just a minute. I submit that is quite unfair to assume facts not in evidence.

Mr. Wessel: On the contrary, they are in evidence.

Mr. Stryker: Totally irrelevant; and to attempt to cross examine this gentleman about them, totally immaterial, irrelevant to any charge in this case——

Mr. Wessel: On the contrary——

Mr. Stryker: —the bill of particulars, the indictment or anything else.

Mr. Wessel: —this is just one more concealed asset, sir, and the facts are in evidence.

Mr. Stryker: I move to strike out that testimony of Mr. Wessel's unless you want to take the stand about concealed assets.

Mr. Wessel: I will be glad to tell you about it, sir.

Mr. Stryker: I move to strike it out. I think these observations by the prosecutor without proof are very unfair.

(2861)

Mr. Wessel: The proof, sir, is in.

Mr. Stryker: I am not asking for proof. I am talking about your statement.

Mr. Wessel: There is proof in this record that this plant was sold to Mr. C. B. Astor for $15,000. Mr. Kohn dwelt upon it this morning. It is in evidence in the papers submitted by the defendants in this court, and it is in evidence through Mr. Kohn, that they were still at the 101 Fairmont Avenue plant long after this receivership was finished.

Mr. Stryker: You are talking now about what is in evidence. I am going to reply to it.

It is also in evidence that every blessed thing that happened was brought to the attention of the Government, and they did nothing whatever about it.

Mr. Wessel: We are doing something right now, sir.

Mr. Stryker: You didn't do it when you had a chance to do it.

Mr. Wessel: We have a chance right now.

The Court: It all depends who you mean by "you," perhaps.

Mr. Stryker: What?

(2862)

The Court: I think we had better quit this exchange.

Mr. Stryker: I think so, too.

The Court: I think you have both had a fair chance. Now, let's get back and start asking questions and answers.

Mr. Stryker: I think so.

The Court: I am going to overrule the objection. That is where we all started, I guess.

Mr. Wessel: I will rephrase the question because I think it is quite a 'ways back.

By Mr. Wessel:

In 1950 you did see Mr. Giglio and you knew that the Heparin Company was operating at 101 Fairmont Avenue; is that correct, sir? A. Yes, sir.

Q. And you were not advised, were you, that that plant had been sold in a receivership for $15,000; is that correct? A. No, sir.

Q. And you knew that the invesment in that plant was a great deal in excess of $15,000; is that correct, sir? A. Yes, sir.

Q. Would it be fair to state it was about a half a million dollars? A. I don't know.

Q. Well, in any event, a good portion——

(2863)

Mr. Wessel: Strike that.

Q. Can you in some way allocate the $750,000 to $1,000,000 figure you mentioned between the Agar plant in Jersey and the Agar plant in Michigan? A. That would be difficult.

Q. In any event, the Michigan plant operation lasted about three months and the other about nine months; is that correct? A. About—oh, no, from November until April, and the other from February, until about the 1st of December, I think.

Q. Was any of this sugar ever made from blackstrap molasses? A. In Jersey City, yes.

Q. Can you tell me about how much, sir? A. I would have to guess at it. I don't know.

Q. I don't want you to guess, but can you tell me, was it ever manufactured in any commercially salable quantity

—let's say over 5,000 pounds? A. I don't know about poundage, but I can talk in terms of gallons.

Q. Put it any way you want to. A. It would be my judgment that we produced—of actually produced liquid sugar—oh, 75,000 gallons.

Q. Total? A. Somewhere around there; let's say less

(2864)

than 100,000.

Q. And during what period of time was that, sir? A. That was in the latter, latter part of the campaign. Again, it is going to have to be an estimate. The last three or four months, possibly.

Q. The last three or four months; that would be from sometime after October of 1946? A. Oh, no. We closed in December. That would be November, October, September—maybe the latter part of August or something like that; middle of August.

Q. I am sorry. I was thinking about both operations. You were talking only about the Jersey City operation. A. Jersey City, that's right.

Q. So it would be sometime from August of 1946 or July of 1946 on that you produced this 75,000 gallons—— A. I believe so.

Q. —approximately. Before that time, was any large quantity of syrup manufactured? A. Oh, no, sir. We were working up to it, then, you see; quite a while to make the installation of equipment.

Q. Incidentally, you are not being paid anything in addition to your subpoena fee for testifying here, are you,

(2865)

sir? A. I am not being paid anything. I don't know anything about a subpoena fee, for that matter.

Q. You don't know about the $4 that you are entitled to get? A. No, sir.

Q. Perhaps I shouldn't have mentioned it.

Mr. Stryker: It is probably my fault.

By Mr. Wessel:

Q. You are under subpoena, though? A. Yes, sir.

Q. And you were not served any subpoena fee when you were served? A. No, sir.

Mr. Wessel: I have no further questions.

Redirect Examination by Mr. Stryker:

Q. You will have to help me a little bit: It's a long time since I have been to school, as I guess I have evinced here.

How much is 750,000—how many pounds is 750,000 gallons? A. 750,000——

Q. Wait a minute, 750,000 gallons of sugar is how many.

Mr. Wolfram: No.

Mr. Stryker: Oh, I couldn't read your figures.

(2866)

Q. Now, is it a fact that 75,000 gallons of sugar equals 750,000 pounds of sugar; would that be about right? A. 75,000 gallons, there is about six to six and a half pounds of sugar to the gallon. I am afraid my mental arithmetic isn't up to that either, sir.

Q. Well, then, 75,000 gallons would be about 450,000 pounds—according to Mr. Wolfram; is that right?

The Court: It's close enough to get on to the next question.

Mr. Stryker: I think so; I think so.

That is all.

The Court: All right.

(Witness excused.)

Mr. Stryker: Herman Holzer.

(2867)

HERMAN HOLZER, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination by Mr. Stryker:

Q. Mr. Holzer, where do you live? A. I didn't hear you, sir.

Q. Where do you live? A. In South Orange, New Jersey.

Q. Are you a married man? A. Yes, sir.

Q. Wife and family out there? A. Yes, sir.

Q. Are you a certified public accountant? A. Yes, I am.

Q. How long have you been a certified public accountant? A. I was certified in 1940.

Q. And are you a member of some certified accountants' firm here? A. I have my own firm in Newark.

Q. Here? A. I have my own firm in Newark.

Q. In Newark, New Jersey? A. Right, sir.

Q. Now tell us a little bit more—I am trying to hurry this a bit—of your background, just so the jury will understand what it is. You have been sitting here in court for a good deal of this trial, have you not? A. Yes, sir.

Q. Tell us who you are and what you have done? A. Well, I have taken my undergraduate work at New York

(2868)

University. I have gone to the Graduate School of Business Administration of New York University.

I am a member of the New Jersey Society of C. P. A.s. I was a member of the tax committee, Federal Tax Committee, in 1945 and 1946, and I am presently on the Federal Tax Committee of the Essex County Chamber of the New Jersey State Certified Public Accountants Society, and I have lectured in the last several years on behalf of the State Society as well.

Q. How long have you been working on this case, Mr. Holzer? A. Well, I began working on this case about the middle of December, 1952, and we worked on this particular case in the latter part of March 1953, when Judge Goddard dismissed all the indictments.

Mr. Wessel: Objection, if your Honor please.

Mr. Stryker: It is already in evidence.

Mr. Wessel: A backhanded way of bringing in this evidence.

Mr. Stryker: It is already in evidence by other witnesses, the dismissal by Judge Goddard. It is not adding anything.

The Court: All right.

Q. About of March 1953—— A. We stopped working at the time the indictments were dismissed. Intermittently,

(2869)

we were on conference work. Very little work was done until about the latter part of the end of October or somewhere in the latter part of October of 1954, that we were called back in after the indictments were reentered against these particular defendants.

Q. Just one indictment is all we have now. A. That is right.

Q. All right. Did you work from then, sometime in October of last year, down until the present time, or—— A. Well, we start—at some time in October we began our

work on this, but we were hindered in our work, trying to get a bill of particulars, in order to ascertain just exactly what we were looking for.

The Court: Now look, Mr. Stryker, I have had this out before and I don't want any discussion from this witness of the history of this case. We have been over this.

Mr. Stryker: It is not his fault.

The Court: That is for me, not for the jury, what has been before previous judges.

Mr. Stryker: Your Honor, I understand your ruling. I am only asking what the witness did.

The Court: Well, since he has been on the stand twice he has told us there was a previous indictment that was dismissed. Now he is telling about the bill (2870) of particulars. I assumed he is called here as an expert in his field.

Mr. Stryker: Will your Honor bear with me? I am only here to get from this gentleman what he did, what his problems were.

The Court: All right, let's get down to what he did, and not what he couldn't do and what this court did.

Mr. Stryker: Very well.

Q. Did you continue working as well as you could from October down to the present time? A. Yes, sir.

Q. How much have you been paid for services during the past two years, Mr. Holzer? A. I received $2,500 from the defendants.

Q. That is all? A. That is all, sir.

Q. Do you know why you have not been paid more? A. Well, I have asked the defendants and they told me they just didn't have the money and wished that I continue.

Mr. Wessel: Objection. I move to strike as hearsay.

The Court: Strike it out.

Q. Are you familiar with the books of the corporations in this matter? A. I am, sir.

(2871)

Q. Are you familiar with Eatsum general ledger? A. Yes, sir.

Q. And with the Nadel receiver's report in the New Jersey receivership? A. Yes, sir.

Q. Are you also familiar with the Burlan Corporation books? A. Yes, sir.

Q. And are you familiar with the tax returns in this matter, the ones that the Government has offered in evidence? A. I am, sir.

Q. Can you tell us from the Burlan books herein evidence how much was drawn out of the Burlan Corporation by Mr. Lubben or his dummy, Roy Hankermeyer—and Roy Hankermeyer in the form of salaries or loans, and when were these amounts drawn by them from the books? A. May I have the books, sir?

Q. I show you Government's Exhibit 78 in evidence and ask you what that document is? A. This is—Exhibit 78 is the Burlan general ledger and the journal of Burlan Corporation.

Q. With the books before you, do you remember my question or should I repeat it to you? A. Do you want to repeat the question?

Mr. Stryker: Maybe the reporter will. Then

(2872)

you will have the same question for sure.

(Question read.)

Mr. Wessel: It calls for a yes or no answer.

Q. Can you tell from the book? A. Yes, sir.

Q. Now, having the book before you, will you show what the books disclose in that regard? This is a book in evidence.

Mr. Wessel: Objection as clearly irrelevant.

Mr. Stryker: That is very definitely not, your Honor. I don't see why I can't of my own account refer to some book in evidence to assist me in defending this case. Everyone else has.

The Court: Well, this is on a different—I mean, the Burlan Corporation isn't a part of this case.

Mr. Stryker: I can't explain every minute every reason for everything. I tell you I have got a perfectly good reason and it is relevant.

The Court: Well, we have spent a long time, Mr. Stryker. I think we will save a little if you come up here. You don't have to bring Mr. Wessel up. Just come up here and tell me.

(Discussion at the bench off the record between counsel for defendants and the Court.)

(The following took place at the bench, not (2873) in the hearing of the jury:)

The Court: Mr. Wessel, I just had a discussion with Mr. Stryker and Mr. Wolfram, and they will correct me if I am wrong, the sole basis for the offer is that there was testimony taken from Lubben that one of Giglio's brothers, one of Mr. Giglio's brothers, drew some money out of Burlan, and I have said that so far as I know, there is no charge that any of the Burlan money was unreported income.

Mr. Wessel: None whatsoever.

Mr. Stryker: But it is in there as an implication.

Mr. Wessel: I want to be clear about it. The only charge is that this is another method of tax evasion, this $10,000 withdrawal. It has got nothing whatsoever to do with the figures of tax which are charged in the indictment.

The Court: In other words, I don't see how Lubben, what he got out of this corporation, has anything to do with this lawsuit at all.

Mr. Wessel: None whatsoever.

Mr. Stryker: Judge, don't you see this? I don't see why the evidence about Giglio's brother was admitted either, but it was.

(2874)

Mr. Wessel: I will explain that.

Mr. Stryker: That is in there, leaving an implication that Giglio or his brother was milking this company. I want to show that that implication is not justified by the books.

The Court: Supposing Lubben was milking the company, what difference does that make?

Mr. Wessel: He might have taken twenty million dollars out. It is very possible. I don't know.

Mr. Stryker: The way the record stands, it is only our boy that did something.

The Court: I can tell you that this isn't going to the jury on any comparison between your boy and Mr. Lubben.

Mr. Stryker: I understand that, but when a line comes in—I didn't think it had any place here—but when it does I don't think I ought to be left standing here and not be able to show facts.

Mr. Wessel: Let me explain.

The Court: Go ahead.

Mr. Wessel: The basis of that offer, if your Honor please, was with respect to the conspiracy charge, which charges that he evaded taxes in a number of ways. Mr. Roth testified about taking moneys out of the companies or phony expenses.

(2875)

This was one of those phony expenses, along with Goldenberg and others. It has got nothing to do with what Lubben did or did not take. I have no idea what he did take, but I know he did take money, must have taken money out.

The Court: The way it stands is this, anything in the Burlan records which may explain what your clients did, fine, but we are not going to go off on any question of what Lubben did or didn't do.

Mr. Wolfram: It is our understanding that this has no part in the concealment picture?

The Court: No.

Mr. Wessel: This happened in April '40, and has no part at all.

Mr. Wolfram: Good. That illustrates the point that we never did have a bill of particulars, and we never knew whether it relates to concealment of assets or evasion of taxes.

Mr. Wessel: When I offered it on the conspiracy count, I didn't offer it on any other count.

Mr. Wolfram: The conspiracy count embraces concealment.

Mr. Wessel: That's right, it does.

The Court: So to that extent, it relates, that is

(2876)

right. In other words, I am not limiting you or Mr. Wessel. What I am saying is that any evidence that explains what Mr. Giglio did, or any of your

other clients, fine, but let's not go off into the question of what Lubben did, because I don't see if Lubben took out ten times as much, that would be any defense.

Mr. Wessel: It might be proper on cross-examination of Lubben to impeach, but you can't impeach collaterally.

The Court: That is right.

Mr. Wolfram: Is the Burlan picture part of the Eatsum picture, as far as the Government is concerned?

Mr. Wessel: I don't know what I say makes any difference. I don't see how it is It is a separate corporation.

Mr. Wolfram: Well, it is not in the Eatsum return.

Mr. Wessel: No, it shouldn't be.

The Court: It is not in it. It is not in the Eatsum return; it is not in any of the counts charging——

Mr. Wolfram: Nor in the bill of particulars.

The Court: It is only with respect to the conspiracy count. In other words, it has no bearing on the first six counts in the indictment.

(2877)

Mr. Wessel: First nine counts.

The Court: First nine counts you say. You go further than that.

Mr. Stryker: What is your Honor's ruling?

The Court: I am ruling it out.

Mr. Stryker: I except.

The Court: All right.

(The following took place in the hearing of the jury:)

The Court: Objection sustained.

Mr. Stryker: As the objection is sustained to this particular line, I respectfully except and will proceed to another point.

By Mr. Stryker:

Q. Can you tell, Mr. Holzer, from the Eatsum ledgers, the books of the American Corporations and the receiver's report, how much was advanced by Mr. Giglio and Mr. Livorsi to these various American Corporations? A. Yes, sir.

Q. How much was? A. You want to give me—I would like to have the receiver's report. That is Exhibit 88, I believe.

Q. All right. What else do you want? We don't need Burlan now. A. As of December 2, 1947, in accordance

(2878)

with Mr. Nadel's report, which we have checked back into the books that are available here, we have ascertained that there was due to the Eatum Food Company, that is, the Giglio interests, a sum of $25,407.75, and there was due to the Loraine Food Company, likewise the Giglio group, the sum of $179,619.33, or a total of $205,027.08. In addition to that there was the contribution to capital stock in the sum of $80,000, which we have ascertained as coming from other companies other than the American companies, and from the Giglio interests, the sum of $80,000, making a total of $286,027.08.

Q. How much does the receiver's report show as loans advanced from the American corporations to Mr. Giglio first, and then to Mr. Livorsi, and what is the total? A. The total, in accordance with the December 2, 1947 statement, shows that Mr. Giglio has charged to him $107,553.25, and Mr. Livorsi, $34,558.33.

Q. Making a total of what? A. A little over $141,000.

Q. Well, I have got it added here to $142,111.58; would that be about right? A. A total of $142,111.58.

Q. All right. Now, what was the excess amount of money the Giglio group advanced to the American Corporations over what Frank Livorsi and William Giglio drew

(2879)

out of the American Corporations in the form of loans? A. $142,915.50.

Q. In other words, then, there was still due and owing to the Giglio group $142,000-odd, I think you said, when the American Corporations went into receivership; is that right? A. Right, sir.

Q. It is not true that this $142,000-odd was completely wiped out when all of the assets of the corporations were liquidated in the receivership? A. That is correct, sir, and also as brought out by the receiver's report itself, in addition to this accountant's report.

Mr. Stryker: Judge, it is two minutes. I think each time you give me a little chance I shorten it for you. So I will save you the two minutes and we will stop now.

The Court: All right, we will start then at ten-fifteen tomorrow. Don't discuss the case.

(Adjourned until Tuesday, February 15, 1955, at 10:15 a. m.)

(2880)

New York, February 15, 1955,
10:15 o'clock a. m.

(Jury in box.)

HERMAN HOLZER, resumed the stand.

Direct Examination Continued by Mr. Stryker:

Q. Mr. Holzer, when we were concluding last night, I think you had told me that the excess amount of money that the Giglio group advanced to the American Corporations over what Livorsi and Giglio drew out of the American Corporations in the form of loans, amounted to 143,905.50.

Mr. Wessel: I want to object to the question, if your Honor please, and to the testimony yesterday afternoon, which I reviewed again, because it assumes that Loraine is a Giglio company, and if your Honor will recall, I attempted to introduce into evidence the various minute books of the Loraine Company——

Mr. Stryker: I haven't made any assumptions as yet.

Mr. Wessel: —to show who the stockholders were, and the objection was sustained. There is no evidence that I know of in this proceeding as to who the stockholders were, to establish that it was a

(2881)

Giglio company, a hundred per cent owned by him. I believe Mr. Holzer's previous answer was based on that assumption.

Mr. Stryker: We will have to come to that. I can only ask one question at a time. I have asked him this question, he has given me an answer, and

I submit I should be able to go ahead even as Mr. Wessel did with his expert.

The Court: Mr. Wessel called his expert last, I think, and his expert only testified as to matters at least on which there was a basis of arguing, as was established by the evidence.

Mr. Stryker: Your Honor, these questions are purely preliminary to a course of procedure.

The Court: I don't want us to go along on a theory, Mr. Stryker. I don't understand completely how much importance there may be on this Loraine picture, but let's not go along on an assumption which we haven't any basis for.

Mr. Wessel: The contention, as advanced in the receivership, which I sought to bring out on cross-examination of Walter Kohn, was that they were trying to offset the moneys which American Brands owed to Loraine against moneys which Giglio owed to American Brands. The theory on which that

(2882)

must have been advanced and was advanced, according to Mr. Kohn's statements in the receivership, was that Loraine was a hundred per cent owned Giglio company, as was Eatsum. That was the cross-examination.

Mr. Kohn said he only knew what he was told. He did not know what they were but he was told such and such as far as Eatsum was concerned, and he had a partnership agreement. He didn't say with Loraine because he said he didn't know.

Now the importance of this line of examination that counsel started yesterday afternoon and is now continuing with is to show exactly what the receivership—what was sought to be shown in the receiver-

ship, that is, that those loans were not actually moneys owed by Giglio and Livorsi and Roth to the various companies. It is based upon an assumption which is not in evidence.

Mr. Stryker: I haven't made any assumption at all. I have asked a plain question of fact.

The Court: Read the question.

(Question read.)

Mr. Wessel: Now that was based upon this statement of Mr. Holzer at 2879.

Mr. Stryker: I haven't based it on anything (2883)

yet.

The Court: You referred to what he said last night.

Mr. Wessel: That is exactly what he said.

"We have ascertained that there was due to the Eatsum Food Company, that is, the Giglio interests, the sum of blank, and there was due to the Loraine Food Company, likewise the Giglio group."

Now I think your Honor will have recalled that I asked a lot of questions about Louis Damaro, and whether he owned stock in Loraine. None of those questions have been answered; everybody has denied knowledge, and there is nothing in this record about this subject. I would like to cross-examine on it, but I never had a chance because I never had a witness who said he has knowledge.

Mr. Stryker: You will have a chance to cross-examine Mr. Holzer.

Mr. Wessel: Mr. Holzer doesn't have that knowledge.

Mr. Stryker: I am asking if he knows. He said he does in '43. Now, in cross-examination, if that is an error, that may be developed.

Mr. Wessel: May I ask a preliminary question

(2884)

on the voir dire of Mr. Holzer?

Do you know——

Mr. Stryker: If your Honor please. Just a minute, Mr. Wessel. I have introduced this gentleman, a qualified expert, and I propose to proceed in precisely the same way in which the Government has proceeded with his expert. I have charts, I have large charts to show the small ones, and this evidence is directed to a great many issues in this case, amongst which is the charge in the indictment that the defendants knowingly and wilfully filed a false return, and I propose to show what the true situation was. I don't know how I can do it except from the books and records of the corporation and the books and records in this court in evidence, and here is a gentleman that knows about it, and has studied them, and I don't think I ought to be blocked.

Mr. Wessel: If your Honor please, ——

The Court: Mr. Wessel, I would just like to go on here. I have listened to everybody for a long time, Mr. Stryker, and what you say is nothing more than a profession of your good intentions. Mr. Wessel raises a point of evidence which you, I am sure, recognize, and the question isn't whether the charts are big or small, or whether the form of things is the same as what the Government did. The

(2885)

question is, have you laid a foundation for a question that is a question of evidence? And I would like

to have you address yourself to that. Is there any fact in the record that substantiates the ownership of Loraine?

Mr. Stryker: Yes, sir.

The Court: What is it?

Mr. Stryker: I am addressing this question—it is really a repetition—I was starting off on a recapitulation——

The Court: Where is there anything in the evidence in this record from his own knowledge or from a record properly introduced as to who owns stock in Loraine?

Mr. Wessel: May I give your Honor the Nadel report?

Mr. Stryker: One of the things referred to by the Government's expert is the Nadel report which the Government put in evidence. That is one of the things.

Mr. Wessel: I want to read just that to your Honor, if I may?

Mr. Stryker: Other things are the books and records which the Government put in evidence.

The Court: Which books and which records?

(2886)

Mr. Stryker: All the books of American Brands.

The Court: American Brands establishes who owns Loraine?

Mr. Stryker: I haven't come to that at all, your Honor.

The Court: That is what I am coming to. That is what the question raised by Mr. Wessel, and raised quite properly, is, and you make a general speech about whether the charts are big or small, and I don't like it.

Mr. Wessel: May I state what I believe to be the only evidence in the record, if your Honor please?

This is the bottom of the Nadel report, page 1, and it says, "I have made an examination of all the available books and records—all the available books and records—of the foregoing corporations, with the exception of the Loraine Food Corporation. The books and records of the latter corporation were not available for my examination, as it was the contention of the directing officers of the Loraine Food Corporation that this company is not involved, associated or affiliated with any of the American corporations."

Now this is the only evidence as to this ownership in this record.

(2887)

Mr. Stryker: Will your Honor bear with me? I, of course, agree that it doesn't make any difference whether the charts are large or small. Perhaps I shouldn't have mentioned it.

The Court: I mean, you give a complete picture as though you were being unfairly treated because you wanted to proceed with an accountant and with big charts and small charts, and the charge is, have you got any basis in the evidence for your question?

Mr. Stryker: Will you bear with me, your Honor?

The Court: Yes.

Mr. Stryker: I started this particular line yesterday with this gentleman, and I ask him how much the receiver's report shows is loans advanced to American corporations by Giglio and Livorsi. Now that receiver's report is in evidence, and the Nadel

report is in evidence. The Nadel report was put in evidence by the Government and I am proceeding on what is in evidence.

The Court: Will you tell me what in evidence establishes the stock ownership of Loraine?

Mr. Stryker: My question—I don't know at the moment, but my questions aren't directed to that, your Honor.

(2888)

The Court: Well, then, strike out that answer from yesterday, which assumed—what is the answer?

Mr. Wessel: "and there was due to the Loraine Food Company, likewise the Giglio group, the sum of $179,000."

The Court: All right, strike out that portion of the answer and proceed from there.

Mr. Stryker: All right. I respectfully except.

By Mr. Stryker:

Q. Now, have you prepared certain charts at my request? A. Yes, sir.

(2889)

Mr. Stryker: Will you mark this please, Mr. Dilberian, for identification.

Mr. Wessel: To make the record clear, if I may add, I recall, also, that Mr. Roth testified that Mr. Damaro was a stockholder—period.

The Court: I remember.

(Marked Defendants' Exhibit GGGG for identification.)

Q. Mr. Holzer, I show you Defendants' Exhibit GGGG for identification. Did you prepare that? A. Yes, sir.

Q. Will you describe generally what it is so I will have a background? A. This chart sets forth the bank balances for every month in 1947 for the American Brands Corporations.

Q. And from what sources did you draw that information? A. From the books and records, sir.

Q. Books and records of what? A. Of the American Brands corporations listed on this chart.

Mr. Stryker: All right. I offer this in evidence; preliminary.

Preliminary Examination by Mr. Wessel:

Q. Now, this includes American Brands Corporation, American Brands (Michigan) which is a branch? A. Yes, sir. (2890)

Q. American Brands Wholesale? A. Yes.

Q. American Sweets Corporation, American Agar Corporation, American Trucking & Forwarding? A. Yes, sir.

Q. And that, in your opinion, includes all the affiliated American corporations in 1947? A. Those include the affiliated corporations that were set forth on the books.

Q. And is that the fact—based upon your having heard the evidence in this case, Mr. Holzer, I just want to ask you for a yes or no answer—does this include all the affiliated American corporations in 1947? A. To my knowledge, sir.

Q. It does. Loraine, therefore, was not an affiliated American corporation, is that correct? A. It is not indicated on the books.

Mr. Wessel: All right, I have no objection to it.

The Court: All right, received.

Mr. Stryker: May I have the large one that goes with that? Oh, I haven't had it marked.

Your Honor, I have a replica of this enlarged. I presume I may now show it?

(2891)

The Court: Yes.

(Defendants' Exhibit GGGG for identification received in evidence.)

Mr. Stryker: I think I had better mark this the same.

The Court: Yes, mark it GGGG-1.

(Marked Defendants' Exhibit GGGG-1 in evidence.)

By Mr. Stryker:

Q. Mr. Holzer, will you come down a minute, after Mr. Dilberian finishes marking this.

Mr. Holzer, will you be kind enough to stand over here, maybe, where you won't be in the line of the jury, and take this pointer, and explain to me and to the jury what that shows. A. This chart, chart 1, marked GGGG-1 in evidence, represents the cash balances in banks that are taken off directly from books and records of every one of these companies as of the end of the month of January, February, right through to the end of December.

I note here that the American Brands-Michigan is a branch of the American Brands Corporation, so that these two together represent one company, there being five companies in all.

(2892)

As at January 31st, the books indicate that the American Brands Corporation, itself, had an overdraft figure—by the way, all these circled figures represent overdrafts

in the bank. The regular figures are actual cash balances set forth by the books.

The American Brands Corporation as at January 31st had an overdraft of $1,205.59.

The American Brands (Michigan) Corporation, Michigan branch, rather, of the American Brands Corporation, had a balance of $3,059.34.

The American Brands Wholesale, a balance of $1,036.14.

The American Sweets Corporation, a balance of $14,701.67.

The American Agar Corporation, a balance of $6,535.02.

And American Trucking and Forwarding, a balance of $433.16.

Combining all these totals, we have a balance of cash available, as at January 31st, 1947, of $25,159.74.

We do likewise for the month of February. We have as at the end of February, the overdraft of $6,777.24, and the remaining are actual balances, giving a total balance available at the end of February, 1947, of $4,771.67.

(2893)

In the month of March the American Brands Corporation had an overdraft at the end of the month of $5,990.62.

American Brands (Michigan) on the books had an overdraft of $1,889.09.

The American Brands Wholesale had a balance of $500.62.

American Sweets Corporation of $4,960.22.

The Agar an overdraft of $5,468.33.

American Trucking & Forwarding, an overdraft of $262.18, or an overdraft balance at the end of March of $8,149.38.

In April, the American Brands Corporation at the end of the month had an overdraft balance on the books of $34,531.45.

The Michigan plant had a balance of $1,746.75.

The American Brands Wholesale Corporation had a balance of $610.56.

The American Sweets Corporation had an overdraft of $3,794.10.

American Agar, an overdraft of $8,639.62.

American Trucking & Forwarding, an overdraft of $7.08, or a total combined overdraft at the end of April

(2894)

of $44,614.94.

In May, American Brands Corporation, an overdraft of $5,304.62.

American Brands (Michigan), a balance of $466.29.

American Brands Wholesale, a balance of $5,402.80.

American Sweets, an overdraft of $694.87.

American Agar, an overdraft of $1,760.68.

American Trucking & Forwarding, an overdraft of $96.92, a combined overdraft of $1,988.00 at the end of May.

In June, American Brands Corporation, had a balance at the end of the month of $1,081.65.

American Brands (Michigan) had a balance of $8.75.

American Brands (Wholesale), a balance of $127.05.

American Sweets Corporation had an overdraft of $3,237.33.

American Agar Corporation, an overdraft of $1,165.15.

American Trucking & Forwarding, an overdraft of $25.05, or a combined overdraft of $3,210.08.

(2895)

In July, American Brands Corporation had an overdraft at the end of the month of $18,307.47.

The Michigan branch, according to the books, apparently closed out and carried no balances forward.

American Brands Wholesale had a balance of $58.33.

American Sweets Corporation had an overdraft of $1,566.66.

American Agar, a balance of $129.30.

And American Trucking & Forwarding carried no balance forward from that point on.

The month of August, American Brands Corporation——

Q. You didn't give the total of that month. A. I am sorry. A combined overdraft as at the end of July of $19,686.50.

In the month of August, American Brands Corporation sets forth an overdraft of $6,023.38; nothing for Michigan.

American Brands Wholesale, carries a balance of $58.33.

American Sweets Corporation showed a balance of $122.67 overdraft.

And American Agar shows a balance of $879.74.

(2896)

American Trucking & Forwarding shows nothing, or a combined overdraft at the end of August of $5,207.98.

In the month of September, American Brands Corporation shows a balance of $1,909.62.

The American Brands Wholesale Corporation shows an overdraft of $28.80.

American Sweets Corporation, an overdraft of $122.94.

And the American Agar Corporation carries a balance of $879.74, or a combined balance as at the end of September of $2,637.56.

In the month of October the American Brands Corporation shows an overdraft of $5,687.91.

American Brands Wholesale, an overdraft of $21.00.

American Sweets Corporation, a balance of $141.73.

American Agar Corporation, a balance of $879.74, or a combined overdraft of $4,687.44.

In November and December the same figures are carried forward. There are no further transactions that we have indicated, and they carry the same balances forward, and we carried the same overdrafts for the months of Novem-

(2897)

ber and December.

The same thing holds true of American Brands Wholesale—it accords to the books. The same thing holds true for the American Sweets Corporation, with the same figure, and American Agar with the same figure, and you have the combined overdrafts for November and December of $4,639.23.

Q. Does an overdraft mean a shortage, Mr. Holzer? What does an overdraft mean? A. It is a shortage in the bank account.

Q. Now, Mr. Holzer, in any of the months just enumerated, could these corporations have paid their taxes as per the consolidated tax return filed on September 15, 1947? A. Where those charts indicate overdraft situations, they are the results of the receipts and disbursements in the corporation, and it would be apparent from this particular cash position that no payments could have been made where there were overdrafts in the banks.

Q. Are these overdrafts that you speak of, do you find them in the books of these various American companies? A. They are on the general ledgers of these American Brands corporations.

Q. Now, Mr. Holzer, how much was the total of the checks drawn to cash from these corporations in the year

(2898)

1946? A. My I have the receiver's report, please?

Q. What? A. The receiver's report, Nadel's report.

Q. What book do you want? A. The receiver's report.

Q. The receiver's report: All right. (Handed.)

(Question read.)

A. On the receiver's report for the year 1946, the American Brands Corporation, the total amount of cash checks drawn was $84,789.72.

Q. What was the cents, 46 cents? A. 72 cents.

Q. That was 1946? A. 1946, sir.

Q. Will you turn to pages 30 and 31, and tell us what disposition was made of those checks? A. The disposition of the checks——

Mr. Wessel: Object to the form of the question, the use of the word "disposition."

Mr. Stryker: I don't know any synonym to use for it.

The Court: What is that?

Mr. Wessel: I don't think it is clear. I don't think it is clear. I don't think it is a term which has been explained and I don't think it has any clear meaning.

(2899)

Q. All right: I have asked the word "disposition." What do you understand by that word, Mr. Holzer? A. The classification of the $84,000, or the distribution of the $84,000.

Q. All right.

The Court: By whom?

The Witness: On the receiver's report.

The Court: I see.

Q. All right. Now turning to that, will you tell us what the disposition or classification or what of those checks was? A. The distribution of the $84,789.72 was distributed as follows by the receiver in accordance with his report:

To traveling expenses,	$12,367.60;
Special drawing,	$51,013;
House expenses,	$18,149.06;
General expenses,	$90.;
Entertainment expenses,	$349.;
American Agar Corporation,	$1,000;
Telephone expenses,	$49.66;
Auto expenses,	$1,330;
Miscellaneous expenses,	$441.40.

Q. All right, now, can you tell us from the documents you have, how much was the total of checks drawn to cash in 1947? I think it is reflected on pages 32 and 33, as I have it. Look and see if I am right. A. In accordance with the receiver's report on the American Brands Corporation for 1947 there were total checks drawn to the order of cash for $18,194.55.

Q. Going back a minute—I hope I won't confuse you—was the $51,013 special drawing account, charged to Giglio's and Livorsi's loan account and salary account? A. Yes, sir. The $51,000 was charged to the drawing accounts of Mr. Giglio and Mr. Livorsi, and on the books of the corporation there was a journal entry for $77,000 some odd hundred dollars that was transferred to their respective salary accounts and picked up as income on the individual tax returns of Mr. Livorsi and Mr. Giglio.

Q. Now you have given us the checks drawn to cash in the year 1947.

Will you tell us what disposition—if I may use that word—was made of those checks? A. The $18,194.55 was distributed—and by the way the receiver's report heads it up "Analysis of Disposition by Months"——

Q. All right. A. And they are as follows:

Special drawing,	$3,500;
	(2901)
Entertainment,	$8,550;
Selling expenses,	$1,086.55;
Traveling expenses,	$3,460;
Miscellaneous expenses,	$1,598.

And of the miscellaneous expense accounts there is represented petty cash at $25, accounting fees, $593. Factory expenses of $230. W. G. Expenses for $100. Bracker salary and expense, $350.

Q. Well, it is a fact, then, is it not, that all the cash checks are accounted for on the books of these corporations? A. They are accounted for on the books of these corporations, and also indicated as being accounted for in this manner on the receiver's report.

Q. Now; turning to——

Mr. Stryker: Strike that.

Q. Now, Mr. Holzer, turning to another subject for a moment, if I may, are you familiar with the minute books, the stock transfer books, and the stockbooks of the five American companies? A. Yes, sir.

Q. Will you please take all of the books just enumerated——

Mr. Stryker: Have I got them here? I don't know the exhibit numbers. They are here. They are all in evidence, I think.

(2902)

The Clerk: Which documents do you want? American Brands?

Mr. Stryker: Yes. All the stock books of the five companies.

quires showing that there is money to pay, an act of some kind, such as concealment or falsification of books or something like that; then you have the attempt, which brings the 145A misdemeanor over (2923) into 145B, felony. That is, I think, in substance what the Spies case in the Supreme Court holds is the law of this case. We charge concealment of all assets, that is, they didn't pay any tax except this $300, paid long before we charge concealment of all assets, and we do so by showing some of the assets that were concealed. Some of them I know your Honor is familiar with, some of them a little more tricky.

The Court: Is count 9 restricted to the 1946 tax?

Mr. Wessel: Yes, it is restricted to that tax, nothing else as to that particular tax return filed September 15, 1947.

Now, we don't show all the assets that were concealed, because we don't know. We know that everything was concealed, and we can only show what we found. Those are affirmative acts, sufficient to constitute a felony of concealment. It is material to that particular crime, that is, the ninth count, to show ability to pay, because if there is no ability to pay, there is nothing to conceal, and you haven't got the required act or attempt for a felony. If these defendants say in any way that is admissible in evidence, that they didn't have money at that time, or they couldn't have money at that time, or, for ex- (2924) ample, the 1948 loss that actually was later sustained, really was sustained in '47, but it was depreciation and things like that, which didn't come up in the '48

The Clerk: All right, Mr. Stryker.

(Hands to counsel.)

Q. Mr. Holzer, did you make a personal summary of the stock books yourself? A. Yes, sir.

Q. If you need this to refresh your recollection I will show it to you for that purpose. (Handing.)

I am showing you now, Mr. Holzer—I ask you to look at and state the books in evidence that I have just shown you: just enumerate them so we will know what we are talking about. (Handing.) A. This is the minute book, the stock certificate book and the stock and transfer ledger of American Brands Corporation Exhibit 80-A.

Q. All right. A. This is the minute book, the stock certificate book and the stock and transfer ledger of American Brands Wholesale Corporation, Exhibit 81-A.

Minute book of American Agar Corporation, stock certificate book, stock and transfer ledger of the American Agar Corporation, Exhibit 82-A.

The minute book and the stock certificate book of Ameri-

(2903)

can Sweets Corporation, Exhibit 83-A.

Minute book, stock certificate book and stock and transfer ledger of the American Trucking & Forwarding Company, Exhibit 84-A.

Q. Now, there is no doubt at all, is there, but that the American Brands did not, on the stock books, own 95 per cent of these companies that were stated in the schedule signed by Mr. Roth as affiliated companies? That is a fact, isn't it? A. That is correct, sir.

Q. Will you take those books enumerated and assume for this Court just what one would have to do, physically, and how long it would take to conform those books so as to reflect a consolidation of those companies? A. As far

as American Brands Corporation is concerned, there are only three certificates issued. All that would have to be done is that these three certificates be returned to the corporation, to the secretary of the corporation, and be assigned in blank, and he would then issue three certificates to the holders of these certificates—that is all that would have to be done—and enter that into the transfer ledger, and put the appropriate stamps on it.

Q. Now, Mr. Holzer, let us for a moment take the

(2904)

Government's assumption that the five American corporations were individual corporations, because the technicalities of this stock transfer had not been compiled with; let's make that assumption. A. Sure.

Q. Would there have been any taxes due to the Government for the entire period 1946, 1947 and 1948, if the corporations had filed individual tax returns instead of consolidated tax returns?

Mr. Wessel: Objection. I don't think the '48 figures are in evidence.

Mr. Stryker: Part of the '48 figures are. They are in evidence from the books.

Q. Isn't that so, Mr. Holzer? A. Yes, they are—not from the books, sir, but from the documents in evidence.

The Court: Which documents?

The Witness: Receiver's final report itself has transactions for '47 and for '48.

Mr. Wessel: Isn't the receiver's report dated in September of '48?

The Witness: I am not talking about Mr. Nadel's report. I am talking about the actual receiver's report that was put in. I think it is TTT, or something like that.

(2905)

Colloquy

Mr. Wessel: And that was September of '48, wasn't it?

The Witness: That shows receipts and disbursements beginning with the receipts of December 23, 1947. It also shows receipts and disbursements in 1948.

Mr. Wessel: The receiver's final report is dated September 13, 1948, isn't it?

The Witness: I don't recall the exact date.

Mr. Wessel: It was in September, wasn't it?

The Witness: I don't believe so.

Mr. Wessel: It couldn't possibly include figures for the end of '48, could it?

The Witness: That was as to figures in the receiver's report as to——

Mr. Wessel: The companies continued in business from that time on.

The Witness: Not to my knowledge.

Mr. Wessel: Didn't Mr. Kohn testify he paid out moneys on that?

The Witness: From the moneys on that particular report, generally there was $22,000 some odd received by the receiver. There were receiver's fees of approximately $10,000, and the balance of $12,000 was distribution made to creditors.

(2906)

Mr. Wessel: Didn't the companies continue business after September 13, 1948?

The Witness: Not to my knowledge, sir.

Mr. Wessel: Didn't Mr. Kohn testify yesterday in your presence that after September 13, 1948, he paid out ten per cent to certain creditors on behalf of these——

books, then it would be admissible, I think properly admissible, because it would show they didn't have anything to pay in '47.

As it is, however, with this witness getting up there and stating only that they had a loss in '48 or maybe '54, it doesn't in any way relate to the ability to pay in '47, which is the only issue under count 9, and under count 10, which is the conspiracy count, I don't know of any charge that deals with the 1948 tax. There is nothing in there at all about it. I suppose—well, it is not a question of that. It is just the 1946 tax return, filed in '47, that is involved, and what happened in '48 cannot be relevant under the conspiracy count either, unless it is somehow linked into a charge against these defendants.

The Court: Well, under the conspiracy count.

Mr. Stryker: It goes down to the date of the indictment.

The Court: Yes. I am just trying to think now. As the record stands now, there is no proof of any act with respect to the 1948 income, as I recall it, so that I mean, I am just trying to think in what

(2925)

sense does this bring a defense in here?

Mr. Stryker: Let me try and——

The Court: Let me go one step further. This is an elaboration of what I said or tried to state at the bench, Mr. Stryker, and I am not sure I said it clearly. I don't care what the ultimate issue is, whether it is conspiracy or what it is. You are entitled to prove the intent with which an act is done. Assume that anyhow, that you are entitled to proof as to some act, the intent with which it is done, the question is what was intended when it was done.

The Witness: I wasn't here yesterday, Mr. Wessel. I didn't hear Mr. Kohn.

Mr. Stryker: Just a minute. That certainly is not doing business. That is a liquidation.

Mr. Wessel: Well, if your Honor please, I have no idea what happened to these companies after September 13, 1948. Apparently they continued business. I don't know whether they did or not. It is not in evidence. There cannot be any final figures for 1948 at this time in this record.

Mr. Stryker: I am going as far as the books and records will let me go, and that is as far as I can go or want to go.

The Court: Well, we will leave out 1948; and also in the form of your question you referred to these stock transfers as technical changes.

Mr. Stryker: What?

(2907)

The Court: I am also going to sustain an objection to the form of the question, in which you refer to these transfers of stock interests as technical changes. I trust you don't intend to characterize them as such in your question, so we will leave that part out of the question.

Mr. Stryker: All right.

The Court: Reciting something which is not in evidence.

Mr. Stryker: Well, now, may I have an answer to my question?

The Court: Leaving out the year '48.

Mr. Stryker: Well, we will take it first for the years 1946 and '47.

Well, strike that.

If your Honor please, there is, I believe, in evidence, a carry-back form for the year 1948.

Q. Am I right, Mr. Holzer? A. There is that form, but I believe you are possibly referring to the claim for refund.

Q. That is it. A. There is a claim for refund in evidence.

Mr. Stryker: That is it.

Now, the point of my inquiry, about which there (2908)

is no mystery at all, is to adduce from this gentleman an assumption on such facts as there are in evidence, and it bears directly upon the heart of this case, namely, the alleged willful and knowing filing of false returns.

The Court: Well, now, the "heart of our case" is what was filed in 1947, and whether those returns were fraudulent when filed, not what happened after that. But without going to that, my recollection is, and if I am wrong I trust one of you will correct me, that those returns came in during the testimony of Roth.

Mr. Stryker: That is right.

The Court: He said he filed those returns—am I correct?

The Witness: He presented them.

The Court: —on somebody else's figures, and we have received them, and I think I said specifically at the time, not for the truth of what they contained, but those are not evidence of anything in so far as earnings are concerned.

Mr. Wessel: Then your Honor excluded subsequent to that the 1948 return.

The Court: I think that is correct. I think I left in '47 and struck out '48.

Mr. Stryker: You did do that, I remember distinctly, but I think my memory is correct that you

(2909)

did not exclude a carry-back request for the year 1948.

Q. Am I right about that, Mr. Holzer? A. Yes, sir.

Mr. Wessel: May I inquire of the witness on voir dire? This is preliminary, counsel, entirely.

By Mr. Wessel:

Q. Do you know of any claim for carry-back that was filed on behalf of the year 1948 in this trial, in evidence here? A. The 843 claim for refund.

Q. $300 tentative? A. That is correct.

Q. Yes. A. That was filed in the name of American Brands Corporations and included in the information on that particular form sets forth the losses for the year 1947 and the losses for the year 1948, as set forth by the two tax returns and carried back to the year 1946.

Mr. Stryker: Now may I proceed?

The Court: No, let's find out about that.

Mr. Wessel: I withdraw my objection, if your Honor please.

The Court: What is that?

Mr. Wessel: It does have it in this form, in Exhibit 89, stated in the schedule attached.

Mr. Stryker: All right.

The Court: Let me see it. (After looking.)

(2910)

Well, has there been any testimony with respect to this Exhibit 89?

at all spelled out in the indictment. That is just what Mr. Wessel says in chambers here. As far as we are concerned, as far as we know, the concealment may relate to any time. It may relate to '47, it may relate to '48, it may relate to '49. I don't know, and we haven't been told, we haven't had a bill until—I guess you are sick of hearing it—but the truth of the matter is we haven't had a bill, and we will really be prejudiced by it. That just isn't a claim.

Now, the evidence that Mr. Holzer is being asked about relates to that concealment count. We want to clear that question up.

There is a further point that hasn't been raised,

(2929)

I don't believe, up to this moment. We are asking Holzer this particular type of question: Assume that these are individual corporations and that they should have filed as individual corporations, not as consolidated corporations, give us the picture from the books. This is evidentiary, this is an assumption, but the only assumption in there—and your Honor may have been thrown off a bit by the word "assumption"—the only assumption in there is for Mr. Holzer—is an invitation for Mr. Holzer to assume that they shouldn't have filed a consolidated return, that they were individual corporations.

Now, Mr. Holzer is going to reconstruct the picture as it would have been if they had filed individual returns instead of corporate returns—instead of a consolidated return.

Now, the picture, we contend, is exactly the same. There are features in the case that have not been developed yet. There are these loans, that were

Mr. Wessel: To the effect that a claim to get back the $300 of the taxes paid by these companies was made; nothing with regard to that subject, and I had forgotten——

The Court: Is there anything in regard to the truth or accuracy of these figures in the record?

Mr. Wessel: Not that I know of.

The Court: Is it your suggestion that we are going to act on these now as the basis for assumption, or are we going to act on the assumption that they are true?

Mr. Stryker: I am making an assumption, your Honor, as stated in my question.

The Court: But first I want to know what the basis of it is, sir. Here is the exhibit.

Mr. Stryker: Well, let me see.

Mr. Wessel: I think, your Honor——

Mr. Stryker: I am going to try, if I may, to prove those figures later on.

The Court: No, before, Mr. Stryker. I tell you. I don't wish in any way to upset your order of proof, but I am not going to waste—I won't use the word

(2911)

"waste"—I am not going to devote a lot of time, based upon assumptions, until I see the facts on which you are going to prove those assumptions. Now, when that is proved, we will go along with that line of inquiry, and you can call Mr. Holzer back to do it if you want.

Mr. Stryker: Let me withdraw the question for the moment.

The Court: All right.

bad debts? there are intercorporate loans. If American Brands advanced money to Agar and Agar couldn't pay it back, that has to be explained to the jury. We can't just leave the picture the way it stands now.

(2930)

Mr. Wessel: We have got some evidence on that, I agree.

Mr. Wolfram: We are not going to be bound by your evidence, Mr. Wessel, we have got to produce our own evidence.

The Court: I just want to be sure I got Mr. Wolfram's thoughts. The thing that bothers me in the question is your reference to 1948, and that has led me to this, which I foresee will be the next question, whether I will take proof as to the year 1948, and I still say that on the basis you have outlined, I don't see it. I mean, the year 1948 and the income for the year 1948 is not in issue here; there has been no proof to suggest that you did anything wrong with that income.

Mr. Wolfram: Your Honor, I go back to what Mr. Wessel brought out on the direct examination of Louis Roth, when he said to Roth, when he showed him this form that Roth filed and he said to him, "Now, how did you arrive at that $350,000?" and Roth said, "We have losses of $200,000 and I took a good guess," or "It was a fraud," or whatever he said, that the $150,000 was just a plain guess, it was a fraud or anything else.

(2931)

Mr. Stryker: The implication was he was committing a fraud on our behalf.

By Mr. Stryker:

Q. Now, Mr. Holzer, will you tell us now, take the Government's assumption that the five American corporations were individual corporations, and my question on that assumption is, would there have been any taxes due to the Government for the entire period of 1946, '47 and '48, if the corporatioins had filed individual tax returns instead of consolidated tax returns?

The Court: Leave out the year 1948 until we get something in the record that establishes income or loss for that period.

Q. Well, what do you need for the basis of the assumption?

Mr. Wessel: On this question, if your Honor please, as counsel has phrased it, I won't object to the question, assuming—and I take it that counsel assumes in his question—that the figure set forth in

that exhibit is the correct figure?

The Court: All right.

Mr. Wessel: Of a consolidated.

The Court: All right.

Mr. Stryker: I am not going to stop there either. I mean to comply with your Honor's suggestion; I desire to comply with your Honor's suggestion.

The Court: I want you to know that ultimately I foresee a question of materiality as to that inquiry, and that is why I don't want to spend too much time on it.

Mr. Stryker: I won't spend very much time.

The Court: In other words, I may never permit the proving of it even though you have got the proof.

Mr. Stryker: I hope you will when the time comes.

Now, I believe the question is now allowed. Have you it in mind, Mr. Holzer?

Will you read it, Mr. Reporter.

The Court: Mr. Wessel and Mr. Stryker, can I see you for a moment? In spite of your perfect willingness to go ahead, I would like to know where we are going.

(The following discussion took place at the bench, not in the hearing of the jury:) (2913)

The Court: What I don't understand is the relevance of this carry-back loss proposition. If a return was filed in 1946, which understated income, I don't see what difference it makes two years later the losses may develop carry-back loss rights, which for the sake of argument eliminated the income in 1946? That is why I don't see why we should go ahead with this inquiry.

Mr. Stryker: Well, your Honor, we are dealing with a basic principle, knowledge and willfulness.

The Court: Yes, as of the time the return was filed.

Mr. Stryker: Yes, which of course, in turn, willfulness or knowledge depends, well, on knowledge of what, if people are supposed to have it, know.

The Court: Yes.

Mr. Stryker: All right. Now these charts show what they knew about these companies at that time. It shows their knowledge of that and their knowledge was, therefore, in view of the figures, innocent and not guilty knowledge.

The Court: Well, ——

Mr. Stryker: Let me finish, if you will, please.

The Court: All right.

(2914)

Mr. Stryker: We are dealing here with a criminal case, in which criminal intent is required at every stage of the case. Anything that bears on criminal intent against us is admissible, and vice versa, and this line of proof tends to establish, in my opinion, an innocent and not a guilty intent. In other words, I don't take just one transaction of a particular moment, when Roth filed this '47 return, I take all the surrounding circumstances from the books and records in this case.

Did you want to add something else, Mr. Wolfram?

Mr. Wessel: If your Honor please, my objection before was as to foundation. I didn't object to materiality. I should have, and there is a very definite objection there.

The Court: All right. Now my feeling is this, that even if on the day this return was filed, which was what, September 1947?

Mr. Wessel: 1947.

The Court: That's right. If they knew, if they were gifted with foresight and knew they were going to lose their shirts in 1948, that they were going to lose their shirts before 1947 terminated, if they knew they were misstating the facts on that return, it is a crime.

(2915)

Mr. Stryker: Yes, but you said, "if they knew." Now, you say if they were gifted with clairvoyance, or something like that.

The Court: I think I might have misstated the facts. In 1940, that is a crime.

Mr. Stryker: They weren't gifted with clairvoyance, they were gifted with ordinary businessman's knowledge of the books, where they were, and what the situation was at the time. It goes to the essential question of guilty knowledge.

Mr. Wessel: May I speak for a moment? There are two charges with respect to these American Brands Corporation returns, (a) the one your Honor just referred to, which is that a false return was filed. It makes no difference with regard to that charge whether they did or didn't have money or anything else; (b) the second charge is tax evasion. Now, on that charge, of course, you must show, that is, they didn't pay, but they could have paid as they had some money, which is concealment of assets. And that is the count—in any event, one of the counts is concealing assets, and that requires their ability to pay. Now, it is perfectly true that if at the time—and I think your Honor has pointed this out—if at the time under that count they didn't

have money and couldn't pay, they couldn't be guilty because they couldn't have concealed anything. But what they knew about 1948 isn't proved by what happened in '48. It is proved by either them or somebody else testifying as to what they knew. Now, in 1947 is it perfectly clear from the books—and I haven't objected to the '47 figures—it is perfectly clear that they knew they had a loss, and that is all right, that loss doesn't wipe out the profit.

In 1948, the mere fact that there was a loss, doesn't in any way link to their state of mind the

1947. There is a doubt there, and that is why I think your Honor excluded the '48 return, and that is why I think the question now is objectionable. If they want to get up or somebody wants to get up and prove that in 1947 they knew they had a loss for 1948 and didn't have any money, which is a completely different thing entirely than this witness is talking about, that might be material to the concealment count, but I don't think it is.

Barring that single link, merely proving something that happened without foundation, is not sufficient.

Mr. Wolfram: Let me ask it the other way. I think everybody lost sight of the fact that there is

(2917)

a conspiracy count in this indictment that charges the defendants with certain fraudulent and wrongful acts from the period 1947, I believe, right down to the date of the finding of the indictment. Now this happened within the period of the conspiracy, and I think that we are clearly entitled to show that there was no intent to defraud, and that the conspiracy did not have the particular transaction that Mr. Wessel brought out on his direct case, that that wasn't a part of the conspiracy, because right in the very period that they were filing this return, they knew they were going to have these losses and they subsequently had them. That goes right to the heart of the conspiracy charge.

Mr. Wessel: May I suggest that we are in a very complicated field. Perhaps we should have a hearing in chambers before your Honor to discuss this, and I would have no objection—this isn't a long line of examination—I would have no objec-

tion to let counsel go ahead for ten minutes, and then considering this matter in detail before your Honor, and then we will consider whether it is relevant or not.

The Court: I just didn't see any sense getting along and holding the jury here for this whole line of inquiry.

(2918)

Mr. Stryker: I think what Mr. Wolfram just said really sets the question at rest.

The Court: Mr. Stryker, I don't want to be misunderstood. Anything you can show as to the intent of these people when they did something, I think—I mean, as long as there is something they did that has materiality you can show, but you can't show that they intended something in 1947 by what happened in 1948, unless you can show that connecting link.

Mr. Stryker: Well, if the individual counts were the only counts, that would be one thing. We are charged with conspiracy beginning when? And ending the date of the indictment, and this is within that period.

The Court: Forget the charge, Mr. Stryker. The question was with what intent did they perform certain acts in 1947?

Mr. Stryker: That is just what I am getting at.

Mr. Wolfram: Don't forget the conspiracy charge.

Mr. Wessel: And also the overt acts.

Mr. Stryker: They said they did many things in many overt acts. I am trying to show that whatever they did was not done with a criminal intent in any way but in a very innocent, honest intent. Now

(2919)

it would be impossible to answer the conspiracy count alone; if I were debarred from doing that I couldn't do anything.

Mr. Wolfram: The claim that they filed for a carry-back, I believe, or notice to the Government for a carry-back, was filed right along with—almost at the same time with the tax return, and all of this evidence that we are trying to adduce on that particular line falls within that original claim.

Mr. Wessel: That is the '47 return.

Mr. Wolfram: That is the '47 return. Even if you regarded it from the point of view of the substantive count, your Honor.

Mr. Wessel: That is in the 1947 return.

The Court: We have got the '47 return in.

Look, if you both want to go ahead on this—

Mr. Wessel: It isn't a question of wanting to go ahead, Judge, but we will be here for an hour probably arguing this thing.

Mr. Stryker: I don't think so. My questions——

Mr. Wessel: I am talking about the law on this question, and that is why I think it isn't more than five or ten minutes at the most.

Mr. Stryker: Let's go ahead then and take it

(2920)

up later.

The Court: All right.

Mr. Stryker: Can we have our recess now?

The Court: If we are going to take our recess now, we will come back to our discussion that we were having.

(Jury excused.)

The Court: Now I want to talk with counsel.

(Defendants' Exhibits HHHHH, IIII, and JJJJ, marked for identification.)

The Court: Are you ready to discuss this further now?

Mr. Wessel: Yes, sir.

The Court: Let's go into chambers.

(The following took place in the robing room during the recess:)

Mr. Wessel: I think the record ought to show, if your Honor please, before we start, that about a week ago or so, I handed up a memorandum of law on this subject to your Honor, a copy of which I handed to counsel for the defendants, which indicated at least the Government's view of the law on use of carry-back losses to somehow vitiate the crime. I don't think any reply memorandum has

(2921)

been submitted to your Honor, it certainly has not been to me.

The Court: Well, let me pose my questions and perhaps you people can be most helpful.

We have got three counts dealing with American Brands, in addition to the conspiracy count. We have a count for filing of a false return, based upon the false consolidation. We have a count for the failure to pay their 1947 corporate income tax. Now as to those two counts, I don't see any bearing of the 1948 loss. I mean, if there is a false statement, and the use of a false statement to evade a tax payment, an intentional use of a false statement to evade a tax payment, that is the crime.

Colloquy

Now you have counts 9 and 10. Nine is the evasion of tax by concealment of assets, and 10 is the conspiracy to evade income taxes of this entire group, to use a loose phrase.

Now on count 9, the alleged concealment of assets was going on during what period? That was going on up through '48?

Mr. Wessel: Well, the concealment of assets, of course, continues indefinitely; but the concealing must be at the time of the liability, that is, at the

(2922)

time you file the return and are required to file a return.

The Court: In other words, when they filed their return in 1947.

Mr. Wessel: Or when they were required to file, and if your Honor will recall, there has been evidence as to what it was in March and June and September.

The Court: That is right.

Mr. Wessel: May I just for a moment explain a little bit about what I think the concealment count means?

Under the Spies case in the Supreme Court, which I think is the leading case in this whole field, in order to have a crime of willful failure to pay a tax, you must have an affirmative act, you must have an affirmative act. In the Spies case, one such affirmative act is concealing assets, and all you have to do is show that something was done, an act, in the traditional common law sense, of an attempt, including an act. Mere failure to pay without more would only be a misdemeanor under Section 145A. When you couple with a failure to pay, which of course re-

not what happened eighteen months after it was done.

Now, conceivably, the proof of what happened eighteen months after it was done could show that intent, but it doesn't show it here, and I would say that there are very few cases where it would show. You have got to show some connection.

Mr. Wolfram: Can I say a word?

The Court: Yes.

Mr. Wolfram: As I remember the Government's direct case, the Government proved, of course, the filing of the '47 return, the alleged false return through Roth, and the Government also brought out that Roth——

(2926)

The Court: The false 1947 return.

Mr. Wolfram: Yes.

The Court: The return filed in 1947.

Mr. Wolfram: The so-called consolidated return, filed in '46.

Mr. Wessel: For '46.

The Court: For '46.

Mr. Wolfram: I mean the return filed in '47. And the Government also brought out through Roth in its direct case that Roth, at or about the time he filed this return in '47, filed a statement with the Government that the corporation's anticipated losses amounted to, I believe Roth said, $350,000. Then Mr. Wessel brought out that Mr. Roth knew that the losses were going to be $200,000, and just added $150,000 arbitrarily.

The Court: That is for the year '47.

(2927)

Mr. Wolfram: He did that in the year '47, and he estimated losses for the year 1947, or for whatever period it was, I don't recall.

The Court: It was '47, as I recall.

Mr. Wolfram: That's right, your Honor.

Now, I submit, your Honor, that in view of that direct testimony these defendants are entitled to show that they did have losses and their losses not only equalled what Roth anticipated they would be, but exceeded what Roth anticipated they would be, and that bears on Roth's statement that when he filed the $35,000 claim, he was in effect filing a false statement with the Government, at least to the extent of $150,000.

Now, that is just one aspect of it.

The second aspect of it is this: This is a conspiracy charge; the conspiracy charge is not limited to any particular period. It starts with, I believe, 1947, or it may even be earlier and it goes right down to the time the indictment was filed.

In that conspiracy count the defendants are charged with concealing their assets. If the case is left the way it is now, where we filed what the

(2928)

Government claims is a false return for the year '46, in which we show very large profits, the inference can easily be drawn that we took that money and concealed it, and there wouldn't be anything in the record to refute it.

This evidence that we are tendering now is tendered on that issue.

Now, the third issue, Mr. Wessel says in Count 9, the concealment, referred to, relates only to the time of the filing of the indictment, but that isn't

Mr. Wolfram: Now, we can prove through this witness that Roth was not only right, but he underestimated the losses and that wasn't fraudulent.

The Court: On that issue I think your proof as to what actually happened in the year 1948 is still too remote at this point and I am not going to go into it, I don't think.

Mr. Stryker: Well, Judge, let me say a word.

Mr. Wolfram: May I just finish? I just have something I would like to advance.

Mr. Stryker: Yes, go ahead.

Mr. Wolfram: The only reason that this particular loss occurred in 1948 and not 1947 is that I believe the machinery was finally liquidated in '48. I don't know what the actual loss in '48 was. These corporations were not doing business, your Honor. That loss could have occurred in '47 just as well as it did in '48.

Now, the loss resulted from the liquidation of some machinery. It wasn't a business loss; it was just a liquidation loss.

(2932)

Mr. Wessel: If I may interrupt Mr. Wolfram, that is exactly where you need a fact witness, not an expert witness. He can't testify to what, for example, was a bad debt loan, as distingnished from a good loan, and so forth.

Mr. Wolfram: That objection comes up on the specific question to the witness, not as an objection to the general line.

Mr. Wessel: But now you are referring to five reasons that you want to inquire on this particular subject.

Mr. Wolfram: No; I am trying to answer his Honor with respect to why '48 comes into this pic-

ture, and '48 comes into this picture just as a sort of coincidence, because it happens that in a liquidation of corporations which went into receivership in '47, they happened to take, they happened to liquidate in '48. That is the only reason it comes in in '48. It could just as well have happened, if the proceedings had been a little faster, the year before. It wasn't a business situation. They weren't running a business at that time.

The Court: Wasn't your receivership completed in '48?

(2933)

Mr. Wolfram: I believe it was, yes. Well, that is how the loss was established. That is the only way they established loss, and it is just coincidental that it happened in that year instead of the year before; that is all. It wasn't a business going on in those years and sustaining losses. That loss could have happened in the year they filed the tax return.

The Court: I am not saying at this time that at some point you won't have a proper foundation to inquire into 1948, but as of this point I don't [illegible] and I am not going to go off into an inquiry here which I don't think we have any basis for now. If you want to call Mr. Holzer back, why, that is all right with me.

Mr. Stryker: Will you let me say a word?

You [illegible] interrupting you?

Mr. Wolfram: No, that's all right.

Mr. Stryker: We are dealing with a criminal case, a charge of committing a crime, which requires a criminal intent. All right.

Now, whether a person has a criminal intent at half-past 3 o'clock on a Monday afternoon, may

depend on what happened two weeks before that morning or a week from the Friday after that.

(2934)

Now, I go back to what I believe is a fundamental principle in Wigmore, that evidence is divided into three categories, prospective, immediate and retrospective—you look at it before; you look at the time and you look at it afterwards, all of which, every aspect, every aspect, every shot you take, bearing on the target of what happened then.

Now, these gentlemen are depicted by Roth and Lubben as the worst kind of frauds. Everything they did was wrong; every document that was filed, Roth has a conversation about some dreadful idea that one of these people had. They knew what the business was doing; they knew they were going to the wall. They knew that very clearly in '47, and that chart shows that. You can't assume that they didn't know it.

Now, not only wasn't it clairvoyance, it was just very ordinary garden intelligence to see that. And also it bears on this question, which has been discussed so much at this trial, the fact that these returns were filed late in September instead of March. That is all put to the jury as some great criminal intent on our part, my client's part, to evade

(2935)

and cheat the Government.

Now, all that thrown into the hopper would make a stew of criminal intent. I submit that what happened in these companies at or around the times in question, whether it was the exact day or even the exact year, all bears on the fundamental question of intent to defraud the Government of the United

States, without which you would have to dismiss the indictment.

Now, it bears on those aspects, also the conspiracy, gives us dates. I don't know whether it is '45 or '46. I think '46 it starts in and says down to the filing of the indictment, which was last year some time. All these terrible things, they are all made into a kind of a stew there, in the conspiracy charge. They are supposed to, among other things, to be conspirators, to perform overt acts, to have done this and that as part of the conspiracy.

Now, I submit that I ought to be able to bring these things before the jury in the light of the true facts. I can't get them all from this gentleman in one question, but if he can go on step by step, I intend to establish strong proof that will show that there was no wilful and knowing filing of a false return, and that there was no intent ever to cheat the

(2936)

Government.

Mr. Wessel: That is not what an expert witness is designed to do.

Mr. Stryker: Well, Heaven knows I can't. These things are in evidence. Now, this man is here to explain them, make them clear. Heaven knows I need it for myself, and off the record a minute, Judge.

(Discussion off the record.)

Mr. Wolfram: I should like to make one more point before your Honor makes a ruling.

The Government went into the receivership picture in its direct case. They not only introduced Nadel's report, but Mr. Roth testified about the

receivership and certain transactions in the receivership.

Now, the defendants submit that once you go into the receivership question, we have to be permitted to show what happened in that receivership. We have got to be permitted to show that these corporations not only went into receivership, but that when they came out there were these losses, and that picture, with respect to losses, applies not only to '47, your Honor, but it applies to the subsequent year

(2937)

and it applies to the very termination of the receivership, when all those assets were disposed of.

Mr. Wessel: I don't want to interrupt. I hope they do. They can do that; that will be fine. We need evidence, not an expert witness.

The Court: I have got the point.

Mr. Wolfram: May I correct one impression you have, Mr. Wessel? Mr. Present was a combination expert and fact witness. He testified from the books—of course, he did. He testified to what was in the books. You have books in evidence. You can't——

Mr. Wessel: Mr. Holzer is testifying as to who the owners were of Lorraine Company. He doesn't know.

The Court: Before we get on to another question, I want to make my position clear on the one we have got before us, and that is that I agree with almost—I guess I agree with all of the general propositions cited by Mr. Stryker—Wigmore right on through.

I don't think this is a question that can be disposed of by generalization. I agree that you look

after the event many times to determine the intent

(2938)

with which an event, an act, was committed, but I think we have got to pass on this piece by piece, and at the moment I don't see that 1948 throws the light on the intent, as far back as September '47, and the discussions which were talked of that preceded 1947.

Now, as the evidence develops in this case, I tell you I will alter my ruling.

All I am doing is saying that as of the moment I am not going to embark into this inquiry.

Mr. Wessel: If I may just add, if your Honor please, you are only faced now with the question as to whether this expert witness can testify on that subject. If a fact witness were introduced on that subject, it might be different.

The Court: I am projecting myself ahead as to whether we will take proof on income in '48.

Mr. Wessel: I see.

The Court: Now, Mr. Wolfram has advanced another theory on which 1948 income might be relevant, and on that, all right, I will cross that bridge when I come to it, but this question before me is clearly directed to showing the carry-back loss for 1948 in relation to the income tax of 1946, and on that issue, as of the moment, I don't see its

(2939)

relevancy.

Mr. Wolfram: We are tendering it on all issues, your Honor. We are not tendering it on one issue on all issues.

The Court: In this question you don't tender it on all.

You link it into your 1946 return.

Mr. Wessel: I didn't know it had that 200,000 figure in it. It is not broken down as between the companies, and there is nothing in evidence that I know of about 1948 as between the individual companies in the consolidation and the particular question before the Court now, as I understand it, is whether or not the individual losses of each company of '48 change the tax picture at all.

That I don't think is in evidence.

Mr. Wolfram: May I make one statement?

Mr. Holzer is a fact witness to the extent that he is testifying from the books and records of the corporations.

The Court: That is all right.

Mr. Wolfram: They are in evidence.

Mr. Wessel: The '48 books aren't in evidence.

Mr. Wolfram: Whatever he is testifying to is (2940) in evidence. He is not——

Mr. Stryker: It is in evidence.

The Court: The whole trouble is it is not.

Mr. Wessel: That is quite so.

Mr. Stryker: He is getting it from the books and records.

Mr. Wolfram: There are documents in evidence now which show the '48 losses.

Mr. Wessel: Not individually, that I know of.

Mr. Wolfram: Yes. Well, if they aren't then this man can't testify.

Mr. Wessel: That is one of the objections to the question now before the Court.

Mr. Wolfram: That is what we have to find out, from him, isn't it? Don't we have to find out

whether those books and records—whether the evidence will support his testimony with respect to 1948?

Mr. Stryker: Suppose I approach it that way and see.

Mr. Wessel: This is just another objection to the same question. There is a materiality objection. There is a competence objection. There is a foundation objection, which is this one.

(2941)

Mr. Stryker: Judge, will you let me say this: Of course this man, not being there, he can only testify from the books or records or documents in this record, obviously.

Now, if he can't tell me from the books and records what the losses were for any part of '48, I would agree with you, you should not permit it.

If he can, he bases his testimony on whatever is in evidence in the same way that Mr. Present did.

Mr. Wessel: Why don't we take it step by step? Let's find out first whether he can answer the question without regard to the materiality objection, and then if he can, then let us consider the other.

I think your Honor's ruling is correct on materiality, too.

The Court: What I am interested in now is the carry-back question, and on that I stand on the ruling that I have announced.

When you get into '48 as it bears on the receivership, or if you have got better—I mean, if you can show a better connection on intent, I will reconsider even as to the carry-back.

Mr. Wessel: I should state on Count 9, the word "consumed" is used in Counts 7 and 8—I just

(2942)

read it again—Count 9 used other words in the Spies case, "did misappropriate, convert and divert assets of ABC for the year 1946 when they filed their tax return," which would be September 1947.

Mr. Wolfram: That makes our argument only stronger.

Mr. Wessel: It is the same thing.

Mr. Wolfram: It is stronger.

The Court: Now, wait a minute.

Mr. Wolfram: Well, we will have to try to approach it a little differently, that is all.

Your Honor has ruled we can't approach it with the pending question.

The Court: I sustain the objection on the pending question.

Mr. Stryker: Suppose you do that, and if I am wrong, that's that.

The Court: All right.

Mr. Wolfram: May I ask for permission to do one thing? We have a county clerk, or a representative of the county clerk of Kings County, with a certificate of doing business for Tavern Fruit Juice Company. We should like to put him on and get him off and your Honor can rule on it.

(2943)

The Court: All right, do we need the witness?

Mr. Stryker: He will have to take the certificate back with him. It is an official record.

The Court: I wonder if you have an authenticated copy, rather than get into the problem you got into with your Jersey man. Talk to Mr. Wessel and get together on the question of an authenticated copy. The clerk can go back and send you an authenticated copy.

Mr. Wolfram: If there is no objection, we will take a photostat of it.

Mr. Wessel: That will be all right.

(The following proceedings were had in open court:)

By Mr. Stryker:

Q. Mr. Holzer, assuming that the five corporations were all individual corporations, would you give us a picture of each corporation's earnings or losses from 1946—I have it here through 1948; I will put it as 1947——

The Court: Yes.

Q. (Continuing)—showing all the losses including bad debts from corporations in receivership, and basing all your computations on the books and records in evidence.

(2944)

Mr. Wessel: I object to the form of the question on the ground there is no foundation as to bad debts.

The Court: Strike out that portion of the question and give us the picture as to the—I am trying to rephrase Mr. Stryker's question—give us a picture as to the losses for the year 1947, based upon the records in evidence.

Mr. Stryker: I know what I am going to do. These charts are made up, 1947, '46 and '48.

Well, anyhow, let's get the charts.

Q. Will you look at those, identify them, tell the jury whether you made them up at my request. A. Exhibit HHHH is a chart which I prepared for the American Brands Corporation.

Q. This isn't in evidence, so don't read it. Just describe it so I will have a foundation for it. A. Yes. These are charts—HHHH, IIII and JJJJ are charts that were prepared by me for these five corporations, setting forth the earnings and losses for the years involved.

Q. And the years you have there on the charts are '46, '7 and '8? A. '46 and '7 pertain to the charts that are IIII (2945) and JJJJ, and '48 is only on the chart HHHH.

Mr. Stryker: Let's leave that HHHH aside for the moment.

And I offer these two charts in evidence.

Preliminary Examination by Mr. Wessel:—

Q. Am I correct, Mr. Holzer, that there is none here for American Brands Corporation? A. That is on the other exhibit.

Mr. Wessel: There is no objection to Exhibit JJJJ.

The Court: Received.

(Defendants' Exhibit JJJJ for identification received in evidence.)

Q. Before I ask any question, isn't it a fact, Mr. Holzer, that a write-off of a bad debt is income to the company that gets the benefit of it? A. No, that is a matter of law. The way I understand, under the regulations, that where you have the write—where you have the forgiveness of the debt, and that company that receives it is still in an insolvent position, it does not give rise to taxable income.

Q. In Exhibit IIII you made certain assumptions am I (2946) correct? A. Which is IIII?

Q. That is the American Brands Wholesale Corporation. A. In respect to what, sir?

Mr. Stryker: I have a copy of it here, so you can see what he is talking about.

Q. During the year 1947, I take it, you found that American Brands Wholesale Corporation had receivables of $226,000-odd from American Brands Corporation, American Agar Corporation, American Sweets Corporation and Lawn International. A. Yes, sir.

Q. You found there were those receivables? A. Yes, sir.

Q. And you determined they should be bad debts, is that correct.? A. In the reconstruction of the 1947 income tax return treating them on a separate entity basis, based upon the receiver's report.

Q. You determined that they were bad debts?. A. Yes, sir, based upon the receiver's report and the balance sheets that were included in that report.

Q. Now, does the receiver's report say that these were bad debts? A. The receiver's report does not say they were bad debts, but all that the receiver showed was that on these companies that had these liabilities, that these com-

panies were definitely not in a position—they were actually on these reports; they were insolvent; they had no assets with which to pay their liabilities to these debtor companies.

Q. Well, now, when you say they had no assets, I take it you are referring to such things as bank accounts, buildings, such as 101 Fairmount Avenue? A. I am taking the net worth position as set forth by the receiver on his report.

Q. Now, for example, this building at 101 Fairmont Avenue, which was an asset of American Agar Corpora-

tion—is that correct? A. I don't know whether that statement is correct or not.

Q. Do you know what company it is an asset of or was an asset of? A. I have to check my figures.

Q. You heard it was sold—during the course of the evidence, that it was sold at some time for $15,000, correct, sir? A. In accordance with the receiver's report there is a sale of that property.

Q. And you learned that and it is in evidence, it was sold for $15,000; is that correct, sir? A. Well, I wasn't (2948)

here the day that that testimony was given. I haven't read it, but I know from my examination of the receiver's report there was a sale of the Fairmont Avenue property.

Q. Well, now, in order to determine whether or not these various receivables on the books of American Brands Wholesale Corporation were in fact—well, if the companies couldn't, in fact, pay them, you would have to know what the asset picture was, wouldn't you? A. That is true, and that is precisely what I did. I went through the balance sheets of these various corporations and took the actual positions of the company, and even eliminating the amounts that were due on these other companies, the companies still would have been in an insolvent position.

Q. Well, now, I see you wrote off the American Agar amount owed to American Brands Wholesale as a bad debt.

Did you note that American Agar as of December 2, '47, had total capital assets of $192,000-odd? That is on Exhibit N, page 49 of the receiver's report. A. On the balance sheet of Mr. Nadel's report to the receiver of American Agar Corporation he shows a total deficit there (2948a)

of $315,000.

Q. Didn't you hear my question, Mr. Holzer? I asked you whether or not it didn't show capital assets in the amount of $192,000. A. It shows capital assets of $192,000.

Q. It also shows that Lawn International owes $1,950, doesn't it? A. 1,950.

Q. And then it shows American Brands Corporation (Michigan) owes $50,000-odd? A. Right.

Q. Now, as you said, that makes a total asset there of $248,000. Now, there is a deficit that you found? A. Right.

Q. Apparently an operating deficit of 315,000. Well, now, if a company has assets of $248,000, which it seems to have, without going into every part of that company's business, could you determine that it couldn't pay any part of the amount it owed American Brands Wholesale? A. Because as of this particular time there the actual—the actual current assets that the company had with which to pay was only $3,000.

Q. I wasn't talking about current assets, was I, sir? I was talking about capital assets. A. You asked whether they could pay.

(2949)

Q. I know a debt may be payable a year from now. You don't write it off until you know you can't pay it, isn't that so? A. Based upon this situation here, I took the situation: You have a deficit of $315,000——

Q. Now, if I may go into this a little bit more carefully—perhaps I am not being clear. Here is a company that has assets of $248,000, is that right, sir? A. Right, sir.

Q. And, of course, you don't know whether or not that asset now will be transferred into cash; it may be transferred into cash a year later or two years later or ten years later. A. Right.

Q. You can't tell by looking at this balance sheet, so how can you tell whether, when that company owes something to somebody else, that money is going to be paid or not? A. For this reason: In going into the analysis of these various books of the companies, from the records there was a cessation of operation during the middle of 1947, so that for the middle of 1947 I was able to determine from these books that from about that particular time to the end of the period that these companies were more or

(2950)

less in a liquidating position and were not in an active operating position.

The sales, some of the sales, ceased in these companies, and so forth. So that based upon the actual stopping of operation, of the manufacturing here, I was—I took the situation here that they had plant and equipment that was more or less obsolete.

Q. How do you know that? A. Because of the actual operations stopping there, and the manufacturing processes that they were utilizing.

Q. Do you have any personal knowledge that the American Agar plant reflected in the statement a financial condition as at December 2, '47, was in fact obsolete? A. Based upon the testimony I heard here.

Q. Didn't you hear some testimony that was being used even up to 1950 and 1951? A. No, sir.

Q. You didn't hear that testimony? If you did hear that testimony, then you would change your opinion, is that correct? A. No, because all I took from the financial point

(2951)

of view here was that this company was financially insolvent inasmuch as they had a deficit of $315,000.

Mr. Wessel: I could go on at great length, if your Honor please. I think there is sufficient here to show——

Mr. Stryker: I think he has gone into more than an examination on voir dire. I haven't objected. I think I showed a basis for the document. Do you object to it?

Mr. Wessel: I wish counsel would give me an opportunity to complete my objection.

I think there is sufficient here to show that this witness's assumption that the receivables on the books of American Brands Wholesale were bad debts is not founded upon the evidence in this record now.

Maybe there will be and maybe there won't be evidence, but it is not founded upon evidence, now, and I therefore object to it as not founded on the evidence in this trial.

Mr. Stryker: I think it is shown that it is.

The Court: I will sustain the objection.

Mr. Stryker: Well, let's take this Exhibit IIII.

(2952)

By Mr. Stryker:

Q. This is an analysis of profits and losses, American Brands Wholesale, for the year '46 and '47, is that correct? A. That is correct, yes, sir.

Q. Now, upon what——

Mr. Stryker: Strike that.

Q. Is that an analysis based upon evidence in this case? A. Yes, sir.

Q. What is the evidence upon which you base that analysis? A. Nadel's report.

Q. That is a document in evidence, offered by the Government. A. Yes, sir, receiver's report.

Q. You base it entirely on that or something else? A. No, I base it on that report, plus the—no, that I base completely on the receiver's report.

Q. This particular document that I handed you? A. Yes, sir.

Q. And all you have done is to here graphically analyze as an accountant what appears in this Nadel report, is that right? A. Yes, sir.

Mr. Stryker: Now, isn't that admissible your Honor?

The Court: What is this, 1947 you are talking about now?

(2953)

Mr. Stryker: That's right.

The Court: Show it to him.

Mr. Stryker: He has seen it.

Mr. Wessel: That is the same one I was talking about. I was cross-examining or voir diring from the Nadel report.

The Court: The Nadel report doesn't say these are bad debts, does it?

Mr. Wessel: Not at all.

Mr. Stryker: I am asking him, your Honor, whether this document, which I would like to have in evidence, is predicated upon the document in evidence. He says it was. I am asking him then if this is his analysis, the accountant's analysis of what that document in evidence shows.

Now, if his analysis is incorrect in any way, that is a subject for cross-examination or contrary proof, but on the face of it, on the document as I have offered it, I submit that the foundation is there and that we should have it in evidence.

The Court: I am going to hold that whether a debt is a bad debt or not isn't something that you can determine from an internal analysis of the Nadel

(2954)

report.

Mr. Stryker: Well, now, let me just see. I think this document is under "Losses," and this gentleman's description—I don't know whether it is in the accountant's report or not—he, as an accountant, calls it a bad debt.

Now, if he is incorrect that could be corrected, but I don't care about his phraseology. I care about his accountant's analysis of this document.

Now, may I have that?

The Court: He is analyzing a document as an accountant. When he shifts an asset, when he writes off an asset as a bad debt, that is not an accounting dissolution, it is a business dissolution.

Mr. Stryker: It is an analysis of a document, what it means accountingwise.

The Court: Accountingwise that figure is on the books until some authority writes it off. I may be wrong. Now, if I am incorrect in my understanding of what an accountant does——

Mr. Stryker: I am sure your Honor knows more about accounting than I do.

The Court: I doubt that.

Mr. Stryker: That is all I am trying to do, to

(2955)

have this certified accountant analyze for this jury a document in evidence.

The Court: As soon as you lay a foundation which supports your conclusion that that is a bad debt, why, we will come back to that question again.

Mr. Stryker: Your Honor, just one thing you said which may be important here.

The Court: Yes?

Mr. Stryker: Your Honor said something, as I heard it, to the effect that you were not going to

call this a bad debt until it is written off—I think you said something like that.

The Court: No, I don't think I quite put it that way. I just say on the evidence thus far advanced it not having been written off——

Mr. Stryker: I believe the receiver did write it off, Judge.

The Court: The receiver wrote it off? If you show me that; all right.

Mr. Stryker: I think I am right. I will verify that. That is my impression.

Q. I show you Exhibit TTTT in evidence. Am I right that the receiver wrote that off? Correct me if I am wrong. (2956)

Mr. Wessel: I think the witness said he was testifying about the Nadel report. Now he is talking about what the receiver, Mr. Boyle did; an interpretation of the final order, I think.

Mr. Stryker: This is a document in evidence and——

The Court: That doesn't dispose of all the problems.

Mr. Wessel: That is a legal question for your Honor. I would be very happy to have your Honor decide what the final order of that court does, if anything, but that is not the Nadel report which is the document the witness says he is talking about.

Mr. Stryker: I know I am not showing the Nadel report. I have shown him that. I am showing him something else also in evidence, the receiver's report.

Q. Isn't that right, Mr. Holzer? A. Yes, sir.

Q. Now, how does he handle that? That is in evidence. Let's see if we can't get on. A. He shows in this particular report the total receipts received by him, and there is the order of the Court here showing these receipts less the amount of the expenses that he has, and the balance he was

(2957)

ordered to pay out to the remaining creditors.

The Court: May I see it when you are through with it, Mr. Holzer?

The Witness: Sure.

The Court: You go ahead.

A. (Continuing) He shows total amount of liabilities on here, receipts of $22,818; shows his disbursements at $10,577.88, with a balance of $12,240, and the order to pay the $12,240 out.

Mr. Wessel: Now, when your Honor looks at it you will note that is 1948 and not 1947.

Secondly, there is no proof that all the assets were turned over to the receiver, that I know of.

And, thirdly, the receiver himself has nothing to do with whether or not these are bad debts or not, which was merely confined to this accountant's report.

Mr. Stryker: Will your Honor look at it and ask any questions you want?

The Court: All right. I will try to do it very quickly.

Mr. Wessel: I think I should also add that the inter-company transactions, as reflected on the Nadel report, were never put into the receivership.

(2958)

The Court: I am not sure I follow you on that.

Colloquy

Mr. Wessel: This whole thing which the witness has broken down into different companies was handled by the receiver's accountant, Mr. Nadel, as on this consolidated statement, financial condition, in an over-all picture.

He never went around to try to get the money from American Brands, to pay off American Wholesale, and so on.

The Court: The inter-company transactions weren't shown there?

Mr. Wessel: That's right.

The Witness: May I explain?

Mr. Wessel: They are shown; they are in separate schedules, but they are handled on a consolidated basis.

The Witness: May I explain accountingwise? What actually happens accountingwise and what the receiver did is that when you treat these companies on an individual basis, one company will show, will be as a debtor, another company will be as a creditor, but when you affiliate and consolidate them automatically the debtor-creditor relationship ceases in (2959)

a consolidated report.

The Court: I see. I think that is what Mr. Wessel is trying to make clear to me.

Mr. Wessel: Yes.

The Court: Where does he treat with this at all, Mr. Stryker? As a matter of fact, Mr. Holzer, if you are better informed——

Mr. Stryker: Mr. Holzer can tell you better than I could, your Honor.

The Court: All right.

Mr. Stryker: May I ask a question there which may help clarify it?

The Court: All right.

By Mr. Stryker:

Q. Mr. Holzer, did the receiver liquidate by a sale the Fairmont Avenue plant? A. Yes, sir.

Mr. Stryker: All right. Now, maybe you can help his Honor with the question he has in mind.

The Witness: On the schedule of receipts the receiver shows the entire proceeds from the disposition of all the assets

Mr. Wessel: Have I made my point clear on that, your Honor?

(2960)

The Court: I think so. All you are talking about is his report, as to what he got on liquidation; is that right? There is nothing in here—there was never any conclusion that a particular asset should be written off or written up or written down, was there?

Mr. Stryker: No, but when it is sold, if the amount received is not enough to pay the debt, it is a bad debt.

The Court: That is a matter of—well, that is a matter of argument now.

Mr. Stryker: That is a matter of, I should think, just plain English, but, of course, it goes into accountancy, a field that I hardly dare touch, but this gentleman knows it.

The Court: We get into the question of when it was sold, how it was sold, and all the circumstances surrounding it, which I think is something else again.

Mr. Stryker: No. I am just trying at this moment to introduce a schedule made by this gentle-

man and may I say, so that you will have it clearly, I hope to show—I can show, if your Honor permits me—this essential point, that even though all these companies were put into the affiliated schedule by Mr. Roth, even though they were treated individually, the Government did not lose that way.

(2961)

Now, that is my ultimate objective through this testimony to show.

The Court: I recognize your hope. Now, let's get back to what we have in the record.

The Witness: May I explain the rationale of this thing, sir?

The Court: Yes.

The Witness: Here is my rationale on the situation: This receivership went into receivership as at December 2, 1947. Now, the——

The Court: Mr. Holzer, I am not interested in quite that, I don't think.

If you analyzed the books of any corporation—forget this—and they have an asset on the books of $100,000 and you don't like it and you say, as an accountant, "I am going to value that down to $10,000," you have got to have a basis for it.

Mr. Stryker: He has a basis. Ask him if he has.

The Court: Yes, on a sale that took place two years later, and then we want to know all about those facts.

Mr. Stryker: That is a pretty good basis.

The Court: And you haven't proved that here.

(2962)

If he is going to rely on facts outside the books themselves, I will want those facts proved here so we can all know what his basis was for doing it.

Colloquy

Mr. Stryker: Judge, I still haven't made myself clear. I am asking to have——

The Witness: If your Honor please——

Mr. Stryker: Well——

The Witness: The assets that are in issue here on the American Agar Corporation, the fixed assets, had a total book value of $192,250.77. Assuming they were all collected in full as to the 192,250.77 Mr. Nadel sets forth the current—he sets forth assets due to the Lorain and Eatsum in the amount of $205,000, and there are other assets of $210,000, on this balance sheet, on the consolidated basis.

The Court: Maybe if I look at the balance sheet I could follow you better.

You want to hold that and give me the——

Mr. Stryker: What do you want?

The Court: I guess we can get along. This is an exhibit in evidence.

The Witness: This is in evidence. Here is the American Agar Corporation. Now, if we were to

(2963)

take the $192,250——

The Court: Total capital assets.

The Witness: Total capital assets, offset against that the actual current liabilities alone——

The Court: For the 6,000.

The Witness: —it would bring this down to $150,000-some odd.

The Court: Right.

The Witness: Now, that is only on the corporation alone.

The receiver treated this an entire unit, both the corporations.

The Court: You still got $150,000 left in assets.

The Witness: That's right, but when you get down here as to the combined liabilities of the corporation on its combined balance sheet——

The Court: You are not talking about them as an individual any more.

The Witness: That's right, sir, because——

The Court: Let's keep our lines straight. Treating it as an individual corporation, now, you still got $150,000 in assets there.

The Witness: Well, here, if you had here—— (2964)

you have $46,000, $46,000 in actual liabilities on an individual basis; you had due to these affiliated companies another $79,900, which is approximately 126, 127 thousand dollars there. Then on $127,000 you deduct that 127 from the 192, which will leave you approximately $65,000 of assets.

The Court: Yes, over and above liabilities, including your inter-company liabilities.

Mr. Wessel: How do you know which one of those companies is going to be paid off? How do you know which one of these debts is going to be paid off? Maybe they were going to pay all American Brands and nothing on the other companies. You don't know which liability is going to be paid off.

The Witness: That is precisely the point. The point at issue here is the fact that on an over-all basis situation I am totally within my rights to consider the fact that you had the company in an insolvent position here.

The Court: This isn't insolvent.

The Witness: $315,000 deficit.

The Court: Well, wait a second now.

The Witness: You see, they show total assets of $248,000; these are your total liabilities; you (2965)
take the 315—in other words, to balance out here.

The Court: In other words, it has a deficit only if you pay out all the other affiliated accounts, except this one, is that right?

The Witness: No. It would only have a deficit of $315,000 if these assets had full value. If these assets are considered to have lesser value, then the deficit would be greater.

The Court: What I say here now—I agree with you, see—if there is a basis in this record for saying that these assets have a lesser value, then you, as an accountant, are in a position to do something. As yet, I want to see that basis.

Mr. Wessel: I want your Honor to understand: I have only picked one of the companies in this, not all five of them. We can go into every one of the companies in each one of the books on that.

The Court: I recognize that.

Mr. Stryker: Let me—just one moment, your Honor. I am not interrupting you?

The Court: No.

Q. Will you pursue the very question his Honor asked; the basis, from records in evidence, for—what was the question, losses, for the writing-off? (2966)

The Court: Yes.

Mr. Stryker: That is what you said, wasn't it?

The Court: Yes, for changing the books. In other words, the book shows assets.

Q. Show us how those things at first blush seem assets but are not assets, not from your imagination, but from your analysis of the books in evidence.

Mr. Wessel: In the year '47.

Mr. Stryker: We are talking now about '47.

A. In '47 I based my analysis on that Nadel report inasmuch as these companies were in an insolvent position.

Mr. Stryker: All right, does that answer your Honor?

The Court: Then you write off your debt completely because of insolvency?

The Witness: That's right, sir.

The Court: In other words, supposing my assets exceed my liabilities by 10 per cent—in other words, I can pay 90 cents on the dollar—you write off your debt completely?

The Witness: I will take the partial debt off right there.

The Court: You took it all off.

(2967)

The Witness: Yes, on the basis they were all off here.

By Mr. Stryker:

Q. Is it not a fact that by definition in the Internal Revenue Code and the regualtions a bad debt is one determined to be uncollectible because of a receivership; isn't that the definition? A. The bad debt is written off at the time that you determine it to be a worthless situation or partially worthless situation.

Q. Well, a bad debt is one determined to be uncollectible because of the receivership, is that not so? A. Yes, that would follow.

Q. All right.

Mr. Stryker: Now, haven't I, your Honor—this gentleman will respond, I am sure, gladly, to any amount of cross-examination——

Colloquy

The Court: I didn't intend to get off into cross-examination at all.

Mr. Stryker: Not you, Judge.

The Court: The problem in my mind——

Mr. Stryker: Please, will you please not misunderstand me?

The Court: Yes.

(2968)

Mr. Stryker: I am not talking about you. I am talking about my opponent. He has the right to cross-examination; that is all right. And, of course, your Honor has an infinite right to ask any question. I recognize that, of course.

But now I submit that on these answers I have a basis at least for this analysis, this accountant's analysis.

I hope you will let me have it and go forward. I am not dealing with the year that you are talking about, '48. I am dealing with '47.

Can I have it now?

The Court: Well, Mr. Stryker, I don't want to, as I say, upset your order of proof, but I don't want to get off here on something which I don't see being lined up in the immediate future so I am going to sustain the objection as of this point.

Mr. Stryker: Let me see——

The Court: If there is further basis here or if you have something more convincing that shows this should be wiped off as a bad debt——

Mr. Stryker: Of course, my line of proof, one thing depends on the other, but let me see if I can't still persuade your Honor.

(2969)

Which is the number we are talking about?

The Court: We were talking about IIII.

Mr. Stryker: There is another one that you did let in.

The Court: JJJJ is here.

Mr. Stryker: That you have.

By Mr. Stryker:

Q. Now, just let me see if I can't, in my poor way, make this plain: This paper, IIII, is a paper that you prepared at my request? A. Yes, sir.

Q. As an accountant? A. Yes, sir.

Q. Did you not? A. Yes, sir.

Q. And you prepared it to answer my question—give me an analysis of the profits and losses of 1946 and '47 in the American Brands Wholesale Corporation. A. Yes, sir.

Q. You have set forth—I am not asking you what they were, just by items,—the profits in 1946? A. Yes, sir.

Q. The profits in 1947? A. Yes, sir.

Q. And then you have an item, under 1947 of losses. A. Yes, sir.

Q. And you have called those losses on this paper bad (2970)

debts. A. Yes, sir.

Q. Now, let me ask you specifically: Is this paper, IIII, your certified accountant's analysis of books and records in evidence in this case? A. Yes, sir.

Q. Is it the Nadel report alone or something else? A. That is the Nadel report, the information from that report alone.

Q. All right. Now, does the Nadel report show you what the losses were in this Wholesale, American Wholesale, for the year 1947? A. The Nadel report shows a profit for '47 of $48,657.59.

Q. I am talking about does it show the losses? A. It has these amounts carried as receivables from American Brands Corporation, American Agar, American Sweets Corporation and Lawn International in the total amount of $226,027.84.

Q. Now, have you analyzed the report with respect to the corporations you have just enumerated? A. Yes, sir.

Q. From that report are you able to state from the evidence in this case, the report itself, that those companies could not pay the debts attributed to them, charged against

(2971)

them on the books? A. Yes, sir. Based upon the financial reports showing these other companies in an insolvent position.

Q. Now, what report shows them to be in an insolvent position? A. Nadel's report.

Q. And it is because of that that you have made this, based on that that you have made this category of losses, bad debts for the year 1947? A. Yes, sir.

Q. Is there anything on that report that is not directly predicated upon a document in evidence in this case, namely, the Nadel report? A. That is correct, sir.

Mr. Stryker: Now, can't I have it?

Mr. Wessel: Let me just state this, if your Honor please: I fail to find in the Nadel report the analysis of the assets of Lawn International, and yet that is one of the bad debts that he wrote off ostensibly based solely upon the Nadel report.

The Court: I don't want to labor any more this point. On the basis that you have just laid, Mr. Stryker, I am going to sustain the objection.

Now, we will go on with something else, and

(2972)

if you can supply a stronger basis or better basis, or if you want to reargue the point with me when we are not taking up the time of the jury, why, I will be glad to go further into it.

Mr. Stryker: Well, you have allowed Exhibit JJJJ in evidence, and without the others——

The Court: You want to withdraw it?

Mr. Stryker: No, I don't want to withdraw it.

The Court: Well, it is in anyhow. You do whatever you want to with it.

Mr. Stryker: Yes. I will go ahead with the one chart I have in, JJJJ.

Q. Just come down, Mr. Holzer, and identify this, will you? Is the big chart which you put on the easel a copy of JJJJ in evidence? A. Yes, sir.

Mr. Stryker: Have we got it marked?

The Clerk: Yes, that is JJJJ-1.

Q. Let's start with one chart. I will get out of your way and you be kind enough to tell his Honor and the jury what this, at least this one chart, shows. A. This chart——

The Court: Well, if we are going ahead with JJJJ, can I have that there, Mr. Stryker? You

(2973)

can go ahead with the large one.

Mr. Stryker: Surely (handed).

Q. Go ahead, Mr. Holzer, I can see this. A. This chart sets forth the earning picture for the year 1946 and 1947, treating each of these companies on a separate entity basis for the corporation, American Sweets Corporation, American Trucking and Forwarding Corporation, and American Agar Corporation.

Q. Go ahead. A. These figures were included in the consolidated income tax returns that were filed for 1946 and 1947.

Q. When you say "these figures," what are you pointing to? A. These figures are contained in this——

Q. As you go over it, give me what each figure is. A. All right. These figures, as I state, were included in the tax returns that were filed for 1946 and 1947 and these are taking out from the two tax returns that were filed the component earnings or losses of these three corporations that are indicated here.

In this firs one, in the American Sweets Corporation, for the year 1946, they sustained a loss of $4,853.41.

(2974)

In 1947 they sustained a loss of $130,069.34, or a total loss, from operations alone for the two years, of $134,922.75.

In the American Trucking and Forwarding Corporation, in the 1946 consolidated income tax return, their share of profit was $3,180.16.

In the income tax return for 1947, their share of the loss was $4,519.30, having a net loss for the 2-year period of $1,339.14.

And under the applicable revenue regulations we are allowed to take this particular loss of 1947 and carry it back to 1946 and expunge the tax liability that would have been due on the 1946 income tax return.

Going to the American Agar Corporation, we have for the year 1946 a loss from operations of $242,058.

In 1947 their share of the loss that was included in the consolidated tax return was a loss of $73,650.13, or a combined loss for the 2-year period of $315,708.39.

Mr. Stryker: Are you through with JJJJ, your Honor?

The Court: Yes:

(2975)

Mr. Stryker: May I take it, please?

(Handed)

Q. Let me ask you this, in reference to HHHH for identification. Just correct me if I am wrong. I find, although at the top it is 1948, I find only one item pertaining to '48, or am I mistaken? A. There is just one item for 1948; losses on liquidation, and that does not include any other items of the expenses of the receivership.

Mr. Stryker: All right. Now, eliminating that '48 item from this exhibit, I now reoffer Exhibit HHHH for identification.

Mr. Wessel: I haven't seen it.

The Court: Oh, you haven't seen it?

Mr. Wessel: No.

Mr. Stryker: I don't know whether he has or not. Here it is. (Handing)

Here is a copy of it, Judge. (Handing)

The Court: All right.

Mr. Wessel: Same objection as to the prior—as to——

Mr. Stryker: I am taking out the 1948, which I understood was the only objection you had.

Mr. Wessel: No. I am talking about the bad

(2976)

debt business, not that.

Mr. Stryker: Before your Honor rules, may I ask this?

The Court: Yes.

Q. Mr. Holzer, you have labeled this paper "Analysis of profits and losses, American Brands Corporations." You

have got it 1946, '47, '48. I am eliminating '48 for the moment. A. Yes, sir.

Q. All right. Now, will you tell us clearly as you can the basis upon which you made the analysis set forth in that chart? A. Nadel's report, sir.

Q. And how did you work this out? Did you take Nadel's report and then answer from it the questions that I asked you? A. Yes, sir.

Q. And are those figures and statements in this exhibit directly based upon and predicated upon the document in evidence, namely, Nadel's report? A. Yes, sir.

Mr. Stryker: Can I have it, your Honor?

Mr. Wessel: It is the same thing as the other: it is the bad debt, the assets, the receivables transferred over to the bad debts.

(2977)

Mr. Stryker: I don't know—well, he has got the word "losses," and if you cavil about bad debts, why, it is a matter, I suppose, of phraseology or accounting practice.

The Court: I don't think it is a matter of phraseology. This is a matter of substance.

Mr. Stryker: Suppose I take out the word "bad debts" and leave in the "losses"?

The Court: When you reduce assets by several hundred thousand dollars or a substantial amount, why, that is what I think the rub is.

Mr. Stryker: Judge, if you will let this gentleman answer, I am sure he can explain it to your satisfaction, as well as the jury. It was a little hard for me to get at first, I will admit.

Mr. Wessel: For example, on the American Brands Corporation balance sheet there are assets

of Lawn International, Inc., 24-odd thousand dollars. How that could be written off as a bad debt without looking at—and this doesn't even have Lawn International in it—without that subject being considered is something I can't see. It isn't possible.

(2978)

Mr. Stryker: That was a trivial amount.

Mr. Wessel: No, it wasn't a trivial amount. It was over $24,000.

The Witness: The Lawn International books are in evidence there.

Mr. Wessel: You said this is based on Nadel's report alone, didn't you, sir?

The Witness: With the qualification on the Lawn International, sir, which is not part of this particular report.

Mr. Wessel: How about Tavern Fruit Juice Company, are those books in evidence?

Mr. Stryker: Wait a minute, just a minute.

By Mr. Stryker:

Q. The Lawn International isn't on this, but you have it in some other report I am trying to get in. A. We got it from the books in evidence here, sir.

Q. All right. As an accountant analyzing these books and records, does this schedule that you have made, in your opinion, clarify the testimony that you would give if permitted on the subject of the analysis of the profits and losses for this particular company for these years? A. Yes, sir.

(2979)

I will go a step further, in furthering my rationale, your Honor, in analyzing the actual moneys that flowed from the American Brands Corporation and from the American Sweets Corporation to these other corporations, I find the following situation:

In analyzing the profit and loss statement of the American—in analyzing the profit and loss statement, you have the following peculiar accounting situation: In the year of 1946 the total income from sales for this particular corporation was $20,314.38. They have a total cost of sales of $244,266.10, or a total loss on actual sales alone of $223,268.61.

Actually by analysis of this actual report, with that, these moneys that were advanced from these corporations, from American Brand and American Wholesale, both to the American Agar and to the American Sweets Corporation, actually were, in fact, actual expense advances and the analysis of these reports and the operation that you have on here show that these particular corporations were worked as separate departments, and that from an accounting concept they were not properly treated, because

(2980)

if they were properly treated, if these advances that were made from American Brands and American Sweets were here, and these companies rendered service to those companies, they would have charged back, as income to these companies, to the American Sweets and the American Agar, they would have charged back as services rendered to American Brands and American Wholesale, they would have charged back their services rendered, thereby doing the following: They would have reduced the losses on American Agar and American Sweets, and likewise reduced the profits on American Brands and American Brands Wholesale.

So that in fact, when you talk about these items as being actual loans, in fact they were not loans, as far as my analysis is concerned, based upon the analysis of these particular profit and loss statements.

What actually happened from these particular reports and from the analysis of these profit and loss statements,

is that the American Brands Corporation, the American Brands Wholesale Corporation, just advanced these expenses, and they likewise, instead of carrying them in a loan account, right at that particular point they could have

(2981)

taken off on the 1946 and 1947 tax returns these same amounts that are carried in the loan accounts and carried them as if they were actual expense accounts.

(2981a)

Mr. Wessel: Well, I won't—all right.

The Court: What you are now going to do is—in other words, they had the setup at the time these books were set up?

The Witness: Right.

The Court: So that if American Agar had made a profit, its profit would have been reduced by——

The Witness: Their losses.

The Court: Their assets would have been reduced by these loans?

The Witness: In other words, from an accounting concept you cannot have a situation where sales are $20,000 on an intercompany situation.

The Court: I recognize that.

The Witness: And you have $244,000 worth of expenses.

Mr. Wessel: This was the initial year for American Agar.

A. (Continuing) Forty-six and forty—and you have the exact same situation in 1947, they show sales of $30,302.70, and the cost of sales of $96,067.04.

Now, further than that, you actually have to go into the component elements of the cost of goods sold. You will have a different concept if you buy merchandise and

(2982)

realize losses on merchandise, but here was a corporation that was in a research process, and so forth, rendering a service to another company, and because of accounting concepts you don't have tthe follow through.

The Court: All right, what can you add, Mr. Stryker?

Mr. Stryker: I couldn't do half the job he has done.

The Court: I didn't mean that at all. As I sit here receiving this on three sides—well, I will just let you go ahead.

Mr. Stryker: Don't you think it is admissible now?

Mr. Wessel: Do you want to hear from me now or would it just add to the confusion?

The Court: Go ahead, Mr. Wessel.

Mr. Wessel: Now, Mr. Holzer's statements have some assumptions in them not founded on the record, and not being an accountant I can't attack each one of them. For example, Agar had an entirely different stock ownership in the other companies, and he talks about them, about being parent-subsidiary relationship. There is no such relationship, and he has just testified himself on the analysis of the books, that he found no such relationship.

(2983)

Mr. Stryker: Well,——

Mr. Wessel: As far as using Lawn International or using other books in evidence, there are assets on American Brands Corporation from Tavern Fruit Juice Company for $12,000-odd; Eatsum Food Products Company, $13,000-odd. Those books are not in evidence.

Irrespective of whether he tried to use all the books in evidence or not, they are not in evidence; they don't exist; there is no way of telling whether that company is insolvent or not.

The Witness: We are using that as losses now.

The Court: Just a second. Go ahead.

Mr. Wessel: I think I probably hit the nub of it, which is relationship, parent and subsidiary, which doesn't exist.

Mr. Stryker: Your Honor, may I just say something? All these charts do——

The Court: That doesn't help much.

Mr. Stryker: You might say they are like illustrations in a magazine article, they are pictures. There is not a fact in there that in my judgment I haven't a right to elicit. I thought it would be clearer for the jury if these—these numbers are so terrific, that I could expect no one could remember

(2984)

them all, at least I can't.

The Court: Let me put it in my own poor way.

Mr. Stryker: It won't be a poor way.

The Court: It is an illustration for a magazine article about a part of a text that was never written so far. That is the problem. When you get the text in together, to go with the illustration, you can be sure that those charts will be in.

Mr. Stryker: The text is written.

The Court: All right.

Mr. Stryker: Let me approach it another way then.

The Court: All right.

By Mr. Stryker:

Q. Let me ask you this, Mr. Holzer, did you, irrespective of this particular document that I am trying to offer, did you make, at my request, an analysis of the profits and losses of American Brands Corporation for the years 1946 and '47? A. Yes, sir.

Q. Did you ascertain from the books and records or whatever——

Mr. Stryker: Strike that.

Q. This analysis was made on the basis, am I right, (2985) of the Nadel report received in evidence here? A. It was based on Nadel's report, in addition to that, as I was corrected, the other books that are in evidence, pertaining to the Lawn International Company as well.

Q. And also, I think, on the final report of the receiver? A. That is correct, sir.

Q. Now, from that examination and analysis can you tell his Honor and the jury what the profit of American Brands was for the year 1946?

Mr. Wessel: I object. It is the same objection. It is the same question.

The Court: Yes, we are going over the same ground.

Mr. Stryker: Your Honor, if I were to take these books and try to tell the jury what is in them, you know what a mess I would make of it.

Mr. Wessel: I would like to see the Tavern and Eatsum books.

Mr. Stryker: I am just taking the documents, the Government has read this and offered these papers. I am trying to do what, if I were smart

enough I would do myself, I am getting a man who is able to do it, and he has just made this analysis. Can't I get a plain answer to a plain simple question?

(2986)

The Court: Well, when you put it that way, Mr. Stryker, I will have to object to the form of the question. You can't get an answer to this question.

Mr. Stryker: I didn't catch the comment Mr. Wessel made, but Mr. Wolfram did. It was something to the effect that he would like to see the Tavern and Eatsum books. I submit that that ought to be the basis for a mistrial, for reasons your Honor knows.

The Court: I don't see that at all.

Mr. Stryker: I will not argue it in the presence of the jury. I make the motion and I assume you deny it.

The Court: Yes.

Mr. Stryker: Exception.

I think everybody is worn out with me, as well as my being worn out. I would like to have some lunch.

The Court: All right, that is something we are in accord on. Don't discuss the case. We will start at 2:05.

(Recess until 2:05 p.m.)

(2987)

(Trial resumed: jury present.)

HERMAN HOLZER resumed.

The Court: I guess we are all here, Mr. Stryker.

Mr. Stryker: If your Honor please, I have here a photostat of a document produced by the County Clerk of Kings County on Tavern. Mr. Wessel has seen it. I offer it in evidence. It is the one I mentioned to you earlier, you will remember.

Mr. Wessel: No objection.

The Court: All right, received.

(Defendants' Exhibit KKKK received in evidence.)

Direct Examination Continued by Mr. Stryker:

Q. Going back to 4-G, will you come around a minute, please.

(The witness leaves stand and goes to chart.)

Q. In evidence of this morning. Now going back, Mr. Holzer, to the cash balances of the corporation, will you explain to me and to the jury what you mean by cash balances. A. Well, the cash balances here are the balances that were indicated by the books. As I recall it, in our

(2988)

analysis of these things, the books themselves were not complete, inasmuch as the '46 balances were not carried over into the '47 books, so we had to actually reconstruct these balances as at the close of business on the end of every one of these months, and these figures represented the balances.

These figures, the regular figures uncircled, represent the actual balances that were on the books; the overdrafts represent the balances that were on the books. Now these figures necessarily do not tie in and represent the same figures that may be on the bank statement. For example, you may have an overdraft here. This overdraft may be an overdraft by the company issuing checks, that may be

in transit, that haven't reached the bank as yet. So therefore the balance—you may have an overdraft on your cash account by having issued more checks. They may have been held up, they may be in transit, they haven't cleared the bank. So that when you compare the book cash value, it is not necessarily the same figure that you have on a bank statement.

Mr. Stryker: I think that is clear.

(The witness returns to the stand.)

Q. Now, Mr. Holzer, I show you Government's Exhibit 89 in evidence. What is that document? A. It is claim (2989) for refund.

Q. Filed by whom for what? A. It was filed on behalf of the American Brands Corporation.

Q. Does this document indicate what the losses of the American corporations were for the years '47 and '48? A. Yes, sir.

Mr. Wessel: Objection as irrelevant and immaterial.

Mr. Stryker: I am asking about a document in evidence, what it shows, instead of my reading it. I am asking the witness as an accountant to read it and tell me what it shows, that is all. He is not adding anything. He is reading from a document in evidence.

The Court: Well, I think the document speaks for itself. I don't see that we need—Does that document contain a statement of income for 1948?

The Witness: Loss for 1948.

The Court: Loss for 1948.

Mr. Stryker: And '47.

The Witness: And a loss for '47.

The Court: And all that document shows is that a loss was asserted.

The Witness. Yes, sir..

(2990)

The Court: If you saw that document alone you wouldn't know whether that was an actual loss or not, would you?

The Witness: Well, here it shows the actual losses are on here.

The Court: It shows one was asserted.

The Witness: That's correct.

The Court: You, as an accountant, wouldn't draw any conclusion from that report?

The Witness: No. It says here that the losses were set forth.

The Court: Go ahead.

Q. Will you tell me then what the paper shows with respect to losses for '47. A. It shows the loss on here for the year,——

The Court: What it is claimed it shows. I think we will all know what you are talking about.

Mr. Stryker: All right.

A. A loss was claimed for 1947 in the amount of $205,554.44, and a loss is claimed for 1948 in the amount of $207,439.75 a total loss for '47 and '48 in the amount of $412,994.19; applied against a taxable income of 1946 of $261,753.36, and a net loss, after applying the income against the losses for the two years, a net loss of $151,240.83. And on that basis, the income tax liability as set

(2991)

forth on this claim for the year 1946 of $104,701.35 would have been wiped out completely.

Q. On what was this claim based, if you know? A. It was based upon the two tax returns that were filed for 1947 and 1948.

Mr. Wessel: Objection and move to strike out the answer as incompetent.

Mr. Stryker: He is giving me the basis of the document, your Honor.

Mr. Wessel: The 1948 returns are not in evidence.

Mr. Stryker: He is giving me the basis of it.

The Witness: The returns were filed from my office, which I received a receipt for from the Collector of Internal Revenue.

Mr. Stryker: All right.

Q. You say returns. What returns? A: The tax returns for the American Brands Corporation on a consolidated basis for the years 1947 and '48.

Q. All right. Now, do you know who prepared these returns? A. Mr. Roth prepared the returns.

Q. And you filed them, you said, in 1950? A. They were filed the latter part of October 1950.

(2992)

Q. Were you called in then at that point to assist the defendants in connection with the charges that were against them? A. Yes, sir.

Q. The informations? A. Yes.

Q. If the returns had been filed on an individual basis instead of a consolidated basis, would the result have been the same? A. Yes, sir.

Q. Is it a fact, Mr. Holzer, that there were certain inter-company loans between the American companies? A. Yes, sir.

Q. Can you state whether as of September 1947 these loans could have been paid? A. No, that chart there right in front of you, that sets forth the cash balances, indicates that these companies did not have the cash with which to do so.

Q. In December 1947 these corporations went into the Jersey receivership; is that right? A. Yes, sir, December 2nd.

Q. And were all the assets of these companies sold in either December 1947 or early in 1948 by the receiver?

Mr. Wessel: Objection, if your Honor please. The witness doesn't have any personal knowledge of that fact.

(2993)

Q. Well, can you answer that from the documents in evidence?

Mr. Wessel: It calls for a yes or no answer, Mr. Holzer.

The Witness: Will you read the question, please.

(Question read.)

A. The receiver's report indicates the sale, final sale, in 1948.

Mr. Wessel: That is not a responsive answer. I move to strike it out. The question is whether all the assets were sold by the receiver and the witness doesn't answer about that. He just said the receiver's report indicates the sale of assets.

Mr. Stryker: Well, I submit that he has a right to state as an accountant what the receiver's report shows.

Mr. Wessel: I move to strike out the answer as not responsive.

The Court: I will strike it.

Mr. Stryker: I except.

Q. Can you say from the receiver's report whether all of the assets were sold either in 1947 or early in 1948? I think I am handing you the receiver's report. I believe I am.

(2994)

A. This document sets forth, and I am reading from paragraph 4 of TTT, it says: "Your petitioners further show that an audit has been made of the assets of the defendant corporations by the accountant appointed by your Honor, which audit has been filed with the Clerk of this Court."

Now, based upon that statement in here, I have nothing further other than to assume that this having been passed through a court, and this being the legal document of the Court, and an accounting having been made, that from this, I just go by this particular document, that all the assets have been accounted for of these corporations.

Mr. Wessel: I object to that. Is the witness stating that that document says that all the assets have been accounted for?

The Witness: It says here—I am repeating—"Your petitioners further show that an audit has been made of the assets of the defendant corporations by the accountant appointed by your Honor, which audit has been filed with the Clerk of this Court."

Mr. Wessel: I therefore still make the same objection, on the ground it is a hypothetical assumption.

The Court: Sustained.

(2995)

Mr. Stryker: Well, if your Honor please,——

The Court: We will let the answer stand.
Go ahead. I have changed my ruling.
Mr. Stryker: All right, sir.
The Court: Go ahead.

Q. Now, can you tell us from the documents in evidence how much was received for the assets liquidated in the receivership?

Mr. Wessel: I object, if your Honor please.

The Court: He didn't say all the assets were sold, Mr. Stryker.

Mr. Stryker: I didn't put it in my question.

The Court: I will let it stand for what it is worth.

Mr. Stryker: I just asked the assets. I didn't use the word "all."

The Court: All right.

A. The receiver's report indicates under their schedule of receipts the following: that on December 23, 1947, there is proceeds of $7,000 for the sale of the plant and equipment in Brooklyn, New York; on February 10, 1948 there was a collection of accounts receivable in the amount of $548.04; in April 1948 there are proceeds from the sale of the American Agar plant in the sum of $15,000; on August 11, 1948, there is a refund of $15.74 from the

(2996)

Brooklyn Union Gas Company; on August 11, 1948 there are transfers of bank balances of American Sweets Corporation in the Pennsylvania Exchange Bank of $176.34; a transfer of American Brands Corporation bank balance in the Pennsylvania Exchange Bank of $62.39; and a transfer of American Brands Corporation bank account in the

Isabella County Trust Bank for $15.55, making total receipts of $22,818.06.

Mr. Wessel: If your Honor please, I move to strike on the following ground: that the statement the witness has just made shows that all the assets were not sold and were not accounted for.

Mr. Stryker: I am only asking him to state what is in the receiver's final report by the audit, that is all my question was. It is just as though I took the document and read it to the jury, although I am doing it by means of a man who knows so much more about this than I do, a certified public accountant.

The Court: All right. Let's get on. Next question.

Q. Well, then, is it not the fact that these intercompany loans had to be written off as bad debts, whether in 1947 or in 1948? A. That would hold true, sir.

(2997)

Mr. Stryker: While I am waiting to find something, your Honor, Mr. Dilberian tells me now that he has completed photostats—correct me if I am wrong—of NNN-63 and NNN-58. You will remember that some of the jurors did not see some page, and I am now showing them with your Honor's permission, those documents.

The Court: Very good.

Mr. Stryker: While they are doing that, if your Honor please, I renew my application to introduce HHHH and IIII for identification, upon the ground that the foundation has been laid for the same.

The Court: The same ruling.

Mr. Stryker: Your Honor, I may have other charts, and would your Honor, for my guidance, point out to me wherein I have failed to follow the same procedure as the Government has? It might help me if you will tell me.

The Court: The Government laid a foundation of fact for all of its assumptions. You haven't.

Mr. Stryker: Well, I had understood—now you will correct me if I am wrong—Government's expert made a great many assumptions, a great, great many, and some of them not predicated on any facts, as I recall it.

The Court: I don't recall any, sir. Any of those (2998) that I thought weren't predicated on facts, I wouldn't have permitted in. I don't say that I agree, that I am passing upon the testimony one way or the other, but at least there was testimony from which the Government could argue to the Court and to the jury that there was a base in fact for all of those assumptions.

Mr. Stryker: Well, I guess I will respectfully except to that one.

Q. Mr. Holzer, Mr. Present said in his direct examination that there was $174,292.75 drawn from these corporations by the officers during 1947.

Will you be good enough, if you can, to give us a breakdown of this $174,292.75? A. Yes, sir.

Q. And show us how it was charged on the books. A. Yes. The $174,202.25, as set forth by Mr. Theodore Present, was as follows:

A total drawing by William Giglio of $42,758.34; cash drawings $22,241.55; Frank Livorsi, $57,058.33; Louis

J. Roth, $19,950; H. Lawn, $10,196.87; Lawn International Inc. $18,840.56; L. J. Roth & Co. $3,246.60, a total of $174,292.25.

Q. How much of this total was drawn in cash, Mr. Holzer? A. $22,000—this tabulation indicates $22,241.55. (2999)

Q. Can you tell us the disposition of that figure you have just given us? A. May I have the receiver's report? It is right here on top.

Q. I will give it to you. Do you want the report or Nadel's? A. The receiver's report for American Brands Corporation during this period of 1947 shows a total of $18,194.55 for cash checks, of which the analysis of those cash checks was $3,500 to special drawing; $8,550 to the entertainment account; $1,086.55 for selling expenses; $3,460 for traveling expense, and $1,598 for miscellaneous expenses. There is a difference of—from this report here—of a difference between the $18,194.55 and $22,241.55, of about $4,000, which I have not been able to ascertain as yet.

Mr. Wessel: May I interpose an objection and move to strike out the last answer, if your Honor please. Mr. Present's testimony, as I recall it, was with regard to drawings from all the companies. Mr. Holzer's analysis, I believe, is based upon only one company.

Mr. Stryker: No. I said in my question "from these corporations," meaning the American Brands corporations, so I think my question is quite correct. (3000)

Mr. Wessel: I think your question is correct, sir, but I think that Mr. Holzer's answer—and he answered the same way when he talked about cash drawings, was only about American Brands Corporation.

Q. What about that, Mr. Holzer? Clear that up.

Mr. Wessel: I think it is Schedule H, Mr. Holzer.

The Witness: What is that, sir?

Mr. Wessel: I think it is Schedule H.

The Witness: Schedule H refers to the '46.

Mr. Wessel: There are two pages that follow. Maybe it is I.

The Witness: Schedule I, the total for 1947 on that schedule is the $18,194.55.

Mr. Wessel: Isn't that headed American Brands Corporation?

The Witness: That is headed American Brands Corporation.

Mr. Wessel: That is what you testified to this morning, too.

The Witness: Yes.

Mr. Wessel: One company.

The Witness: All right.

Mr. Wessel: I move to strike out the answer, if your Honor please.

(3001)

Mr. Stryker: Your Honor——

The Court: I will let it stand.

Mr. Stryker: I will start with one company. That is what we started with, because it is one company. I don't see why we can't have an answer to that.

Mr. Wessel: Because he said there was an inconsistency in Mr. Present's testimony both this morning and now.

Mr. Stryker: I am not talking about inconsistency in Mr. Present's testimony. I am only asking whether Mr. Present on his direct examina-

tion did not testify that this figure drawn from these companies by the officers during 1947——

The Court: Do you both want the last sentence stricken out about Mr. Present's testimony?

Mr. Stryker: I don't know what it is.

The Court: Do you want it to stand?

Mr. Stryker: I have got the reference to the page. I can see it in a moment. I am asking him—I am referring to what Mr. Present swore to, and then I asked him for the breakdown on that figure, that's all.

The Court: I will let it stand.

You can handle it on the cross-examination.

Mr. Stryker: All right.

(3002)

By Mr. Stryker:

Q. Mr. Holzer, how much of this total was charged to salary accounts, if you can tell us, and give us the figure if you can by individuals. A. The analysis of the salary accounts per the books indicate for Mr. William Giglio $12,500; Mr. Frank Livorsi $22,500; Louis J. Roth $11,450; H. Lawn $10,196.87 or a total of $56,646.87.

Q. And all of those figures come out of the $174,000-odd I mentioned when I started this line? A. Yes, the balance of the accounts, which comes to $117,645.38, and is analyzed as follows:

William Giglio loan, $30,258.34; Frank Livorsi, $34,558.33; Louis J. Roth, $8,500; Lawn International, $18,840.56; accounting fees, Louis J. Roth, $3,246.60; and the expenses, $22,241 to various expense accounts.

Q. How much of this figure—I am still talking about the 174-odd thousand dollars—was charged to expenses? A. $56,646.87 of salaries and the $3,246.60 of accounting

fees and $22,241.55 travel, entertainment and selling expenses.

Q. I think you have given me the individual items already, have you not? A. Yes, sir.

(3003)

Q. In this particular matter I am asking you about. A. Yes, sir.

Q. Now, how much of this figure was charged to loan accounts? A. An amount of a little in excess of $91,000.

Q. Will you tell us to whom those loans were charged. A. William Giglio, $30,258.34; Livorsi, $34,558.33; Louis J. Roth, $8,500; Lawn International, $18,840.56.

Q. How much of the loans were charged to Giglio and Livorsi? A. $64,816.67.

Q. Will you tell us, please, during this same period of 1947, the amount of money Giglio and Livorsi advanced to the corporations from the other companies? A. Well, we have made an analysis of the situation by comparing it between—the figures available from December 31, 1946 to December 2, 1947.

The balance due from Mr. William Giglio as of December 31, 1946 was computed at $91,666.67, and on December 2, 1947 it was in the amount of $107,553.25, or a net increase of $15,886.58.

On Frank Livorsi there was no balance in existence on December 31, 1946, and a balance on December 2, '47 of $34,558.33, or a net increase of $34,558.33.

(3004)

Louis J. Roth had a balance of $11,000 on December 31, '46, and on December 2, 1947 a balance of $18,500 or a net increase of $7,500.

On the Lawn International we have the situation of $9,142.69 on December 31, '46 and $32,433.97 on December 2, 1947; and the cash in special drawing accounts, there

was no balance on December 31, '46 and a balance of $11,500 on December 2, '47.

Q. Now can you tell us, Mr. Holzer, how much more Giglio and Livorsi put into these corporations in the form of loans than they took out in the form of loans? A. There are analyses of the loans payable accounts, and we have on the Eatsum Food Products Co. a balance on December 31, 1946, a balance on the American Brands Corporation owed, of $9,500. On December 2, 1947 there was a balance due of $25,407.25, a net increase of $15,907.25.

On the Loraine Food Corporation there was a balance due on December 31, 1946 of $125,411.83. On December 2, 1947 there was a balance of $179,619.33 or an increase of $54,207.50. There was also put into this company the proceeds of Van Dyk Industrial. Now that balance was a receivable on the books as of December 31, 1946 of $9,939.12. In that amount there was an adjustment on

(3005)

the books, there was $15,000 put into this company, and this balance was, accountingwise, transferred, that is, this $9,939.12 was applied against that $15,000 and the balance of the $15,000 was put into the regular loans receivable account.

Mr. Wessel: I move to strike out the answer on the ground that it has precisely the same assumptions in it as the charge previously referred to including Loraine and the rest.

The Court: Motion granted. Strike out the answer.

Mr. Stryker: Exception.

Q. Can you tell me from the books and records in this case in evidence how much more Giglio and Livorsi put

into these corporations in the form of loans than they took out in the form of loans, giving me the summary without all the details?

Mr. Wessel: Objection, if your Honor please, on the same grounds. Counsel is seeking to get the same information in summary fashion without the assumptions being in evidence.

Mr. Stryker: I am asking him to tell me if he can, or if he can't, then Mr. Wessel's objection is valid.

The Court: Mr. Holzer, you know my ruling, (3006)

that is there is no assumption that Loraine was owned by Giglio, and there is no evidence to that effect. You put in a lot of stuff about Loraine now in the total Mr. Stryker asked for. Don't put anything in there about Loraine.

The Witness: Does Mr. Van Dyk go in there?

The Court: Is the stock ownership of Van Dyk in evidence?

Mr. Wessel: I believe there is some evidence about Mr. Van Dyk, Mr. Livorsi and Mr. Giglio.

The Witness: There was testimony that the $15,000 was put into the company, as far as my recollection serves.

Mr. Wessel: That is correct.

A. Omitting the Loraine figures, we have that net increase, the net increase on the Eatsum Food Products was $15,000 —excluding the Loraine Food Corporation in my computations.

Q. I didn't hear that. A. Excluding Loraine Food Corporation from my computation, there would have been an excess of $35,098.54 taken out by Livorsi and Giglio.

Mr. Stryker: Thank you.

Q. In what form was it taken out Mr. Holzer? A. These are balances in the loan account, sir.

(3007)

Q. All right, just a minute.

Mr. Holzer, have you made an analysis from the evidence in this case as to when in 1947 these corporations were in an insolvent position? Did you make an analysis of that kind? A. We made an analysis of the various corporations by trial balances for the various months during 1947 at various cut-off points.

We have compared that with the books and records here and the receiver's reports, and Mr. Nadel's report, to ascertain the current positions of these companies during that period of time.

Q. Well, can you give that to me in a little bit more detail? A. Yes, sir. On a consolidated basis we have worked out the net working capital as at August 31st, 1947 as well as February 28, 1947——

Q. Wait a minute. I am handing you, I think, some of your own work sheets on this. Would you care to look at them to refresh your recollection as to the details? A. On these monthly trial balances that we have here for the various corporations, we are working along on one assumption, and that is on the merchandise inventory, carrying it for-

(3008)

ward during the entire period of time, inasmuch as we do not have inventories during the interim periods.

Now, on the American Brands Corporations as at January 31st, 1947, utilizing that inventory assumption, and carrying that forward, we have a net worth position as of January 31st, 1947 of 90,593.95.

Now, these figures are predicated on the books and records, and so forth, without any accounting adjustments which we have no knowledge of taking place at that time except going by the books that we have here.

So therefore at January 31st, 1947 it shows the difference between all the assets and all the liabilities, a net worth, where the assets exceed the liabilities of 90,593.95.

On February 28, '47, we have a situation of where the net worth is 135,574.84.

In March it is 126,010.21.
In April it is 159,484.44.
In May it is 224,810.21.
In June it is 253,614.64.
In July it is 285,443.03.
In August it is 296,454.49.

(3009)

In September it is 290,135.14.
October, 285,234.53.
November, 261,215.23.
And in December, 2——

Q. Wait a minute.

Mr. Wessel: Wait a minute, let's have an answer to this question.

Mr. Stryker: I don't think he is answering my question.

Mr. Wessel: I think he is answering it very effectively.

Mr. Stryker: I am sorry, I don't garee with you.

The Court: Let's complete it. Go ahead.

Mr. Stryker: What?

The Court: Complete the answer.

A. That is of the American Brands Corporation, itself.

The Court: That is as far as you go in '47?

A. In December it was 24,844.33.

The Court: What was the question?

(Question read.)

The Court: All right.

A. (Continuing) Now, the American Brands Corporation (3010) (Michigan) books, we have the following situation, which has to be taken into consideration, together with the American Brand Corporation, because the books were kept separately, and these are individual analyses.

On January 31st, '47, there was a deficit of 44,069.07.
On February 28 there was a deficit of 94,334.88.
On March, a deficit of 134,805.43.
On April, a deficit of 142,281.85.
In May, a deficit of 145,368.45.
In June, a deficit of 241,866.69.
And we carry it up to June.

Now, this deficit of 241,866.69 is to be applied against the net worth of the American Brands Corporation which I gave as of December as 247,840.43, or a difference there of approximately $6,000 net worth position. That is prior to any adjustments accountingwise, directly from the books.

On the American Sweets Corporation we have as of January 31st, 1947, on the same basis, a deficit of 34-303.08.

On February 28, a deficit of $56,951.95.

(3011)

On March a deficit of 82,953.18.
On April a deficit of 128,721.02.
On May, a deficit of 124,033.15.
On June, a deficit of 122,299.46.
On July, a deficit of 137,801.93.

August a deficit of 135,439.27.

On September a deficit of 65,640.33.

October, a deficit of 64,074.21.

November, a deficit of 69,608.84, and on December, a deficit of 69,788.84.

On the American Brands Wholesale Corporation we have directly from the books again, without any adjustments whatever, and assuming the same inventory positions, we have a net worth on January 31, 1947 of 29,948.

On February 28, a balance, a net worth balance of 51,695.87.

On March 31, 1947, 53,232.38.

On April, 48,355.86.

On May, 52,219.78.

June, 52,244.78.

July, 51,988.06.

August, 51,988.06.

September, 51,968.59.

(3012)

October, 51,966.59.

The same figure for November and the same figure for December.

On the American Agar Corporation we have as of January 31st, 1947, a deficit of 23,978.25.

February 28, 1947, a deficit of 51,631.59.

On March, a deficit of 51,224.35.

On April, a deficit of 36,456.14.

May, a deficit of 33,793.98.

June 30, 34,209.94 deficit.

July, a deficit of 34,797.54.

August, a deficit of 35,839.04.

September, a deficit of 37,687.15.

October, a deficit of 29,944.69.

November, the same figure, and December the same figure.

They are carried forward on the books.

I believe the next one is—on the American Trucking & Forwarding Corporation, as of the end of January 31, 1947, again on the same basis—and directly from the books, themselves, without any adjustments—we have a net worth position of $110.50 on January 31.

On February 28, a net worth position of $39.75,

(3013)

On March 31, 1947, a deficit of $474.25.

On April 30, 1947, a deficit of 1,011.17.

On May 31, 1947, a deficit of 2,136.02.

June 30, 1947, a deficit of 3,023.23.

The end of July, a deficit of 4,100.23.

The end of August, a deficit of 3,704.30.

On September 30, '47, a deficit of 3,704.30.

The end of October, a deficit of 3,606.30.

And the same figures are carried forward as of the end of November and the end of December.

I believe that covers the five American corporations.

Q. The ones you are giving to us now, those are the figures of the individual corporations? A. Yes, sir.

Q. Is that right? Now, can you tell us, based on the figures, the books and records, what the——

Mr. Stryker: No, that is wrong. Withdrawn.

Q. Well, now, will you now give us your analysis of these various companies, based on a consolidated basis, for the years—yes, December '46. A. On the consolidated basis, comparing December 31, 1946 with December 2, 1947, we have the following net worth positions——

(3014)

Q. Oh, wait a minute. Let's see if you have got my question before you clearly, Mr. Holzer.

I asked you can you tell us, based on these figures, what the respective current positions of these companies were on a consolidated basis, starting first on December '46. Can you do that? A. Yes, sir. On a consolidated basis, the current positions of these companies, net working capital position on December 31, 1946——

Q. Was what? A. Was $81,593.40.

As of February 28, 1947 there was a deficit in the net working capital position of 45,696.60.

And on August 31st, 1947 there was a deficit in the net working capital position of $128,652.

And on December 2, 1947 there was a net deficit in the net working capital of $88,618.11.

Mr. Stryker: Your witness.

Cross Examination by Mr. Wessel:

Q. I am afraid I didn't catch this last group of figures you gave, Mr. Holzer. A. All right.

Q. Did you state before the net worth of these various companies at various times—net worth? A. No, I did not. (3015)

The figures—are you referring to this last group?

Q. The last group of figures on all the companies that you gave. A. The last group of figures that I gave was the actual difference from a trial balance position of the companies between the asset and liability valuation as set forth on the books prior to our knowledge of any adjustments whatsoever. Just as the books exist.

Q. That would be assets less liabilities? A. That's right.

Q. Well, aren't assets and liabilities always the same in every company? A. Never.

Q. Well, take Mr. Nadel's report, when they total up assets on balance sheets, they always seem to have assets in the same on each side? A. They are only total figures, Mr. Wessel.

Q. What are you talking about? A. In other words, if you take assets on one side, deduct your liabilities, you will always find either a positive or a negative figure, so that when you add your total assets on one side, you will get a total. If you add your liabilities and either plus or

(3016)

minus the net worth of the company, you will likewise get down to the same total there.

The totals on those particular balance sheets are meaningless figures in themselves.

Q. You were just talking about net worth then? A. All I was talking about was the difference between the total assets and the total liabilities, and giving a balancing figure so that the two totals should be in balance.

Q. When you talk about total liabilities you are not referring to net worth; that is the capital stock and surplus? A. Net worth is the difference between assets and liabilities. If the assets are greater than the liabilities, you have a positive net worth position. If the liabilities exceed the assets, you have a deficit position.

Q. And then the figure you were giving before was net worth, net worth, which means the amount of moneys somebody could get if they went in and took out what they owned, is that correct? A. Not necessarily money getting out. It is a difference between the assets. Now, these assets accounts, without going through it, could have prepaid expense

(3017)

accounts, capitalized items and so forth, that not necessarily would be in the form of cash. They represent other assets that you couldn't just pull out.

Q. If I understood you, you said the net worth of American Brands Corporation December 31st, '47 was $247,000? A. That only represent——

Q. Without regard to Michigan. A. Without regard to Michigan, yes, sir.

Q. You said it was $247,000, am I correct? You just—I just took the figures down. A. Let me just find it again.

On December 31st, yes, the figure was $247,844.33, without offsetting against that the deficit position of—deficit net worth in the Michigan Brands.

Q. If I recall, you said that the net worth of American Brands Wholesale was 29-odd thousand dollars in January of 1947, correct? A. 29,948.

Q. Didn't that company make $169,000 in January? A. I could not tell what the profits were for any particular month.

(3018)

Q. Incidentally, also, Mr. Holzer, if I understood you correctly, you said you filed '47 and '48 tax returns from your office, is that correct? A. Yes, sir.

Q. You filed consolidated returns from your office, sir, knowing they weren't properly consolidated? A. The answer to that, sir—I did not prepare the returns or analyze the returns.

Q. But you permitted them to be filed, didn't you, sir, knowing they weren't consolidated? A. No, sir. First of all, at that particular time all that I did was follow through. They asked me to come over—Mr. Giglio, Mr. Lawn retained me to have these tax returns filed. They then had Mr. Roth prepare the returns, and all that I did at that particular time was to take the returns as prepared by Mr. Roth and as signed, and all that was done, they were taken over, strictly on a messenger basis, to the Collector's office in Newark.

Q. You are a certified public accountant? A. Yes, sir.

Q. You have a Treasury card, don't you? A. Yes, sir.

Q. And you permitted—participated in the filing of

(3019)

consolidated returns knowing they were not consolidated, didn't you? A. No, sir, Mr. Wessel, because at that particular time I never saw any books. I have no knowledge of any books. I had no knowledge of any of these particular companies whatsoever. All that I did was to file them because Mr. Giglio, Mr. Lawn said American Brands did not have an office. All that they did was use my office address on that, and they were taken over to the Collector's office. I had absolutely no knowledge or had nothing to do with the preparation of the returns. I didn't examine any records. I had no knowledge of the affairs of the company.

Mr. Wessel: I don't think I want to ask any more questions of this witness.

The Court: All right.

Mr. Stryker: Just a moment.

Can I have the '48 tax return?

The Court: I don't think the '48 tax return is in evidence.

Mr. Stryker: It is not in evidence. It is for identification.

(3020)

Redirect Examination by Mr. Stryker:

Q. Let me ask you, Mr. Holzer, from the Internal Revenue Code and regulations, while a company is in receivership, is the receiver supposed to file the returns? A. Yes, sir.

Q. And did you find that they had not been filed by the receiver? A. Correct, sir.

Q. And these returns had been prepared by Mr. Roth; you had begun to work for the Giglio group, and you took them over yourself? A. All that actually happened, sir, was that I ascertained the returns were not filed, and I reported back and told them to make certain that they get the returns prepared and have them filed, and I had nothing to do with the preparation of the returns whatsoever or any analysis thereof.

Mr. Stryker: Can I have that exhibit?

The Clerk: CCC for identification.

Mr. Stryker: I think the Government has it. I am not sure.

(Produced.)

Mr. Stryker: I now offer in evidence CCC for identification. This is the '48 return that we had before.

(3021-3022)

The Court: Show it to Mr. Wessel.

Mr. Wessel: I have seen it, your Honor. I make the same objection as before.

The Court: Same ruling.

Mr. Stryker: Exception.

That is all, Mr. Holzer, thank you.

The Court: I just have one question.

By the Court:

Q. Mr. Holzer, we had a claim here with the statement on it for 1948. A. Yes, sir.

Q. May I see that statement?

(Handed.)

Q. (Continuing) Didn't you tell Mr. Stryker what that was based on? A. Yes, sir. That claim for refunds,

sir, was prepared by Mr. Roth, sent over to my office, and was just retyped. All that I actually took off of that return was the fact that they had, on the basis of those returns and as requested, they just showed the profit that they had on the 1946 return, and the losses that they showed on the 1947 and '48 returns, as prepared by Louis Roth and filed. All I did was strictly on a messenger basis, filed from my office. It was taken over to the Collector's office and that is strictly from the face of the return, sir.

(3023)

Q. You checked this claim against the '48? A. Just against the totals, sir. I have no knowledge of any of the contents of those reports.

The Court: All right.

Mr. Stryker: I think, if your Honor please, it is time for a recess.

The Court: Yes, it is a good time for a recess.

(Witness excused.)

The Court: All right, don't discuss the case.

(Jury out.)

(Short recess.)

(Jury present.)

Mr. Stryker: Leo Diamond. Take the stand, please.

LEO A. DIAMOND, called as a witness on behalf of the Defendants, being first duly sworn, testified as follows:

Direct Examination by Mr. Stryker:

Q. Mr. Diamond, I believe you graduated with a Ph. B. from Chicago University, is that right? A. That's right.

(3024)

Q. And then I think you had another degree from them, didn't you, JD? A. That's right.

Q. In 1929, from the same Chicago University, is that right? A. That is correct.

Q. And are you a member of the Bars of New York, Illinois, Indiana and the District of Columbia? A. That's right.

Q. Were you at one time the attorney in office of—an attorney in the office of Chief Counsel of the Internal Revenue Service from 1934 to 1940? A. I was.

Q. And were you a special assistant to the Chief Counsel in the Internal Revenue Service from 1940 to 1943? A. I was.

Q. And were you head of the Tax Department of a large law firm in New York for many years, several years? A. I was.

Q. Are you now in private practice? A. I am, at 165 Broadway.

Q. Do you lecture at the Practicing Law Institute; have you lectured there from 1943 right on to date? A. Yes, I have.

Q. Just in a word, what is the Practicing Law Institute? A. The Practicing Law Institute is an educational institu-

(3025)

tion that has been in existence for many years, designed to continue adult legal education for lawyers, and I have been continuously a lecturer for the past 12 years on tax subjects.

Q. Now, Mr. Diamond, would you mind going on in your own way, giving the jury the rest of your background, without my having to take time to ask questions? A. In addition to being a private practitioner, I am also an associate professor of law on taxation matters at the law school of Rutgers University, and I also lecture on corporate tax

subjects at the New York University Graduate School, in the law school, graduate law school.

Q. Well, have you not also lectured at the University of Pittsburgh? A. I have done considerable amount of lecturing at various tax institutes throughout the country, at the University of Pittsburgh, my alma mater, the University of Chicago, and at New York University for many years, and a number of other universities.

Q. West Virginia? A. West Virginia and Tulane University.

I have also lectured a good deal before various Bar Association groups and tax professional groups and have

(3026)

done a fair amount of writing on the tax subjects.

Q. Well, will you give us just a thumbnail of the writings you have done on this subject? A. Well, at the present time, I am engaged in revising one of the volumes of a standard text on law of Federal income taxation, Merton's Law of Federal Income Taxation.

I have also contributed a number of law review articles and smaller notes to various professional magazines.

Q. Was one of them entitled "Learned Hand and Federal Taxation"? A. It was.

Q. In the Syracuse law review of 1951? A. The Syracuse law review, and I also wrote on various corporate aspects of some of the revenue acts in other law reviews.

Q. Now, Mr. Diamond, I am going to ask you to make the following assumptions—— A. I assume I can make some notes if you are going to give me some figures.

Q. Yes. Do you want a piece of paper and a pencil? A. I have a little sheet.

Q. Do you have a pencil? A. I have one, yes.

(3027)

Q. Here is a light that may help you. A. All right.

Q. Now, will you assume, first, that there was a New York partnership known as the Tavern Fruit Juice Company.

Will you assume that Mr. Giglio's accountant, Louis Roth, in a discussion with Mr. Giglio, at the inception of the partnership, suggested to Mr. Giglio that it would be perfectly legal to have the wives of Mr. Giglio and Mr. Livorsi as partners in a family partnership.

Assume further that Mr. Giglio adopted the suggestion.

Assume further that Mr. Roth testified that Mr. and Mrs. Giglio and Mr. and Mrs. Livorsi were all partners of Tavern, this Tavern partnership, before the organization of the Eatsum partnership.

Further, will you assume that an information return was filed for the Tavern partnership showing four partners, William Giglio, Frank Livorsi, Dorina Livorsi and Margherita Giglio.

Will you assume further that Mr. Roth testified that both Mrs. Livorsi and Mrs. Giglio should have filed individual tax returns based upon the information returns of

(3028)

the Tavern partnership for their respective shares of income.

Also will you assume that the net profits of Tavern Fruit Juice Company, according to the information return filed by the partnership for the period from April 16, '45 to March 31, '46, amounted to $140,726.32.

Upon the foregoing assumptions, can you state the amount of the distributive share of each of these persons? A. Well, based on the assumptions that you have given me, Mr. Stryker, which includes, of course, the assumption that each of the four persons named is an equal partner, I would say, of course, that under those facts each partner would have a distributable share of one-fourth, so approximately,

without going down to the last penny, it would be in the neighborhood of $35,000 for each partner.

Mr. Stryker: I will ask to have this marked for identification.

(Marked Defendants' Exhibit LLLL for identification.)

By Mr. Stryker:

Q. I show you LLLL for identification and ask you if (3029) that chart sets forth correctly the testimony that you have just given? A. Yes, it does, Mr. Stryker.

Mr. Stryker: I offer it in evidence.

Mr. Wessel: No objection.

Mr. Stryker: I think I have one that goes with this.

This is a large copy of what I just put in evidence, your Honor. I am doing this, rather than bothering the jury with the small one.

(Defendants' Exhibits LLLL and LLLL-1 for identification received in evidence.)

(3030)

Mr. Stryker: Maybe you had better step around. I guess you had better handle this rather than I.

Q. Will you explain this any further, if it needs any further explanation, to the jury? A. The assumptions which were given to me by Mr. Stryker included two major items, first, that the information return correctly showed the profits of the partnership as $140,726.32, and the second major item was that there were four partners, all of whom—that is, each of whom was an equal partner, namely, a 25

per cent partner. I gave—made the statement that if that were based on those assumptions, each partner would have a distributable share of aproximately $35,000 without going into the precise arithmetical division.

Q. That is all right. A. This is $35,181.58 for each one, which is close to what I said.

Q. All right, would you mind resuming the stand.

(Witness resumes stand.)

Q. Have you got a copy of this? Did I leave one with you? A. No, you did not.

(Mr. Wolfram hands copy to witness.)

The Witness: Thank you.

Q. Now, Mr. Diamond, would you be kind enough to state, on the basis of your previous testimony, how much (3031)

Mr. Giglio was required to report on his income tax return for the year 1946 as his income from the Tavern partnership, when he prepared and filed his personal tax return? A. Based on the foregoing assumptions, the answer would be $35,181.58.

Q. Will you also state how much Mr. Livorsi, under those assumptions, was required to report on his income tax return for the year 1946 as his income from the Tavern partnership? A. My answer would be the same, $35,181.58.

Q. Let me take another assumption, Mr. Diamond: let us assume that the net income of Tavern Fruit partnership for the fiscal year ending March 31, 1946, is the amount alleged by the Government, namely $221,598.77. Have I made my question clear to you? A. I think so. I understand your question is to assume that the income of the partnership known as Tavern Fruit Juice Company, for

the fiscal year in question would be, instead of $140,000-odd, as we assumed before, it would be the Government's figure of $221,598.77.

Q. That is my question, yes. A. All right.

Q. Now we will ask you to assume that. Can you state the distributive share of William Giglio, Margherita Giglio, Frank Livorsi and Dorina Livorsi under the last assumption, namely, the Government's figure? A. I would have (3032)

to assume again another item assumed in the first assumption. I assume that is what you have in mind, and that is that they are still equal partners.

Q. That's right. A. Under the second set of assumptions.

Q. That's right. A. Well, the same procedure would be followed. I would divide $221,598.77 by 4, which would give in the neighborhood of $55,000, without going into the precise pennies. I can divide it now.

Q. Well, I am going to show you a chart and save you strength.

(Defendants' Exhibit MMMM for identification marked.)

Q. I show you this Defendants' Exhibit MMMM for identification and ask you if that chart correctly reflects the testimony that you have just given? A. Yes, it does.

Mr. Stryker: I offer it in evidence.

Mr. Wessel: No objection.

The Court: Received.

(Defendants' Exhibit MMMM for identification received in evidence.)

Q. I wish you would come down again, if you don't (3033)

mind, and explain that to the jury. Will you, please, Mr. Diamond?

Mr. Stryker: Did I give your Honor a copy of that?

The Court: No, I have got the original, Mr. Stryker.

(Defendants' Exhibit MMMM-1 received in evidence.)

A. As I understand this chart, this is the same as the other chart, with the exception that superimposed or added to the $140,726.32, which was shown on the return, information return, there was added the amount of $80,872.45, which is the additional income alleged by the Government on which Tavern Fruit Juice should have reported on its information return. Assuming for purposes of this chart that the Government is correct, the total income then of Tavern Fruit Juice for the year ended March 31, 1946, would be $221,598.77; and proceeding on the same basis as I did on the first chart, I would divide this amount by 4, which indicates that each one of the four partners, assuming again they were four equal partners, would be $55,399.69, except that Mr. Giglio is charged with one cent more.

Mr. Stryker: All right, thank you very much. (3034)

(Witness resumes seat.)

Q. Now, Mr. Diamond, will you state under this assumption how much Mr. Giglio was required to report on his income tax return for the year 1946 as his income from the Tavern partnership? A. My answer to that is the same, basically, as that of the first set of assumptions, but here the figure would be larger, namely, $55,399.70.

Q. Will you state under this assumption how much Mr. Livorsi was required to report on his income tax return for the year '46, for his income from Tavern? A. Proceeding on——

Q. I imagine the figure is as you stated there, $55,000-odd? A. $55,399.69.

Q. Now, Mr. Diamond, I ask you to be kind enough to make the following assumptions with respect to a different partnership, namely, the Eatsum partnership: one, that there was a New York partnership known as Eatsum Food Products Company, Ltd.; two, that the general partners were William Giglio and David Lubben, while the limited partners were Frank Livorsi, Mrs. Dorina Livorsi, Mrs. Margherita Giglio, Ronald Stone, Roy Hankermeyer and Frank Loperfido; three, that at the inception of the partnership Lubben alone owned 50 per cent of the part-

(3035)

nership, and that Stone and Hankermeyer were merely Lubben's dummy partners; next, that Mr. Giglio and Mrs. Margherita Giglio, Mr. Livorsi and Mrs. Dorina Livorsi, at the formation of Eatsum partnership, drew money by check out of the Tavern partnership, and contributed as their special capital contribution to the Eatsum partnership, the amount invested by Mr. and Mrs. Giglio and Mr. and Mrs. Livorsi, approximately $30,000; next, that the net profits of the partnership were to be divided in accordance with the contributions which the partners made to the partnership; next, that Lubben and his group contributed $33,500, and that Giglio and his group contributed $33,500 as a capital investment in the partnership; next, that of the $33,500 contributed by the Giglio group, Mrs. Margherita Giglio contributed $7,370; that is the $33,500 contributed by the Giglio group, Mrs. Dorina Livorsi contributed $7,370, and that on March 6, 1946, Mr. Giglio entered into

an agreement with Mr. Lubben, whereby Mr. Giglio agreed to take over Mr. Lubben's 50 per cent ownership in the business beginning May 31, 1946, and agreed that on May 31, 1946, he would accept full ownership of the business.

Assume further that the limited partners, Mrs. Dorina

(3036)

Livorsi and Mrs. Margherita Giglio, played no part in the management of Eatsum; and still further assuming that an information return was filed for the Eatsum partnership, listing as partners, among others, William Giglio, Frank Livorsi, Dorina Livorsi and Margherita Giglio.

Now, can you hold those assumptions in mind, Mr. Diamond? A. I made some notes here.

Mr. Stryker: Can I have Government's Exhibit 6, please?

Will you mark this, please?

(Marked Defendants' Exhibit NNNN for identification.)

Q. Now, you have before you Government's Exhibit 6 in evidence, the Eatsum partnership return for the year June 1, 1945 to May 31, 1946, have you not? A. I have.

Q. Now taking that, and the foregoing assumptions, I ask you whether the exhibit I have just marked for identification, NNNN, correctly reflects the amount set forth for the distributive share of each partner on that return? A. Yes, it does.

Mr. Stryker: I offer it in evidence.

Preliminary Questions by Mr. Wessel:

(3037)

Q. I am a little bit confused on NNNN, sir. The assumption was that Mr. Lubben and his partners were

50 per cent on one side and Mr. Giglio and his partners were 50 per cent on the other side; is that correct? Was that one of the assumptions? A. I think so.

Q. Well, if you add up the Giglio group and the Lubben group, they don't come out equal, as I read it. You will notice that the Giglio group comes out to $247,000, and the Lubben group comes out to $234,000. A. That is correct.

Mr. Wessel: I must object to the schedule.

Mr. Stryker: Well, on the sheet——

By Mr. Stryker:

Q. Is there a difference because of salaries, or what? A. I don't know.

Mr. Stryker: Let that go for a minute. Pardon me a minute, your Honor. I am sorry.

The Court: All right, take your time.

Q. Now dropping the last exhibit for a moment, the exhibit for identification, Mr. Diamond, if you assume that the net profit for Eatsum Food Products Company Limited for the fiscal year ending May 31, 1946, is the amount alleged by the Government, namely, $622,025.76—— A. Will you repeat that?

(3038)

Q. $622,025.76, can you state the amount of the distributive share of David Lubben on the one side, representing 50 per cent of the partnership, and of the Giglio-Livorsi group, representing the remaining 50 per cent of the partnership? A. Well, as I understand your question, based on the assumption that each group has a 50 per cent interest, it would be $311,012.88-$311,012.88 for each group.

Q. That would be for the Lubben group? A. For the Lubben group, and a similar amount for the other group.

Mr. Stryker: Where is that NNNN? Is that up here?

The Witness: Right here.

Q. Well, I show you NNNN here, and ask you of those figures aren't the figures of the tax return, Exhibit—— A. 6.

Q. —6? Will you look at that and tell me that? A. Yes, they are. They show exactly the same figures as on the return.

Q. That is all it is; it shows the figures on the return. A. That is right.

Mr. Stryker: I would like to have the chart on that if I may.

(3039)

I offer this. I don't think you have any objection?

Mr. Wessel: No objection. It assumes the same——

Mr. Stryker: Just the text.

Mr. Wessel: No objection.

(Defendants' Exhibit NNNN for identification received in evidence.)

Mr. Stryker: Will you mark this, please.

(Defendants' Exhibit NNNN-1 received in evidence.)

Q. Will you come down and tell us about this; just what is that chart? A. This chart is the blow-up of the paper I just looked at, and this is an exact copy, figure-wise, of the profit, net profit, shown on the partnership return, information return, filed by Eatsum Company for the period June 1, 1945, to May 31, '46, showing on the information return $482,025.76, and indicating that the distributive shares attributable to Mr. William Giglio and Margherita Giglio,

were in the aggregate of $101,123.88, and that a similar amount of $101,123.88 attributable to Mr. and Mrs. Livorsi, and the amount of $45,682.20 attributable to Frank Loperfido. When I say "attributable," I mean the distributable shares of the profit attributable to those individuals.

(3040)

Similarly, the amount of $99,620.88, is shown opposite the name of David Lubben, and $63,962.46 opposite the name, Ronald Stone; $70,512.46 opposite the name of Roy Hankermeyer. These three latter items also being distributable share of the profits, for a grand total of $482,025.76, which is the same as that figure at the top.

Mr. Stryker: I would like to have this paper marked.

(Marked Defendants' Exhibit OOOO for identification.)

Q. Will you examine Exhibit OOOO for identification and just explain what that chart is? A. This Defendants' Exhibit OOOO shows the net income per information return of Eatsum Food Products, $482,025.76, which appears on the preceding exhibit, but added thereto are corn deal profits of $140,000, making a total of $622,025.76, and the document also shows the distributive share of that total figure of $622,025.76 as broken down between the so-called Lubben group and the so-called Giglio group.

Q. Give us the figures opposite—give us those figures as you have them there?

Mr. Stryker: Oh, well, I am only asking you to identify it, all right.

(3041)

I offer this in evidence. Any objection?

Mr. Wessel: I don't know. (After looking:) My objection as to this document is that it is com-

pletely without any foundation, as distinguished from prior documents.

Mr. Stryker: Well, I think you will see it has a perfectly clear foundation, but I won't argue with it unless your Honor wants me to.

The Court: I will sustain the objection.

Mr. Stryker: I respectfully except.

Q. Now, this document sets forth, does it not, the net income as per the information return that was filed? A. It does.

Q. And it sets forth the so-called additional income alleged, the Government claims, from the corn deal profits, of $140,000? A. That is right.

Q. And you have added those two figures together, taking the Government's figures, is that right? A. That is right.

Q. You come to $622,025.76; is that right? A. Right.

Q. Now then, you have a heading here, "Distributive Share of Profit," is that right? A. That's right.

(3042)

Q. Are the items there stated based on the testimony, the assumptions that you have made hitherto, or are they based on something else? A. Well, these figures that are presented here are based on the assumption that the Lubben group did have a 50 per cent interest in that partnership, and that the Giglio group had a 50 per cent interest in that partnership.

Q. Yes. A. And that as far as the Giglio group is concerned, that each of the two husbands and the two wives, namely, Livorsi and Giglio, that is, each of the husband had 11½ per cent interest in the partnership, and each of the two wives had an 11 per cent interest in the partnership, based on the capital investment which they made in the Eatsum partnership from drawings out of Tavern, and that

the Loperfido interest was a 5 per cent interest, as the evidence indicates.

Q. Of the corn deal? A. No, the 5 per cent of the whole.

Q. 5 per cent—oh, yes, I am wrong. A. Yes.

Q. Go ahead. A. And that all those items added together, plus the 50 per cent interest in the so-called corn deal profits, came to the figure shown here, which totaled $622.025.76, after taking into account the Lubben share.

(3043)

Mr. Stryker: I believe this is preliminary to further questions I am going to ask you.

Now, if your Honor please, I submit that this is clearly admissible. Won't you allow it?

The Court: No, I will stand on my original ruling.

Mr. Stryker: I except.

Your Honor, it is only five minutes of four. I find a bit of confusion on my notes on this. I think if you will adjourn I can save you time tomorrow morning.

The Court: We keep cutting it shorter and shorter, Mr. Stryker. I will do anything I can to help you along with this.

Mr. Stryker: I may have to stop and look. I will do whatever your Honor says.

The Court: All right, if you would like to stop now, we will stop.

Mr. Stryker: I would be glad now if we could.

The Court: We will adjourn to ten-fifteen tomorrow morning. Don't discuss the case.

(Adjourned until Wednesday, February 16, 1955, at 10:15 a. m.)

(3044)

New York, February 16, 1955;
10.15 o'clock a. m.

Trial resumed.

(Jury in box.)

LEO A. DIAMOND resumed.

Direct Examination by Mr. Stryker (Continued):

Q. Mr. Diamond, yesterday I asked you to make certain assumptions with regard to the Eatsum Food Products Company, Ltd. Have you those assumptions pretty well in mind? A. I have refreshed my recollection.

Q. And also I introduced in evidence yesterday Exhibit NNNN, which was merely a reproduction, as I understand it, of Schedule I of the partnership information return as filed in 1947. I think you came down and explained that to us. A. I did.

Q. Therefore, is it not the fact that this Exhibit NNNN, which reflects the return as filed, shows the distributive shares of the partners as per the original partnership agreement? A. It does.

Mr. Wessel: Object to the form of the question.

The Court: Sustain the objection. Strike out (3045) the answer.

Mr. Stryker: Wait a minute, leave that for the moment.

Q. Will you also assume that Mr. Wessel has conceded "that the Eatsum partnership return reflects the distributive shares of the partners per the original partnership agreement". I neglected to ask you that.

Mr. Wessel: Object to the form of the question again. I don't recall exactly what counsel is talking about, but I am talking about the original written agreement in May and not the oral conversation.

Mr. Stryker: I have dropped that for the moment. I omitted to ask this question which I now ask, and what I have presented to the witness is directly from the record.

Mr. Wessel: Well, I don't know how long that record runs, but I recall we discussed a written agreement in May, plus oral discussions, and I stated at that time, I believe, that the oral discussions reflected the——

Mr. Stryker: I have got the pages here, your Honor. I can cite it. Page 2349 of the record.

The Court: We will take Mr. Wessel's concession if that is a stipulation between the two of you If it isn't, we will not go along on it.

(3046)

Mr. Stryker: Mr. Wessel has questioned it. May I turn to the record?

Mr. Wessel: My recollection is refreshed, if your Honor please, and I recall what it was we were discussing. The words Mr. Stryker has referred to are, of course, in the transcript. We were discussing at that time Defendants' Exhibit UU.

Mr. Stryker: Just a moment, your Honor. I am quoting for my assumption the words that I have taken directly from the transcript. I believe I have correctly stated them. I have presented the page to Mr. Wessel. If I am in error anywhere, he can correct me.

The Court: No one has said you haven't correctly read it. Mr. Wessel is trying to tell me the

context out of which you took the words. He should be able to do that.

Mr. Wessel: We were discussing Exhibit UU and whether or not the partnership information return as filed correctly reflected the interests of the partners as set forth in the original written agreement.

I said at that time there is no question about that, it does so set them forth.

I then also stated, however, that there were lots

(3047)

of other questions, one that the original agreement had been modified by later writings, and two, that the original agreement did not reflect the true understanding of the parties because the wives were dummies, et cetera, et cetera, et cetera, and Lubben said that his people were dummies.

Now this is a long colloquy and there is other colloquy in connection with the same subject. There is no question in this lawsuit that I know of but that the information return does correctly set forth the distributive shares of the partners as per the original written agreement, and I should have said, when I said at page 2349 what I did, original written partnership agreement. That was undoubtedly my error, but the context indicates clearly what we discussed at that time.

(3048)

Mr. Stryker: Let me read a bit more of the context. It goes on.

The Court: Why don't I read the whole thing.

Mr. Stryker: Well, you will find there a statement two or three lines down, "And it is conceded if counsel wishes it" by Mr. Wessel.

The Court: I never realized you ever accepted a concession. I don't remember that any stipulation was made between you.

Mr. Stryker: He said he conceded if counsel wishes it. I don't know what more I can do.

The Court: Let me read it.

Mr. Stryker: There it is, your Honor. That's the page.

Mr. Wessel: It is also conceded at page 2370.

The Court: Wait a second. I haven't finished reading this.

Well——

Mr. Wessel: That same subject is referred to at page 2370, and in accordance with your Honor's request I even handed up a memorandum of law.

Mr. Stryker: I am asking the witness to assume that which appears on the transcript, and a line or

(3049)

two after what I read you will find that Mr. Wessel says, "I so concede"—I think you have it before you—"if counsel wishes it."

The Court: I don't know what is gained by that repetition, Mr. Stryker. Let me tell you what happened. I read the entire interchange between you. You had offered the document, which I held you had not proven the authenticity of. Mr. Wessel offered to make a concession. You declined it and persisted in your offer of the document. As I see it, you resisted that concession. Now, I don't know how important that is. If Mr. Wessel and you want to get together on a concession, that is fine. At this point, as I read this transcript, there is no stipulation between you. If you want to accept his concession and proceed on that basis, talk it over with Mr. Wessel now.

Is there any other concession on the record that I have overlooked?

Mr. Wessel: 2370.

The Court: I have no idea whether this is important or unimportant.

Mr. Stryker: I assure you it is important to the basis of this gentleman's expert opinion, to which I am coming.

(3050)

Mr. Wessel: I repeated that same statement at page 2370 of the transcript. It went on for quite some time.

The Court: All right.

(After reading) 2370 is a more flatfooted concession. Maybe I am wrong. You might want to show that to Mr. Stryker, 2370.

Mr. Stryker: What is it you want me to see, your Honor?

The Court: In other words, the concession that you refer to, Mr. Stryker, was, as I read the interchange between you, not accepted. You persisted in your original course.

Mr. Stryker: Well——

The Court: Now, if you want to make a further agreement now, fine.

Mr. Stryker: I wouldn't suppose at this stage your Honor would ask me to do anything further than to cite to this witness what appears in the record. I am asking him to assume that statement. Now Mr. Wessel can cross-examine him any length he wishes, of course.

The Court: You are asking him to assume a statement. Will you read the statement that Mr. Stryker asked him to assume.

(3051)

Mr. Stryker: Yes, I will, I have got it right here.

The Court: All right.

Mr. Stryker: I think that I have assumed——.

The Court: Let's have your question.

Mr. Stryker: All right, will the reporter——

The Court: Rephrase the question, Mr. Stryker. It will be easier.

Mr. Stryker: I will put it this way:

Will you assume that Mr. Wessel has conceded—if you like I will change it to the words "has stated on this record"—that the—and this is right from the page that your Honor read, page 2349—that "the Eatsum partnership return reflects the distributive shares of the partners per the original partnership agreement."

Now, may I now have the assumption?

Mr. Wessel: May I state that Mr. Lubben had this experience and Mr. Roth had this experience; and I am now having it. That statement is taken out of context and I did not intend, and I am quite sure it appears clear from the record that I didn't intend to say that that was the only agreement. If counsel wishes to add the word "written" in there, it is per-

(3052)

fectly all right.

The Court: All right, take it on that basis or not at all.

Mr. Stryker: All right, I will go ahead on that basis.

The Court: All right.

Mr. Stryker: I respectfully except to your Honor's ruling, but I will now, in accordance with your Honor's ruling, reframe the question. Is that the right procedure?

The Court: Good.

By Mr. Stryker:

Q. Will you assume that Mr. Wessel has conceded that the Eatsum partnership return reflects the distributive shares of the partners per the original written partnership agreement.

Mr. Stryker: Now, have I stated it right?

The Court: Yes.

Mr. Stryker: All right.

Q. Now, on those assumptions, Mr. Diamond, will you state whether or not Exhibit NNNN, does not reflect the return—does not—I will start again.

Is it not the fact, therefore, that Exhibit NNNN, which reflects the return as filed, shows the distributive share of the partners as per the original—I had the "partnership

(3053)

agreement". I will add, to meet your Honor's ruling—written partnership agreement.

The Court: Yes. Now the word "agreement" should be in quotes. I mean, there is no concession that that represented the agreement, actual agreement of the parties. That is in accordance with a document.

Mr. Stryker: All right.

The Court: Which parties signed.

Mr. Stryker: All right.

Q. Now, you have assumed, have you not, that Margherita Giglio's distributive share of the profits amounted to 11 per cent? A. I did.

Q. That Dorina Livorsi's distributive share of the profits of the partnership amounted to 11 per cent A. I did.

Q. And William Giglio's distributive share of the profits of the partnership amounted to 11-½ per cent. A. That is correct.

Q. That William Giglio's share of the profits of the partnership amounted to—strike that. I think I have asked you William Giglio's distributive share of the profits of the partnership amounted to 11-½ per cent—that Frank Livorsi's distributive share of the profits of the partnership amounted to 11-½ per cent. A. I did.

(3054)

Mr. Stryker: Can I have 141, please, of the Government?

Q. Mr. Diamond, I show you Government's Exhibit 141 in evidence. Now I ask you, have you made a computation in which you have assumed salary deductions allowed by the Government on Exhibit 141? A. I have.

Q. And in which you have assumed further that Loperfido's 5 per cent interest was distributed among the Giglio group? Is your document prepared on that basis? A. I have made such a computation and there is a document of that nature.

Mr. Stryker: I ask to have that paper marked, please, for identification.

The Court: All right.

(Marked Defendants' Exhibit PPPP for identification.)

Q. I show you PPPP for identification and ask you if that is a paper which you prepared? A. This is the paper which is prepared on the basis of my computation.

Q. On that computation, how much would the distributive share of Eatsum income of Mr. Giglio amount to?

The Court: Has this been received?

(3055)

Mr. Stryker: Not yet. Maybe I had better offer it now.

The Court: All right.

Mr. Stryker: I offer it in evidence.

Preliminary Examination by Mr. Wessel:

Q. Mr. Diamond, you have assumed in here that Mr. Giglio was entitled to a 12¾ per cent interest——

Mr. Stryker: 12¼.

Mr. Wessel: 12¾, I believe.

Mr. Stryker: Is it? I am sorry. Go ahead.

Q. (Continuing)—interest in Eatsum for the fiscal year ending May 31, '46. A. That is the assumption.

Q. And that interest differs from his wife's interest by a half a per cent; isn't that correct? A. That's right.

Q. You have also assumed in here that Mr. Lubben had an interest up to May 31, '46, that is, the whole fiscal year? A. That is the assumption on which the paper, that computation has been made.

(3056)

Q. Now, upon what did you base the difference between Mrs. Giglio's and Mr. Giglio's interests? A. As I explained yesterday, though somewhat briefly, I assumed that the partnership interests in Eatsum, the percentage partnership interests in Eatsum to each of the four persons, namely, Mr. and Mrs. Giglio and Mr. and Mrs. Livorsi, were based upon their contribution into the partnership from funds which they drew out of Tavern, and based on that assumption and approximating it as closely as I could, it appeared that out of the 50 per cent attributable to the Giglio group,

as we called them, 11 per cent would go to each of the two wives, and 11½ per cent would go to each of the two husbands, and the 5 per cent would go to Mr. Loperfido.

Q. Then if I understand you correctly, you are basing your distribution upon the original written agreement between the various partners, is that correct? A. In so far as that computation at the moment is concerned, the 11 and 11½?

Q. Yes. A. Yes.

Q. And you are applying that original distribution to the income of the partnership for a period ending a year (3057) later, is that correct? A. That is correct.

Q. And you are not taking into consideration any agreements, written or otherwise, that took place after the written agreement was first executed, is that correct? A. That is correct.

Mr. Wessel: I object to it upon the ground it is not supported by the evidence.

By Mr. Stryker:

Q. Well, Mr. Diamond, when you refer, as you have, in response to my questions, to the written agreement, are you also referring to Government's Exhibit 21 in evidence? A. Well, my computation, Mr. Stryker, was based on the assumption that on the basis of the original written understanding or agreement giving rise to the partnership, that that partnership continued in so far as the proportionate interest is concerned throughout the life of the partnership for the fiscal year.

Q. Did you also consider Government's Exhibit 31? A. I did.

Q. And is it on the basis of those as well as upon the matters previously referred to in my questions on which

you have arrived at a conclusion? A. I can best answer it by saying this, Mr. Stryker, that I took into account all (3058)
of the Governments' exhibits—as a matter of fact all of the exhibits introduced into evidence prior to my testifying, and proceeded on the assumption that as a matter of law and as a matter of fact there is a partnership throughout the fiscal year ended May 31, '46, based on the original agreement, but in no way ignoring any of the subsequent exhibits.

Mr. Stryker: I now reoffer the document.

Mr. Wessel: I think the question of law which the witness appears to have answered is one for your Honor, and that is whether subsequent agreement in any way modify the original agreement.

The Court: I sustain the objection.

Mr. Stryker: Well, let me approach that.

The Court: All right.

By Mr. Stryker:

Q. When you say question of law, would I be correct in understanding that you are referring to this special field in which you are an expert, Internal Revenue Code Regulations, etc? A. I wouldn't—the answer to that question, Mr. Stryker, is yes; I understand that is why I am here.

Mr. Stryker: I don't know that you want to (3059)
hear me argue it—it is plain enough. It is the same thing exactly as Mr. Present, who testified about regulations, Internal Revenue Code, etc., precisely, except that it is stronger than that, because this man is a lawyer, an expert in this field.

Have I not laid a basis now for my assumption?

The Court: No, you haven't. I don't think it is in accordance with the facts, as I understand have been proven in the case.

Mr. Stryker: I respectfully except.

The Court: All right.

Mr. Wessel: I think the record should reflect again, your Honor, that I handed a memorandum of law to your Honor on this subject.

The Court: Yes. Could I see the document, by the way. I would like to be sure.

Mr. Stryker: What is that, your Honor?

The Court: I should like to examine the exhibit which you just proffered.

Mr. Stryker: Surely.

The Court: Because I want to be sure.

(Handed to the Court.)

The Court: All right. I adhere to my ruling. Very well.

(3060)

Mr. Stryker: You will pardon me if I look at my notes?

The Court: Certainly.

Mr. Stryker: Because a whole line of exhibits depends on these assumptions, and I have to go on now to something else.

The Court: All right.

Q. Now, Mr. Diamond, I call your attention to the testimony given by Mr. Present, the Government's expert——

Mr. Stryker: If you want to follow me, I will give you the page. It is page 2200 to 2201.

Q. (Continuing) —as follows:

"Q. I should ask you—I think I neglected that——"

Mr. Stryker: This is a question by Mr. Wessel, your Honor.

Q. "Q. I should ask you—I think I neglected that—on what did you base your assumption that Margherita Giglio and Dorina Livorsi did not obtain any or were not entitled to any share of Eatsum distributive profits? A. Well, that would be based primarily on the individual returns of Mr. Giglio and Mr. Livorsi, in which they themselves do not recognize that Mrs. Giglio and Mrs. Livorsi were partners, but included the entire distributive share

(3061)

on their own personal tax return."

Now, having called your attention to that, I ask this question: I ask whether under the Internal Revenue Code and the Regulations the distributive shares of partners may be altered or changed by one partner reporting in his personal tax return the entire distributive share of another partner?

Mr. Wessel: Objection as calling for a question of law.

The Court: Sustained.

Q. I ask you as an expert—whom I think I have fully qualified in this particular domain of tax regulations, Internal Revenue Code—I think you weren't here but I think precisely the type of question that was put to Mr. Present—I ask you whether you are basing this on your knowledge as an expert in this particular field?

The Court: That doesn't alter Mr. Wessel's objection, Mr. Stryker. All you have done is recite facts which we all know. I don't know for whose benefit but it doesn't help me. Let's get on with the next question. You understand my position. That was a question of law which you asked and I won't take his testimony on a question of law.

(3062)

Mr. Stryker: Well, I respectfully except.

The Court: All right.

Q. Mr. Diamond, I also call your attention to this testimony given by Mr. Present——

Mr. Stryker: Mr. Wessel, if you want to follow me, it is page 2396- to 7. Just a minute, your Honor.

The Court: All right.

Q. Mr. Present testified on that page as follows:

"Q. Well, what was his distributive share on March 8th, when he was still there in the business?"

Mr. Stryker: I interpolate here, that I am sure there can't be an argument that "his" relates to Mr. Lubben.

Q. And Mr. Present answered,

"A. His distributive shares, sir, is fixed in the contract which is in evidence here.

"Q. The partnership agreement, you mean? A. No, sir; the contract of dissolution, or that informal letter. I have forgotten the number."

Mr. Stryker: And the interrogation continued for another one question and answer as follows:

Q. "A. I have too, sir."

Mr. Wolfram: That's a question.

Mr. Stryker: Let's see. It is a little confusing the way it is written here. I will try it again.

(3063)

Q. "Q. The partnership agreement, you mean? A. No, sir, the contract of dissolution, or that informal letter. I have forgotten the number.

"Q. I have, too, sir. A. (Continuing) Setting forth the agreement between Mr. Lubben, the terms under which he left that partnership, which, as I understand it, sir, was used to amend the original agreement."

Now, having that in mind as a tax expert, with special knowledge in the field of taxation, the regulations and Internal Revenue Code, I ask you to tell us, please, whether under the Internal Revenue Code and Regulations, partners may by their dissolution agreement alter or change the distributive share of the partnership earnings for the period preceding the date of dissolution?

Mr. Wessel: Same objection.

The Court: Same ruling.

Mr. Stryker: I respectfully except.

Q. Mr. Diamond, in the voir dire, that is, on the questions determining the admissibility of the document, in connection with PPPP for identification, Mr. Wessel asked you how you computed Mrs. Giglio's distributive share at 11 per cent.

(3064)

Now I ask you whether, in addition to all else that I have given you, you based your assumption on the testimony of Mr. Present at page 2414 of the record——

Mr. Stryker: I think to make clear what I am about to read, I had better read two or three questions and answers that precede it.

The Court: All right.

Q. This is the examination of Mr. Present, my cross-examination of him. It appears at page 2413 of the record:

"Q. Now, you knew what the total amount of the capital of the partnership was from your investigation? A. Yes, sir, $67,000.

"Q. Now with those figures, can't you compute the interest of the limited partners? A. Do you want the two wives, sir?

"Q. That is what I am interested in. Don't bother about the rest. A. Mr. Stryker, I have computed the percentage, as set forth here, except that if we read this again, sir, it does not define how the partnership net income shall be computed, sir. In other words, I will give you a percentage as set forth, that their particular investment bears to the total (3065)

capital, sir——

"Q. Hold it a minute, will you, please, while I take a look."

Mr. Stryker: This, I guess, is part of my question still.

Q. "Q. (Continuing) Well, it says that 'the contributions,' it says, 'their share of the profits' "——

Mr. Stryker: It is in quotes, your Honor.

Q. "it says that 'their share of the profits, they shall receive by reason of their contributions shall be

ratably in proportion, to the sums contributed by each limited partner,' it says that, doesn't it? A. Yes, sir, but it doesn't state, sir, how to compute the profits.

"There was another agreement which stated that their salaries would be taken into consideration, sir, so before we could have any distribution we would have to know about how much of the salaries—how much the salaries were which would be fixed for each individual.

"Q. Well, take this paper as we find it. A. I will be glad to do that, sir."

Mr. Stryker: The paper, for clarity, I interpolate, was the certificate.

The Court: Exhibit 21.

(3066)

Mr. Stryker: Yes, sir.

The Court: All right.

Mr. Stryker: In evidence.

Q. "A. I will be glad to do that, sir."

Mr. Stryker: Continuing with the answer:

Q. "That would be 11 per cent of some figure. If you will tell me what figure you would want me to apply it to, I would be glad to do it for you.

"Q. Where do you get the 11 per cent from? A. $7,370 represents 11 per cent of the $67,000 total capital."

Did you take that testimony into consideration in connection with the assumption that I asked you to make? A. I did.

Mr. Stryker: I now reoffer PPPP for identification.

The Court: Same ruling, Mr. Stryker.

Mr. Stryker: Exception. It requires a bit of reorganization of my notes. I hope you will be patient with me.

The Court: All right.

Mr. Stryker: Maybe if we take the recess now I could reorganize what I have left in the period.

The Court: All right, Mr. Stryker. We will take our ten minute recess now. Don't discuss the case.

(Short recess.)

(3067)

Mr. Stryker: Can I come up to the bench with Mr. Wessel?

The Court: Do we need the reporter?

Mr. Stryker: Yes, I will want to make an offer.

(The following discussion took place at the bench, in the absence of the jury:)

Mr. Stryker: Your Honor, Mr. Wolfram has worked up this aspect of the case. I want to make an offer of proof here at the bench and I am going to ask Mr. Wolfram to be good enough to state it.

The Court: All right.

Mr. Wolfram: With respect to PPPP, which your Honor has ruled out, we intend to follow that exhibit up with a computation based upon a percentage allocation of the distributive shares of the wives and the husbands; and from that point we were going to go into a computation of what the husbands, the defendants in this case, should have reported on their 1946 tax returns, as compared to

what they actually did. We were going to indicate what the husbands should have reported as their income from Tavern, based upon the assumption that the wives and the husbands were both entitled to distributive shares of the profits of Tavern.

(3068)

We were going to show what the husbands should have reported out of their income from Eatsum, based upon the assumption that both the husbands and the wives were entitled to distributive income out of Eatsum, and the distributive shares of Eatsum are based upon the percentages which your Honor knows went into Exhibit PPPP.

Since we can't pursue the subject any further, because the percentage—the figures are not acceptable in PPPP, we can't pursue the other line.

The Court: I am not sure, Mr. Wolfram, that I fully understand the offer. Is PPPP the last exhibit you gave me?

Mr. Wolfram: Yes, sir.

The Court: I have held that that is not admissible.

Now, if that is essential to your further offer of proof, why, all right, I am not passing on whether that is essential or not, because frankly, as you just orally recited to me what you propose to show by other exhibits, I am not sure it fully registers with me. I am convinced without any doubt that that exhibit is not properly admissible. So whatever the

(3069)

consequences that flow from that, are consequences, that is all.

Mr. Wolfram: Well, PPPP is based upon the assumption that the wives had a distributive share

in Eatsum and their husbands had a distributive share in Eatsum, and is based upon the assumption that the wives had an 11 per cent interest in Eatsum, and that the husbands had an 11 per cent interest in Eatsum, and Mr. Wessel challenged that assumption, namely, that the wives had an 11 per cent interest and that the husbands didn't have 11½ per cent.

Mr. Wessel: My basic challenge to that effect——

The Court: Regardless of your basic challenge, I mean, there were several things wrong with that exhibit. You are speculating from an exclusion of that exhibit that I have ruled on this other question that I just raised now.

Mr. Wolfram: Yes, your Honor, the other exhibits which reflect the income tax returns of the husbands, reflect the data in PPPP, because PPPP shows what the husbands' distributive share would be.

The Court: Frankly, I think that PPPP, being based upon erroneous assumptions, states the income of the entire Giglio group—I mean, assuming

(3070)

that Giglio, his wife, and Livorsi and Mrs. Livorsi are the so-called group—below what it was, and if you follow that up by exhibits that assume the correctness of that, why, I assume that those exhibits would be open to the same challenge. That is the basis for my ruling.

Mr. Wolfram: Well, PPPP, your Honor, is based upon the Government's figures, with a different distributive pattern.

The Court: No, there are other things besides.

Mr. Wolfram: It also assumes that Loperfido was bought out as a partner.

Mr. Wessel: It assumes many things. I will be glad to state them for you now.

The Court: I don't think the facts—I mean, they are completely at variance with the only proof that has been introduced here.

Mr. Wolfram: Of course, we disagree with that.

The Court: All right.

Mr. Wolfram: We say, that is, the assumption is based on facts in the record, your Honor. That is our position.

(3071)

The Court: Well, if I could find a factual basis for all of the assumptions, you could be sure the exhibit will be in.

Mr. Wolfram: May we point them out to your Honor?

The Court: Surely. I will be glad to have any information you can give me. I don't want to shorten this.

Mr. Wessel: Do you think I should state for the record——

Mr. Stryker: Will you wait until we finish?

The Court: Let Mr. Wolfram finish.

Mr. Wolfram: PPPP starts with the net income from the tax return. That is a fact in the record. It adds the cash box contents alleged by the Government. That is a fact in the record. It deducts the salaries, as alleged by the Government. Those are facts in the record. So that we get a net income corrected, as alleged by the Government, of $573,625.76. Now those are all facts in the record, and we are taking the assumptions based on what the Govern-

ment alleges. Then we say distributive shares of profits, assuming that Stone, Loperfido and Hankermeyer are not partners——

(3072)

Mr. Stryker: That is based upon Lubben's statement.

Mr. Wolfram: That is based on Lubben's statement, and it is based on inference which the Government says it probably will make on the evidence here.

David Lubben's 50 per cent of profits, which is his own, based on his own testimony, that he was a partner to the extent of 50 per cent. Then we say that if Loperfido wasn't a partner, the distributive shares of Giglio—the distributive percentages, rather than shares, of Giglio, Margherita Giglio, Frank Livorsi and Dorina Livorsi are in these figures, and that can be proven mathematically, because their contribution was a certain amount in total; it was thirty-odd thousand dollars; and they contributed certain amounts which Mr. Present mentioned in his testimony. Each wife contributed the same amount, and each husband contributed the same amount, and therefore the precentages come out that way. Now, these are all facts in evidence, your Honor.

The Court: Now, start going right down. You took me down to here. Now give me the basis in the record for the rest.

(3073)

Mr. Wolfram: David Lubben said he was a 50 per cent partner of Eatsum Food Products Company.

The Court: For how long?

Mr. Wolfram: Throughout the period; and Government's Exhibit—let's have that letter—let me show you this agreement that the Government intro-

duced. Exhibit 31 says—it is an agreement by Giglio with Livorsi.

The Court: With Lubben.

Mr. Wolfram: With Lubben. I am sorry. It says:

"I agree to take over your 50 per cent ownership of the business beginning May 31, 1946, and myself conduct the affairs of the partnership in its entirety until May 31, 1946. At that time (namely May 31, 1946) I agree to accept full ownership of the business."

Now that, in my opinion——

Mr. Wessel: Do you want to read the next little bit?

Mr. Wolfram: Yes.

"And in return for your interest will assume payment for your federal income tax return."

Mr. Wessel: "And in return for your interest".

(3074)

Mr. Wolfram: Yes, on May 31, '46, at that time, it says. So that is not a termination of a partnership on March 6th, and I think we are entitled to assume that there is evidence that this partnership terminated, even as far as Lubben is concerned, on May 31st. Mr. Wessel may argue differently about that, but that doesn't preclude us from arguing that there are facts in this record to show that that partnership terminated on May 31, 1946.

Mr. Wessel: May I——

The Court: Does Mr. Wolfram want to go all the way?

Mr. Wolfram: Do you want me to go ahead with the rest of this?

The Court: All right, go ahead.

Mr. Stryker: Let Mr. Wolfram finish the balance of the figures there, Judge, if you don't mind.

The Court: All right.

Mr. Wolfram: Now, working from 21, your Honor, which is the Government exhibit in evidence, and this is a document that Mr. Present worked from when he fixed the distributive percentages of the wives at 11 per cent, he worked from this document——

(3075)

The Court: He didn't fix it. He assumed it at your request.

Mr. Wolfram: Yes, but based on this document, which shows—you have a document in evidence on which that assumption can be based. That is the only point I am making.

The Court: That document doesn't show any division between the general partners and limited partners. I went through it that day very carefully.

Mr. Wolfram: Well, your Honor, it doesn't do that, but it shows the percentage of distribution of the wives. That is the only important thing for this present moment.

The Court: Of an undetermined amount.

Mr. Wessel: You have got to deduct from income salaries before you get to that.

Mr. Wolfram: Here is the amount of it, undetermined amount. This is the proper amount.

Mr. Wessel: Mr. Present specifically said "No" to the point when Mr. Stryker asked him.

Mr. Wolfram: I don't care what he said.

Mr. Wessel: You have got to have some evidence with respect to that.

Mr. Wolfram: All I am saying, there is a document in evidence on which you can predicate a

(3076)

percentage. I am not talking about figures; I am talking about a percentage. This is Mrs. Dorina Livorsi's distributive percentage, 11 per cent, according to this document.

The Corut: I don't want to break in on you, Mr. Wolfram, so go ahead. I have reservations as to that, but go ahead with the rest of it.

Mr. Wolfram: Then my further point is that Mrs. Giglio, being entitled to 11 per cent, according to this certificate, Exhibit 21, and Mrs. Livorsi being entitled to 11 per cent, and Mr. Giglio being entitled to 11½ per cent and Mr. Livorsi being entitled to 11½ per cent, we have a definite allocation of the Giglio group, assuming that Loperfido is not a partner, but is just a dummy, and when you take that and break it down, you break this 50 per cent down in that proportion, you get exactly these figures, 12¾ per cent for William Giglio, 12¼ per cent for Margherita Giglio, and 12¾ for Frank Livorsi and 12¼ for Dorina Livorsi.

The Court: Now, Mr. Wolfram, I will tell you as best I can the questions that I have in mind, and I break in on you, Mr. Wessel, only because I don't

(3077)

want to hold up the trial a long time; and if you think I am wrong, why, correct me, either of you.

In the first place, the only testimony in this case—I mean, both Roth, Lubben—everyone who has had anything to say on it—is that Lubben got out of this partnership on March 8th, as I recall it; that whatever the writing says, and the writing takes into con-

templation that he was to leave the partnership on March 8th, or to become inactive, so now, if I am wrong on that, correct me, any assumption of distributive shares based upon Lubben's continuing after March 8th is at variance with the only testimony we have.

The second thing is, I don't see anything in Exhibit 21 that furnishes any basis for division between the general partners and the limited partners. In other words, it doesn't tell us what the limited partners had to divide up.

Mr. Wolfram: No, sir; it doesn't give you any figures. Of course not.

The Court: All right, that is where I stop.

Mr. Wolfram: You can't stop with figures at (3078)

the beginning of the partnership. This Exhibit 21 was ended as an agreement, and it certainly doesn't say, "We are going to divide up $600,000 at the end of the partnership." It refers to the ratable interests of the partners, according to their contributions.

Mr. Wessel: Limited partners.

Mr. Wolfram: That's right. Well then, that is easy enough to figure out. It refers to the contributions of the limited partners, and we all know from all of the evidence in the case that the Giglio group contributed 30-odd thousand dollars, and if you deduct what the wives contributed, you have got what the husbands contributed.

The Court: Yes, but there is nothing in this that shows that the distributive share was on that basis.

Mr. Wessel: The evidence is to the contrary, Mr. Wolfram. That is just what the section read from

Mr. Present's testimony shows, that is, you are taking that income, you decrease it by whatever the general partners are to get, then you divide up in accordance with this proportion.

Mr. Wolfram: You didn't introduce through (3079) any of your witnesses, either Roth or Mr. Present, anything that had to be deducted from the distributive shares.

Mr. Wessel: That isn't my burden. I was doing something else entirely.

Mr. Wolfram: We are in disagreement on the Government's burden.

The Court: Well, without getting off into any broader field, I am just telling you why I balk at the exhibit. If you can fill in the foundation, fine, I don't want to block you in the presentation of the exhibit, which would in any way simplify the explanation of the case. But as I sit here now, I don't see the basis for it.

Mr. Wessel: Mr. Tilzer gives me a very important point. How could Mr. Wolfram possibly reconcile Mr. Lubben's purchasing inventory on March 8th, $300,000, then get something back on March 31, 1946, when he received no benefits? In other words, he paid for it. Why did he pay for it if he was still a partner?

Mr. Wolfram: There are any number of cases—I shouldn't say "any number of cases"; that is probably an exaggeration—but there are cases where partners come down to the end of a profitable year (3080) and try to rearrange their distributive shares between themselves, and the courts hold they can't do it; it can't be done that way, your Honor.

The Court: Well, the question really is whether it is an arm's length transaction. Isn't that the question?

Mr. Wolfram: I don't think it is even that question.

The Court: Incidentally, I will be glad to have any law you want to give me on the subject.

Mr. Wolfram: I would like to have time to do it. I wish I could. I will do as much as I can on it.

The Court: It is my understanding that the test is, is it an arm's length transaction or not?

Mr. Wessel: Many partnerships work like that, split it up at the end of the year.

Mr. Wolfram: Let me give you an example, your Honor. The Government would be cheated out of hundreds of thousands of dollars in taxes if that were the situation, because you take the case of an ordinary law partnership——

The Court: I recognize how it can be abused, Mr. Wolfram. I leave that to the Government. I

(3081)

mean, if the Government thought that this was a maneuver by Lubben and Giglio simply to alter, shift themselves from one tax bracket to another, I am sure the Government would have the power to look through it and say, "This is an arm's length agreement under the circumstances," and the only circumstances we have in the case are of a hardbitten dissolution on a new arrangement, which at least one of the parties claims he protested about at great length.

Mr. Wolfram: Well, the cases, your Honor, hold flatly that the partners can't do that at the

end of the year, not on the theory that the Government can look through a sham, but they just hold flatly that you can't do it. Their rights are fixed and you can't do it by a dissolution agreement; you can't come down to the end of a partnership period and then say, "By virtue of a dissolution agreement all of the distributive shares are going to be rearranged," because the parties think it would be to their advantage or disadvantage, whatever the facts would be.

(3082)

The Court: I tell you very frankly that I am laboring perhaps under an erroneous impression that if the partners altered their original relationship by means of an arm's length agreement, they have a right to do so. Now if I am wrong on that I appreciate your memorandum of law on it, and I will reconsider the whole problem.

Mr. Wolfram: I will give you the cases.

Now, your Honor, another thing. I have just been advised that Lubben's distributive share on March 6th would have been higher than it was in June, because all they had between March and June were liquidation losses. The partnership went out of business when Lubben left it, and I think the evidence is pretty clear about that, because he walked right up to the Bronx and he went into the factory, and the partnership did no more business after March 6th; and it is very clear, I think, that the only thing that could have happened between March 6th and May 31st was for the partnership to incur losses.

The Court: Now you are asking me to speculate, and I ask, what have we got in the record on it?

Mr. Wolfram: The fact that Lubben walked out of it, the least you can say is it was frozen after (3083)

March 6th.

The Court: No, I can't say that. As matter of fact, there was a distribution after that.

Mr. Wessel: Of the money taken out after March 6th.

Mr. Wolfram: Aren't we speculating when we say there were profits?

Mr. Wessel: I think there is evidence as to what Mr. Wolfram says, that is, that there was no substantial amount of business after March 8th. They did take moneys out, but they didn't take any of it out of the Eatsum partnership. That has no bearing upon this issue. Their issue is that Mr. Lubben, the partnership, in so far as he was concerned, ceased as of March 9th. Before that time he had agreed to take as his share—that was an arm's length transaction, I think, clearly—$117,000. It works out to that figure. That was his interest in the partnership. It was modified, amended, or what have you, to that extent, and he left.

Mr. Wolfram: I can't see it by that agreement.

The Court: Wait a minute, now. Can I see that a second?

What I am wondering about is, why don't you (3084)

restate your assumptions in the light—I mean, the issue between us on Lubben is, among other things, the difference between the date of his leaving the partnership. Now, if there isn't any substance to that issue, that seems something that you can take

care of with respect to the assumptions in the framing of your exhibit. All I know is, the facts as I recall them are that the partnership stopped operating when, March 6th or March 8th, whenever it was.

Mr. Wolfram: It did; it stopped operating. That is true.

The Court: And Lubben got nothing further from it. Now I may be wrong.

Mr. Wessel: Before he left, he had agreed to accept as distributive share, $117,000, so it works out.

The Court: That is right. He got the plant, which is where you got your $117,000 figure from.

Mr. Wessel: Well, it is all worked out.

Mr. Wolfram: That is just what a partner can't do, as far as tax returns are concerned.

The Court: That is a question of law you have got to explain.

Mr. Wessel: I might say, I have been anxiously awaiting any response to the memorandum of law submitted to your Honor, because if I am wrong in

(3085)

the law—I hope I am not, I don't believe I am; I believe I am correct—I certainly don't want to delay the trial by objections that are improper.

The Court: Suppose you show me the cases that you go on.

Mr. Wolfram: Maybe I can get some cases right now.

Mr. Stryker: Judge, I think perhaps Mr. Diamond, who knows more about this than I do, can help us out.

The Court: Look, I am not going to make any decision on this on a hasty reading of cases at the

bench. You give me your memorandum, in which you give me the cases, and I will go to work on it.

Mr. Wolfram: Will you accept an informal memorandum?

The Court: Its form doesn't bother me at all, but I want to know exactly what you are talking about and what you are citing these cases for.

Mr Stryker: Judge, maybe I can shorten this. Maybe Mr. Diamond, who is an expert, can help us out.

The Court: I don't decide my questions of law that way, if I can help it.

Mr. Stryker: I am waiting anyhow for a witness (3086) from Trenton, so I am not really holding you up.

The Court: Let's go on with the trial. Let's not hold up the trial now.

Mr. Stryker: The only thing is, if you look at those cases and decide differently once you have, that will amount to having this gentleman come back here to answer the questions.

The Court: That's right. You will have to get him back. I am not going to hold up this trial on this. I asked you for this memorandum a long time ago.

Mr. Stryker: Judge, we are doing our best.

The Court: I am not complaining; except I am not going to hold up this trial.

Mr. Stryker: You want to look at the law, don't you?

The Court: Not now. I will look at the law during lunch time.

Mr. Stryker: That is what I mean. I will go ahead with the questioning.

The Court: All right, go ahead with your witness.

Bring in the jury.

(Jury in box.)

(3087)

By Mr. Stryker:

Q. Mr. Diamond, considering for the moment another line of the interrogation——

The Court: All right.

Q. —will you assume that there was a New York partnership known as the Eatsum Food Products Company, Limited; that the general partners were William Giglio and David Lubben, while the limited partners were Frank Livorsi, Mrs. Dorina Livorsi, Mrs. Margherita Giglio, Ronald Stone, Roy Hankermeyer, and Frank Loperfido; and that on or about December 23, 1945, William Giglio bought out the interest of the limited partner, Frank Loperfido. Now, on those assumptions that I have just put to you, can you state what the effect of Loperfido's withdrawal from the partnership and the sale of his interest to the defendant Giglio was, with respect to the continuance of the partnership, for Federal income tax purposes?

Mr. Wessel: I think that calls for a question of law.

The Court: I think it does, too.

Mr. Stryker: It is precisely, your Honor—I will be glad to stand corrected—but I think it is precisely the type of questions that were presented to Mr. Present, precisely. He testified without objec-

(3088)

tion from me about Internal Revenue, even the Code,

and regulations and all that, and I think it is precisely the same thing that I am doing here.

Mr. Wessel: I don't see where this has anything to do with tax law.

Mr. Stryker: It has a great deal to do with it, if I can show you.

Mr. Wessel: It shows effect of a dissolution agreement upon a partnership. It is common law.

Mr. Stryker: I will show you the effect in a minute.

Mr. Wessel: I hadn't finished my objection, sir.

The Court: Mr. Stryker, I don't recall Mr. Present testifying to all particulars, but I doubt that he went beyond a pretty elementary statement of the requirements, simply as a frame for his explanations as an accountant. Now you are asking this man the effect upon a partnership of a withdrawal of Loperfido. We won't characterize him one way or the other. That is a question, I think, you can brief for me, and I will come to my conclusion on it. I don't think it is anything that has to go to the jury.

(3089)

Mr. Stryker: Well, let me rephrase it a bit and add to my question, which was the effect of Loperfido's withdrawal. Let me add to that.

Q. Under the rules of the Commissioner of Internal Revenue and the Regulations of the Treasury Department in effect in 1945, under those, can you give an opinion?

Mr. Stryker: Those things are not, I think, ordinary questions of law. They are the regulations of the Tax Department, and all that is, I would say, over and beyond the ordinary question of law that a Judge has to decide.

Mr. Wessel: The difficulty with this is, if your Honor please, that if the witness answers this question, then I have to cross-examine on this subject, and the jury is in the position of having to decide a question of law.

The Court: Well, you are going to go into a question of interpretation, as I see it, you are bound to, so I think I will keep that for my problem.

Mr. Stryker: Well, your Honor sustains Mr. Wessel's objection?

The Court: Yes.

Mr. Stryker: I respectfully except.

I have another question, practically the same. I (3090)

will read it simply to be sure I have a ruling.

The Court: All right.

Q. Now, upon the termination of the partnership on the 24th day of December, 1945, can you state what the effect of that termination would have upon the duty of the individual partners to report their income for Federal income tax purposes? First, can you state?

Mr. Wessel: This calls for a yes or no answer.

Q. Just yes or no, can you state? A. Yes.

Q. Now, will you state it and hold it.

Mr. Wessel: Same objection.

The Court: All right, same ruling. I will be glad to have your brief, Mr. Diamond's brief, or anybody else's that you want me to examine on this question.

Mr. Stryker: Exception.

Well, under that ruling, then, my next question which related to what Mr. Giglio and Mr. Livorsi

had to report, I assume that you would rule the same on that?

The Court: If you mean by "had," compelled by law.

Mr. Stryker: Not law, but regulations, Treasury regulations and the Internal Revenue code.

Well, in view of your Honor's ruling, that is (3091)

all the questions I can ask this witness.

The Court: All right.

Mr. Wessel: Just one question.

Cross Examination by Mr. Wessel:

Q. Would you mind stating to the jury, Mr. Diamond, what your fee is for testifying and working here? A. May I explain the arrangement?

Q. Go ahead. A. I was engaged in this matter by Mr. Wolfram, associated with Mr. Stryker, and the understanding is that I would get paid for my time and efforts in the matter, and no fixed fee has been fixed as yet, and I have not been paid.

Mr. Wessel: That is all.

The Court: All right, thank you, Mr. Diamond.

Mr. Stryker: Mr. Diamond, will you hold yourself in readiness? His Honor has certain questions of law on which we are giving him authorities, and on the possibility that his Honor might change his mind, will you just hold yourself in readiness for that event?

The Witness: I will be glad to.

The Court: All right.

(Witness excused.)

Mr. Stryker: Maybe I had better tell you this at the bench.

(3092)

The Court: All right.

(Discussion at the bench off the record.)

Mr. Stryker: Well, your Honor, as I explained to you at the bench, I need some time to have a document brought here from Trenton at two o'clock.

The Court: All right, we will work that out.

Mr. Stryker: Now, subject to the production of that particular document, which I am sure will be here at two, and subject to the memorandum of law, which I hope we can get to you on the law questions that were raised at the bench, subject to those two things, the defendants rest.

The Court: All right.

Mr. Wessel: Subject to the same statements, the Government rests.

The Court: All right.

Sit down a second, Mr. Stryker: I have to think and look at the clock. Mr. Stryker, that document you don't expect here before two. I mean, I don't know whether the jury has got plans for the middle of the day.

Mr. Wessel: I think if Mr. Mahon, who seems to have every document at this fingertips, can look at the files, he will find our copy or a copy of it.

(3093)

Mr. Stryker: If you have that it will save a lot of time.

The Court: I think under all the circumstances the thing to do is to excuse the jury now, to come back at two o'clock. I don't see any sense in trying to squeeze it in.

Mr. Wolfram, are you going to have any reading for me to do?

Mr. Wolfram: Mr. Fishkin went down to the office. He is going to pick up some loose papers that we have got, and I am going to submit it to your Honor that way.

The Court: Under these circumstances, if you can give me the cases orally——

Mr. Wessel: I should like to have them, too.

Mr. Wolfram: All right.

The Court: All right.

Mr. Foreman, ladies and gentlemen, if you will return at two o'clock, and don't discuss the case in the meantime, then we will figure out what to do next. There is no way that I can at this time tell you not to come back this afternoon. I think you will have to be here at two. We will save as much of your time as we can then.

(3094)

(Jury out.)

(Discussion at the bench not recorded.)

(At 12 noon a recess was taken until 2:00 o'clock p. m.)

(3094a)

AFTERNOON SESSION

(2:00 p. m.)

(Jury not present.)

The Court: Are counsel ready to talk any further about this? Did you get Mr. Wolfram's?

Mr. Wessel: I have gotten five cases. I am prepared to comment on them to whatever extent you desire.

The Court: All right.

Mr. Wolfram, do you have anything further you want to add to what you told me at the bench?

Mr. Wolfram: Nothing, your Honor.

The Court: I will hear what Mr. Wessel has to say.

Mr. Wessel: I have read the five cases that were offered by defendants, and I might say, first, they are factually very complicated, and an individual reading doesn't ever get you too far.

The Court: I learned that much, myself.

Mr. Wessel: But the Bell case, which is one of—well, two that they primarily relied upon—I think actually supports the Government's position.

In that case there was a partnership, and the court said, in part, "Nor does the"—this is at page 432—"Nor does the record warrant a finding that the dissolution agreement

(3095)

between the parties served to change the petitioner's share of the partnership earnings to an amount less than 50 per cent attributed to him by the respondents for the taxable year 1947."

That is, the record, the facts in that case did not warrant the finding that the dissolution agreement changed the original agreement, and by implication, clearly, if such a finding were proper as a matter of law there could be such a change.

In that case, as I understand the facts, one of the partners, who is charged with additional tax, found that the other partner had withdrawn moneys improperly from the partnership, and there was some complaint and some problems, and he got back $10,000 in cash, and a $10,000 note which apparently resolved that dispute. They dissolved the partnership. He didn't want to declare the note as income. The court held, in part, "If we understand peti-

tioner's argument, it is that he should not be so taxed because he did not, in fact, receive his share of the income."

And the court held it doesn't make any difference what you receive, it is what you are entitled to receive, and they held in effect that that $10,000 note, plus other amounts (3096)

which were in controversy, were part of what he was entitled to get, and the fact that the note was worthless wasn't of any significance.

The Flock case involved a rather interesting situation, completely distinguishable from this one.

There were five people in the partnership, four of whom were named Flock. One of them was a 15-year-old boy named Manfred Flock.

The court said at page 950, "This was merely a family arrangement to divide Sol's earnings two ways for tax purposes rather than an intention upon their part to carry on business as partners."

The court held that the agreement, which was something like the agreement here, did not serve to change the interest of one of the partners, the 15-year-old boy, to make his interest one-sixth rather than one-third.

The distinction between that case and this is that it was a family partnership, that there wasn't any arm's length transaction; in fact, it was strictly done for tax purposes.

The Goodman case, in the tax court, is an extremely long and very complicated case, and I don't purport to know all the facts of it. However, I did note that at both pages (3097)

798 and 803, that the court refused to recognize this partnership as a bona fide partnership for tax purposes.

At page 806 there was some discussion as to whether or not one of the partners, Wagner, waived part of the

profit as a result of an agreement to be relieved of liability for the obligations of the business.

The court specifically said, "The pleadings do not raise an issue on the question"—that is, whether or not when he got out he did, in fact, waive or get rid of any part of his profits and get something back in consideration.

The Neil case and the Stoumen case, both from the Court of Appeals, one of the Ninth Circuit, and one, I think, in the Third Circuit, are really not in point at all.

In the Stoumen case I could find nothing which seemed to deal with this subject, and in the Neil case there was a partnership dissolution in September, on September 30, 1946, and two months later, on November 21st, there was an oral agreement to divide the partnership assets for the year ending September 30th, and the court held—although I don't think the holding is very clear, but it held at least in part, apparently, that you couldn't go back two months

(3098)

before and then change the agreement as it then existed.

In short, I don't think any of these cases hold that you cannot change distributive shares of a partnership during the partners' years.

I have three cases which I won't burden your Honor with, and which I haven't read very carefully in TC Memorandum Decisions.

I could read the headnotes into the record, but I recognize that it would take probably an hour or more for each of us to read the cases.

The Court: Give me your three cases.

(3099)

Mr. Wessel: The citations are—the first is L. E. Allen—and this is all in Volume 15 of TC Memorandum Decisions, Prentice Hall, Vol. 15, paragraph 46-136.

Another is Clement A. Griscom.

The Court: What is your page on your Allen case?

Mr. Wessel: There doesn't seem to be a page. It is at paragraph 46-137.

Griscom is 46-097, and Wartnick is 46-269.

If I may just read the headnotes in the Wartnick case:

> "Partnership agreement is held controlling where no evidence is presented as to subsequent modification relating to distribution of income."

In the Allen case:

> "Court determines the distributive shares of each of two partners in the profits of a partnership where the provisions of the original partnership agreement for an equal sharing of the profits were subsequently abandoned through a dissolution agreement then fixing the 50 per cent distributive share of each partner, such share being later increased and definitely fixed as to the retiring partner by a settlement agreement."

(3100)

Then in the Griscom case:

> "A partner's distributive share is to be determined by the original partnership agreement where during the taxable years in question a partnership liquidation agreement, which provided a larger distributive share, did not become effective."

That was a finding of fact.

Now I think, actually, your Honor, it is quite clear that under normal business procedures, partnerships, especially the legal partnership, for example, gets together at the end of the year and they work out all kinds of modifications

of partnership arrangements. Some partners leave during the year; sometimes a partner is taken in during the year, although usually that happens after the close of the year, but quite clearly, in almost every legal partnership, come December, sometimes it is even held up until January, because there is an argument, people divide up their shares in accordance with the work done by each partner.

Now, as long as that is done with good business purpose, as an arm's length transaction, and is completely bona fide and not done for tax reasons, I don't think it can be questioned by the authorities.

The Court: Mr. Wolfram, have you got the copy of

(3101)

Mr. Wessel's memorandum? There is a case in there, 44 Fed. (2d)——

Mr. Wolfram: He cited the Hellman case, I believe.

The Court: That's right.

Mr. Wolfram: Yes, and I don't think the Hellman case changes the situation at all. First of all, it is a Court of Claims case, decided in 1930, and there certainly have been a great many changes in tax law since that time. But even with that observation in mind, I don't think the Hellman case stands for anything but the proposition that a change in the partnership agreement is not retroactive, it speaks perspectively. The change in the Hellman case, as I recall the case, was held to speak prospectively after the date of the change, and did not affect the relationship of the parties before that day.

The Court: Didn't the partner change his share for the entire year by agreement in the middle of the year? I may be wrong on that.

Mr. Wolfram: As I understand the case, your Honor, the court held that under an agreement of November 18,

1919, the partner whose interest was involved, was no longer a partner and should not be taxed on any of the (3102)

partnership income from that date.

The Court: Yes, but there was an agreement in the middle of the year, in May or June, was it? Am I right in that?

Mr. Wolfram: Yes, on July 26, I believe, 1918, one of the partners retired and a new partnership contract was entered into.

The Court: Didn't one of the partners agree to take one-tenth of one——

Mr. Wolfram: No, that is another case. That is——

Mr. Diamond: The Court will excuse us for a moment.

The Court: As a matter of fact, Mr. Wolfram or Mr. Diamond, whichever is easier, I will be glad to hear, whoever talks with the greater ease.

Mr. Diamond: With the Court's permission, I just want to state our understanding of the facts in the Hellman case.

Mr. Hellman was a member of a partnership that had been in existence for many, many years, and Mr. Hellman was getting on in years and he thought he was about ready for retirement. The arrangement that he had made in one document was that he was to get about 20 per cent—he (3103)

was to get 20 per cent of the partnership profits, but simultaneously with the execution of that document, he executed another document, in which he agreed to give practically one-fourth of that 20 per cent, or practically five per cent, to each of four partners. Actually, it wasn't exactly one-fourth because he was left over with one-tenth of one per cent; and the two documents were executed solely at the suggestion of counsel, who for some reason

not explained in the opinion, thought it would be wiser to have two documents.

The Commissioner asserted tax against Mr. Hellman on the theory that he was a 20 per cent partner, and that apparently the payments made to the other partners under that second document, executed simultaneosuly, was nothing more than a sort of———

The Court: Assignment of his own personal income.

Mr. Diamond: Asssignment of his own income, which would not be deductible.

The Court of Claims construed both documents to be really one, and therefore held that it was understood all the time that he was to be a partner only to the extent of one-tenth of one per cent.

The Court: Yes.

(3104)

Mr. Diamond: May I just finish?

The Court: Do that.

Mr. Diamond: And I think that the quotation in the Government's brief of that little statement that the partner may change is perfectly sound and was the proper thing for the court to have said in that case. But actually, that was only prospectively. When you start out with the initial premise that the two documents are one, he was therefore changing prospectively his 20 per cent interest, and then the later change in 1919 is really not germane to our particular issue at the moment.

The Court: Well, I wasn't clear, and I didn't have a chance to reread that case since we left for lunch, but it was my hazy recollection that he was taxed, that the court held that that agreement affected the income of that entire year. Now, if I am wrong on that———

Mr. Diamond: But, if your Honor please, the statement of facts indicated that as of July 26, 1918, they entered

into really a new partnership agreement, to be effective prospectively, and the Commissioner had asserted that he was really a one-fifth partner all the time, because he had been a one-fifth partner all the time, and that subsequent or collateral agreement was a personal venture between him and the other four individuals; and the Court of Claims (3105)

said, in permitting the refund, that actually the two documents are one—there are two pieces of paper, but they are one agreement, and under that agreement he was a one-tenth of one per cent partner, prospectively.

The Court: My recollection was that it went—he had not withdrawn anything, I guess, from the early part of the year, and the court held that even though it was credited to him on the books, that they would only be taxed on the point of one-tenth of one per cent.

Mr. Diamond: My understanding of it is, that arrangement was affected prospectively, and I believe there was ample authority along the line to indicate that you just can't later in the year; retroactively readjust your partnership income. It is now permissible under the 1954 code, which is a complete and revolutionary change, as far as the statute is concerned, you can do that now, but according to the cases, it seems that that was not permissible under the '39 code.

The Court: Mr. Diamond, do you have any cases that you want to add to those of Mr. Wolfram?

Mr. Diamond: I don't have any at the moment.

The Court: What I am disposed to do here is, I am going to adhere to my earlier ruling. Frankly, I want to go (3106)

over with greater care the cases that you gave me, Mr. Wolfram. I have skimmed through them, but there are a couple of them that are long, and I want to be sure that I

understand them. The cases seem to break down the two groups. There are cases where there was no change in the partnership agreement, where one partner just couldn't collect his share, and there are family cases, where you would have the question of an arm's length dealing, and I want to be sure that I have read them accurately. So I think I will stand on my decision, and I will reread the cases, and if I change my view on that I will let you reopen tomorrow morning the first thing to clean up any loose ends of testimony you would like to put in. But we will go ahead now.

Mr. Wolfram: I think there are two documents that I have shown Mr. Wessel just a moment ago.

The Court: Oh, yes, we want to take them now. Do you want to look at them before we get the jury in?

Mr. Diamond: May I ask the Court? I assume if there is a reversal of your Honor's position, I should be available here tomorrow?

The Court: I think so, Mr. Diamond.

Mr. Diamond: That is all right.

The Court: Now, contrary to what I told Mr. Stryker, (3107)

I would like to start at 9:15 tomorrow rather than nine.

Mr. Diamond: I will be here.

The Court: Thank you, Mr. Diamond.

Mr. Wolfram, on the other exhibits that you had in mind, is this the sole question that we had left?

Mr. Wolfram: Yes, that's right.

The Court: There was also the question of whether there was any factual basis for an assumption as to the original distributive share, too, was there not?

Mr. Wolfram: On Mr. Diamond's testimony. I thought that was what we were discussing, whether Mr. Diamond would resume the stand and pick up on Exhibit PPPP where he left off, because the exhibit was ruled out.

The Court: Well, I was just recounting in my own mind what the points were as to that exhibit. There was this question as to the change of a partnership agreement and its effect.

Mr. Wolfram: Yes.

The Court: And there was the other question of a factual basis for any assumption as to the original distributive share.

Mr. Wolfram. That's right, your Honor.

The Court: All right.

(3108)

Mr. Wolfram: And the two documents that Mr. Wessel is now looking at.

Mr. Wessel: There is a document missing in between. One of them, NNN-61 is a petition for instructions on the part of the receiver to sell the fixtures in the Agar plant for $4,000. The second is an order confirming the sale in the amount of $15,000. The reason I object is because the riginal $4,000 offer was rejected by the receiver.

Mr. Wolfram: That is right. Well, you are right. We will show the chain if you want us to.

Mr. Wessel: I think the other document ought to be in. I have no objection to these two.

I will let them go as they are.

The Court: All right. Are those two exemplified copies?

Mr. Wolfram: Here is the document that shows it, if you want it, Mr. Wessel.

Mr. Wessel: Off the record.

(Discussion off the record.)

Mr. Wolfram: Is it all right if these two go in?

The Court: We will get the jury back in. They will have to read the documents. You are all set, aren't you?

(3109)

Mr. Wolfram: We have one exemplified copy, NNN-11 is an exemplified copy, and NNN-61 for identification will have to be photostated and returned to Mr. Leoni.

The Court: Can you read the parts that you want in Mr. Wolfram?

Mr. Wessel: Let me see it.

Mr. Wolfram: Maybe Mr. Wessel will give us a copy.

The Court: I guess we can get the jury in.

(Jury in box.)

The Court: Mr. Foreman, ladies and gentlemen, there are two documents that we had to wait for from New Jersey, which are here now, and Mr. Wolfram and Mr. Wessel have agreed on their admission, so that they will be received and either read to you or shown to you. I guess that is what we will do first.

Are you all set?

Mr. Wolfram: Yes, sir.

The Court: All right.

(Defendants' Exhibit NNN-11 for identification received in evidence.)

(Defendants' Exhibit NNN-61 for identification received in evidence.)

(3110)

Mr. Wolfram: Perhaps I can summarize what is in these documents instead of keeping the jury here with them.

The Court: Very good.

Mr. Wolfram: And I will do that. Mr. Wessel, will you check me and see that I get this straight?

The documents, NNN-11 and NNN-61, relate to the sale of the Fairmont Avenue plant, which was owned before the receivership by the American Agar Company, and according to these documents, there was a chattel

mortgage of $34,740 to Carl B. Aster on that property. In other words, Aster owned a chattel mortgage in the sum of $34,740 on that property, and when the receiver was about to sell the property, Aster offered $4,000 for the property over and above the amount of his mortgage. That offer was rejected and then Aster raised his offer to $15,000 over and above the amount of his chattel mortgage, and that offer, that last offer, was accepted, so that Aster in effect paid $49,740 for the Fairmont Avenue plant.

(3111)

Mr. Wessel: I am sorry, Mr. Wolfram.

Mr. Wolfram: You correct me.

Mr. Wessel: This does not reflect the purchase of the Fairmont Avenue plant at all. It reflects the purchase of the fixtures in the Fairmont Avenue plant.

Mr. Wolfram: That is what I meant. I am sorry.

Mr. Wessel: The Fairmont Avenue plant, as these documents reveal, was owned by the Cornelison Holding Company.

Mr. Wolfram: It wasn't the building, Mr. Wessel. We just have a little controversy over what the plant is. I didn't say the plant in connection with a building.

Mr. Wessel: And in paragraph 7 of the petition for instructions, the petitioner, who was the receiver, said, "Your petition further shows that the testimony further disclosed said American Agar Corporation paid no rent whatsoever to Cornelison Holding Corporation, which landlord corporation was owned and controlled by close relatives of one William Giglio, the president of American Agar Corporation, and testimony at the receiver's hearing was given by the said William Giglio to the effect that the rent was $22,500 per year."

These reflect a sale not of the plant, that is, the building

(3112)

which you heard Mr. Hennessey describe so much, but

the fixtures in the plant which Mr. Aster had apparently, according to these documents, put into the plant, and on which he had a chattel mortgage, because he hadn't yet received payment for all of the piping and so forth.

Mr. Wolfram: I don't think there is any question that the chattel mortgage covered chattels and not the building itself. It related to the factory or the equipment up there. There is no question about that.

I don't think we have to detain the jury, then, with the reading of that.

The Court: All right.

Mr. Foreman and ladies and gentlemen, tomorrow both sides are going to try to sum up, and on the following day I will instruct you on the law, so to get both summations in tomorrow, I am going to ask you to come in early. In other words, these next two days, to get the case finished up before we get into the week-end, I am going to ask you to come in earlier than we have been ordinarily doing, unless any one of you will be taken by surprise and caused hardship. What we will do is start tomorrow at 9:15, and we will probably—my guess is that we may sit late in the

(3113)

afternoon, depending on how long it takes counsel to complete their summation. And then on the following day we will probably start again at 9:15 or 9:30, and then go through until we finish.

So don't discuss the case, and I will see you at 9:15 tomorrow morning, unless I hear some protest from any one of you.

All right. 9:15 tomorrow morning.

(Jury leaves courtroom.)

The Court: All right, Mr. Wolfram.

Mr. Wolfram: I assume both sides have rested.

The Court: Both sides have rested, as I understand it, and all parties have rested, and that includes the corporation, the corporate defendant.

Mr. Wolfram: From the evidence, your Honor, I would assume the corporation rested a long time ago.

The Court: All right. With the understanding that if I change my view on the question of law we discussed, and if I further conclude that there is a factual basis, in view of the change of law, why, I would reconsider the question of those exhibits and permit you to reopen for that purpose.

Mr. Wolfram: May I be clear on one question, your (3114)

Honor?

The Court: Yes.

Mr. Wolfram: If the trial is reopened for the purpose of following through on Exhibit PPPP and thereafter, is it my understanding that the Government may only reopen for the purpose of cross-examining the witness, or would that be a general reopening of the Government's case?

The Court: Well, I don't know whether Mr. Wessel can tell you now or not. I don't have too clear a picture of what the subsequent exhibits would be.

Mr. Wolfram: Suppose I have them marked for identification and then submit them to your Honor?

The Court: All right, if you care to do that.

(Defendants' Exhibit QQQQ, RRRR, and SSSS marked for identification.)

Mr. Wolfram: Suppose I hand these up to the Court?

The Court: Fine; all right.

Mr. Wolfram, do you have any objection to Mr. Wessel seeing this?

Mr. Wolfram: Not at all.

The Court: I could give you my own guess, but he could give you a more informed one.

Mr. Wolfram: Suppose I give him copies?

(3115)

The Court: All right. It seems to me the only question left is still the Eatsum partnership distributive share situation. That would be the only thing he would want to go into.

Mr. Wessel: I think I can state that if this is what the evidence is, that at the most the Government might want to put an expert on, and I doubt that, but nothing else subsequently.

The Court: At least as far as we can see this time, that would be the effect of your reopening the case.

Mr. Wolfram: Of course we don't have to reopen if we don't want to.

The Court: That is right. That is one choice, I guess, any party has.

Mr. Wessel: Off the record.

(Discussion off the record.)

Mr. Wolfram: May I proceed, your Honor?

The Court: Yes, Mr. Wolfram, go ahead.

Mr. Wolfram: At this time the defendants—I will take them one at a time—the defendant Howard Lawn renews his motion for acquittal on the ground of the insufficiency of the evidence, and I don't know whether your Honor wants me to go into the details or not, but I think I might mention

(3116)

some of them if your Honor wishes.

The Court: Go right ahead, Mr. Wolfram.

Mr. Wolfram: Let us take the first count in which Mr. Lawn is mentioned first, and that is the——

The Court: Seven.

Mr. Wolfram: Seven. That is the concealment count relating to William Giglio's assets, and as I understand the evidence, the only thing we have in the record here on that count is the fact that Mr. Lawn suggested a lawyer by the name of Tepper to Mr. Giglio and to Mr. Roth, and Mr. Tepper subsequently handled the transfer of Giglio's house to Roth and the giving back of a mortgage from Roth to Mr. Giglio in the sum of $20,000.

Now I respectfully submit, your Honor, without laboring the point, that that certainly doesn't come up to the requirements in a criminal case for proving that one man either did conceal the assets of another man or aided and abetted in concealing those assets, and I believe that is all there is in this record on that account.

The Court: Well, I don't think you can isolate it that easily, and I am going to deny your motion on that count.

Mr. Wolfram: Respectfully except.

Now the next count is count 9, I believe, in which Mr.

(3117)

Lawn is charged with concealing the assets of American Brands, and in this connection I might add, without going through the evidence, that there is just as little evidence in connection with that count as there is in connection with count 7, and I respectfully move that the indictment be dismissed as to count 9, as to this defendant.

The Court: I will deny your motion.

Mr. Wolfram: And I make the same motion with respect to count 10.

The Court: Denied.

Mr. Wolfram: And in behalf of the defendant Giglio, I move to dismiss all of the counts of the indictment which

relate to him, on the ground—or rather, I move for an acquittal, judgment of acquittal on the grounds of the insufficiency of the evidence.

The Court: I will deny that motion.

Mr. Wolfram: And I make a similar motion in behalf of the defendant Livorsi.

The Court: I will deny that.

Mr. Wolfram: I renew the motions made by the defendants to dismiss the indictment on the ground that they acquired immunity under the circumstances which we have gone over with your Honor from time to time during the

(3118)

case.

The Court: I will adhere to my previous ruling; denied.

Mr. Wolfram: And to dismiss the indictments on constitutional grounds, invasion of their privilege against self-incrimination before the grand jury.

The Court: I deny that motion.

Mr. Wolfram: I, at this time, renew the motions that were made previously to strike the testimony and the exhibits, Government's Nos. 141 through 151.

The Court: 154, I think.

Mr. Wolfram: Beg pardon?

The Court: You mean all of the charts?

Mr. Wolfram: Not all of them. My motion is confined to the Eatsum, Tavern and individual tax returns in so far as they are predicated on Eatsum and Tavern. It doesn't relate to the American Brands charts.

The Court: Excuse me, I didn't mean to interrupt. I will deny your motion.

Mr. Wolfram: Well, may I state the grounds for the motion?

The Court: Oh, all right.

Mr. Wolfram: The motion is predicated on the ground that the concealment counts—that we have not been given, (3119) were not furnished with a bill of particulars concerning these items, although Judge Palmieri ordered that the Government specify in what respect the tax returns were false, and the Government never did that, although it did purport to serve us with a bill of particulars based on Judge Palmieri's order, and on the further ground that the assumptions on which those charts are founded, are predicated, are contrary to law and unfounded as a matter of law.

The Court: All right. I will deny that motion.

Mr. Wolfram: I think that covers the motions.

The Court: All right, Mr. Wolfram.

Well, then I will see you all at 9:15 tomorrow morning.

Mr. Wolfram: Yes, sir.

(Whereupon an adjournment was taken until Thursday, February 17, 1955, at 9:15 o'clock a. m.) (3120)

New York, February 17, 1955,
9:15 o'clock a. m.

TRIAL RESUMED

(Jury in box.)

The Court: Just before we start, Mr. Stryker, I will just be a second.

Mr. Wolfram and I had a discussion yesterday about one last point, and I am going to adhere to my original ruling.

I checked the record on the facts as well as I could yesterday, and my conclusion is that there isn't any basis in

fact for that particular type of distribution, as well as the point of law that was discussed.

Mr. Stryker: I understand Mr. Wolfram took an exception, so I don't have to.

The Court: He did.

Mr. Stryker: Your Honor, I would like to hand up my requests to charge.

The Court: All right.

Mr. Stryker: And I will give a copy to Mr. Wessel.

The Court: Thank you.

(3121)

Mr. Stryker: I am told we may have some additional ones before the end of the day. If I can get them together, I will do it.

The Court: I will do my best to assimilate them.

All right, I guess we are all here, Mr. Stryker.

Mr. Stryker: Shall I go ahead, sir?

The Court: Yes, sir.

DEFENDANTS' SUMMATION TO JURY

(Mr. Stryker summed up the case to the jury on behalf of the defendants as follows:)

Mr. Stryker: Ladies and gentlemen of the jury, Mr. Foreman: At long last, very long last, I have an opportunity to talk with you. This has been a long ordeal for all of you, taking you business men away from your important business affairs and the ladies away from their homes. You have been very patient, very attentive and very observing of all that has taken place in this court.

For your patience in this long ordeal I want to express now my gratitude on behalf of the three Americans whose fate is in my hands and presently will be in yours.

It is a great trust that has been committed to my keeping, a trust that involves the very lives of three men, because to Americans, liberty is life, and you are asked here by the prosecution to strike down and to destroy three of your (3122)

fellow Americans—strike them down and destroy them.

Now, the real issue in this case is whether or not on the evidence which the Government has chosen to produce you are willing to do that. That is the real point in this case. The evidence on which the prosecution seeks the total destruction of my clients is based on two things—one, the testimony of three men named Lubben, Roth and Bercu, and the testimony of a Government witness, not a certified public accountant, whose views on the accounting phases of this case you heard; and you have heard the basis, at least a large part of the basis of his opinions, which basis is the testimony of these three men.

So, looking at the case any way you wish, it gets back to Lubben, Roth and Bercu. If you do not believe them, then a substantial part of the basis on which their expert has testified falls.

I have there on the table, I think, nearly 3000 pages of testimony; six long, trying weeks, trying weeks for all of us, trying for me and trying for the three Americans whose fate you will ere long determine.

It is obviously impossible in the brief compass of time (3123)

which is accorded me or could be accorded anyone to do more than touch, if I can, some of the high lights of this case. I can't read you three thousand pages of testimony, and I think nearly two hundred Government exhibits, and a great many of our own. So will you have in mind, sympathetically, my problem, and let me say to you that while I will try to touch the really important things, there

is no part of this case which I do not discuss, and I only wish it were possible the idea is absurd—but I wish it were possible that I could go out into the jury room with you, because there is no question that any of you ladies or gentlemen might care to ask that I believe I would be incapable of answering.

It is a great feeling to be talking to you representatives of the American people, because that is what you are. You are here performing the highest function of citizenship, the duty of acting as jurors.

You are taken from your vocations; you are taken from your life, you are brought here, every one has been totally punctual, away from all that interests you, to perform this sacred jury duty.

It is not unlike being called to war. That disturbs people's lives, too, and just as soldiers called to war are

(3124)

called to defend those sacred things of America that we love, you and I—so you as soldiers of justice are called here to defend. I thank God, as I look at you, that I am an American, and that I am in an American court of justice and that I am not before three Russian commissars or before some kangaroo Nazi court. I am here in America where the people through their juries, administer justice.

This is a jury trial and you as jurors are the sole and exclusive judges of the facts. No one else, anywhere, in or out of this room, in the whole world, can tell you how to decide this case. You are the sole and exclusive judges of the facts, and you are the sole and exclusive judges of the credibility of the witnesses.

As you all know, the trial may be divided into two compartments, the facts and the law. His Honor decides questions of law. That is his fucntion, that is his duty, and whatever he says the law is, so far as this trial, this

courtroom is concerned, is the law. Whether I disagree with it or not is of no importance. His decision on that is final.

But yours, yours, the determination of the facts, no one can take from you or interfere with or nullify.

What is this case? This is a charge of knowingly and (3125)
wilfully filing false income tax returns. That is what the case is about. That is what we are trying here, just that; and we are trying it on the charge preferred by the indictment and the limited bill of particulars which the Government has given us.

An indictment, as his Honor I think has told us, and I am sure will again, imports nothing. It is a mere means of printing the case into court. But it does define, it does define that, with its supplement, the bill of particulars, what it is we are trying.

Let's look at, let's begin to look at this case. The five corporations involved here in the year '46, the crucial year, earned the following amounts of money, as per their tax returns:

Eatsum—$4,694,795.09.

Tavern, as per the tax return, $1,092,197.40.

The American corporations, as per the receiver's report, $5,002,870.03, or a total of $11,000,000.

That is for the Eatsum partnership and the Tavern partnership and the corporations.

Now let's see with those vast sums what the charge here boils down to. In the bill of particulars, which as I have said, defines the charge and limits it, Eatsum, with their earnings of four million, seven hundred odd thousand, what is charged against them there? One item, one, of (3126)
$91,000, consisting of $140,000—of course, the famous

corn box that you have all heard of—less $48,000 additional salaries, making ninety-one-odd thousand dollars. Out of that whole picture, all that the Government charges is this $91,000, which is predicated on the corn box deal, which in turn is predicated on the testimony of Lubben. That is all there is to that.

There is one additional point that I would like to make, and that is that additional income of $48,000 for additional salaries is allowed, but unclaimed. In other words, Mr. Roth was such a slovenly and incompetent accountant that he did not even claim the amount that he could have claimed, that the Government allowed. That is the charge on Eatsum and that is all the charge.

Tavern Fruit, with earnings of well over a million dollars, it is alleged there that there was $80,000 income not reported. Part of that $80,000 is $32,000 which is the Gordon expenses of revamping that factory. You will recall that directly contradicting, directly testimony of Roth, Mr. Gordon here, who was called by the Government, showed you, testified unrefuted, uncontradicted, that particular item which Roth says was false, was in fact true. The remaining figures of closing inventory I will come to a bit

(3127)

later.

Now, American Brands. American Brands—well, the American corporations, earning over five million dollars, what does the Government say about that? One thing only, just one—consolidation disallowed. That is all. Consolidation disallowed. Additional deduction allowed. We were unfortunate to have Louis Roth as our accountant; and so patently negligent, incompetent with the figures, that the Government itself, which is doing us no favors, allows us things he didn't claim.

The rest of it relates to two individuals, to which I shall come a little later. The figures there are arithmetical additions and subtractions, made by a theory of accounting, which I totally disagree with, and which I did my best, my poor best, to explode by one of the outstanding experts in his field, who was allowed only to give you a limited amount of testimony.

Now this is a lawsuit that we are trying. Mind you, this case, like any case of its kind, in this case you must find, if you ever dream of convicting anybody, that the defendants had an intent to break the law, a criminal intent; and right there, right there, since obviously that is the point of the case, we find dropped in, dropped in, in one of Mr. Roth's sworn statements here, that these

(3128)

people were discussing criminal intent. I see the point of that. Don't you? The point of that was to minimize the obvious contentions which I make before you.

Now let me go a little bit into these characters on whom the Government relies to ruin and destroy these Americans. Let's see who these characters are. Let's see whether there is any American juror in the box or in any jury box who could rest with his conscience, his conscience, if he declared that beyond a reasonable doubt he believed him.

Now there is a dramitic scene with which I think I shall open this play, taking place in the office of Mr. Bercu, sometime I think in May of 1946. Let me first put together the testimony of these three state government witnesses, and then let me show you, not only the complete perjury of their testimony but the way in which the whole lying, perjurious picture of the Bercu conference was exploded by documentary evidence.

Remember, remember, two of the three involved in this lying scene are the two men, are two of the men on whom their accountant, uninhibited, unrestrained, predicated his so-called expert testimony.

Let me now and again, because I am not Professor (3129)
Einstein—I wish I had his mind—so I can't remember in detail three thousand pages of testimony, so I have made a few notes here and there, which I hope will help me and help you to understand this picture. I want to be very accurate; I want to be very correct; I want, in so far as lies in me, to tell you all the truth.

In his opening Mr. Wessel said that the defendants destroyed a good deal of the documents that would incriminate them. Do you remember that?

Now, he made that statement based on what these characters had told him. He had a right to make the statement. I am not criticizing that. He had a right to tell you what these men had said to him, but you have a right now to look at it.

Let me get the testimony of these three characters first before I—that in itself, if I had nothing else, would paint a picture of fraud and perjury that would be dramatic enough, I think, for any American jury alone, without anything else, to decide that if it was the last act of your lives, you would never, never, never conclude beyond a reasonable doubt that these three characters were telling the truth.

Maybe I had better, before I do this, just give you a little information about these three individuals on whom (3130)
the destruction and ruin of my clients is asked.

Lubben. You all saw Lubben here through days of testimony, didn't you? Now you business men bring to bear the experience and knowledge that you acquired in

your able business lives, I don't know whether any of the ladies are engaged in business, but whether they are or not, they bring something else to bear that women seem to have, that men possess to a less degree, perception, intuition.

Now you saw Lubben on the stand didn't you? Do you remember the struggles that I had to get him to answer any questions? But although my cross-examination was greatly curtailed and interrupted by a barrage of constant objections from the Government's lawyer, I did, I did, even I, succeed in establishing these facts:——

One, that Mr. Lubben is a perjurer, on his own admission, on his own admission;

Two, that he is a blackmailer, on his own testimony, a blackmailer.

You remember how he admitted that in the College Town Candy case he just sat there, right on the stand, in a courtroom like this, before a Judge of this Court, and took the oath—you can get a rough idea of how much he thinks of the oath, how much he thinks of it, how much he thought of it then and how much now, and he swore before Al-

(3131)

mighty God to tell the truth, the whole truth and nothing but the truth, and then what did he do? Why, he lied, he perjured himself. That is an uncontradictable fact, isn't it?

And what else? That while he was lying and perjuring himself—and bear in mind this was a civil case in which he was trying to absolve himself only from a civil liability, that is all; this case is one that involves more millions than there are in Fort Knox, because it involves liberty—and so he sat there and blandly perjured himself, according to his own admission—one of the men whose word you are supposed to take beyond a reasonable doubt. And while he was doing that, who was in the room? Why, Mr. Twohig, the agent, right there.

And do you remember how Mr. Lubben said—now this isn't some interpretation or argument or statement of mine; this is the record—said that Mr. Twohig knew that he was lying. That is not some lawyer's argument. That is the record.

Did they prosecute Lubben for perjury, committed right here in this court house? Oh, no, oh not at all, not at all. It was perfectly okay with Mr. Twohig that he should perjure himself all he wanted to. Nothing happened. He

(3132)

lied his head off, he told you himself, before the Kefauver Committee. Lubben, a man whose word you are asked to say on your consciences and on your oaths that you believe him beyond a reasonable doubt, beyond any reasonable doubt.

Now he was a specialist not only in perjury, and he was a considerable specialist in that, but he was a blackmailer. You remember on his own testimony, and how hard I had to work, oh, how hard I had to work to drag it out of him, that he went up to see a man by the name of Morley Cramer, in Boston, with whom he had had black market operations—just a little social chat, you know, just a little friendly visit to Morley Cramer, as a result of which he shakes down Morley Cramer, who had been in the black market with him, to the extent of $15,000, which Cramer's treasurer paid Lubben; and then he goes and shakes down the Shotwell people and gets a loan, so-called, seventy-five-odd thousand dollars, and then not satisfied there, that seeming to him to be a good touch, in order to make them more eager to pay him off, he asks for $50,000 more. Lubben, $50,000 more; blackmail; and then as if that weren't clear enough to tease these people with whom he had also had black market operations, why, what does he do? Why, he goes and gets a passport to South America, a passport.

(3133)

Now what do you suppose he got that passport for? What was that? What did that have to do? It had this to do, it had this to do: He was saying to the Shotwells, "Now, here, I have got the passport: I will go out, I will leave the jurisdiction, but first a little more, a little more of a touch, $50,000."

He fails in that, Lubben.

Now, what else does he do, to show his delightful saintly character, the kind of man that is foisted on you, unleashed on you for the purpose of destroying three Americans? Why, he has got the problem, a zoning problem, down in his factory that he has moved down to New Jersey. Obviously the people there didn't want a factory in that neighborhood; it had been a chicken farm before that. So he deals with a County attorney, by the name of Weleck. He actually paid him some fees, and there is no dispute at all that Weleck had the right as county attorney to accept them, and then what does he do? Why, then he wants to get something on Weleck, you see, to hold him in line; and so this great public-spirited citizen, this friend of justice, this immaculate character, invites Mr. Weleck to his home in New Jersey, first having rigged up a dictaphone device behind a picture.

(3134)

Now, did he do that because he loved justice? Well, let's see. He got a recording—I think I wasn't able to get all of it in evidence as I remember it—at any rate he got a recording, and did he then run right to the prosecutor and say, "Here, this is something which must be exposed, here is evidence"? Oh, no, not Lubben, not this slippery perjurer and blackmailer. What did he do? Did he turn over within two or three months? Oh, no. Within a year? Oh, no. Two, two years and three months later when he found that he could not get his ordinance through, as a last

gasp he runs then to the prosecutor with this recording that he has taken of a man with whom he had friendly relations. Now that is Lubben. At least, that is part of Lubben.

I haven't time—my goodness, I am watching that clock. How it goes, probably not so fast for you, but for me, very fast.

Now let me put one question to you, gentlemen, let me put it to you straight: as I remember, I don't recall, but I think some of you gentlemen are bankers. Suppose you were the president of a bank, or the loan officer, and Lubben came to you for a loan of the bank's money. Now as an officer of the bank, you have a very strong trust duty; you are not going to lend the depositors' money to someone

(3135)

that you don't trust, are you?

Now let me ask this question: is there a single man in this jury, banker or no banker, who, if Lubben came to him with any kind of a proposition at all, and you knew about him what you know now, is there a man in this jury box that would think for one minute of trusting David Lubben?

And if the answer as I think it must be is no, then let me ask you this: when you are considering a much more sacred trust than mere money, namely, liberty, if you wouldn't lend him money, how could you say beyond a reasonable doubt that you would rely on his testimony, and on it convict three of your fellow Americans?

Now Roth, Roth, the Big Bertha of their case, the great reliance, their foundation stone. Of course the stone is rotten to the core, it is punk, and bunk, but there is the cornerstone of the case, Louis Roth.

Now let me apply the same questions to you with respect to Louis Roth. Suppose Louis Roth came to you and asked

you to invest money or lend money, do anything, and you knew that he was a professional perjurer, that he had perjured himself before the Kefauver Committee and that he perjured himself, he says, before the receiver, and that he had filed false income tax returns for himself, himself,

(3136)

I think, beginning with the year '43, '43 or '44, '45, '46 and '47, deliberate false returns.

Now add to that, add to that—I forgot to say that his respect for an oath is so high, so exalted, this noble, beautiful, wonderful character, Louis Roth, his respect for an oath is so high that he takes an oath to tell the truth, the whole truth and nothing but the truth, just as he did in this room before the grand jury, and then perjured himself there. To help somebody else? No, not at all. For somebody else, somebody he can lay on something else, something he can attribute to these gentlemen? Oh, no. On his own income tax return. He lies and perjures himself, according to his own admission here.

(3137)

What a lovely, lovely character to use for the destruction of three Americans.

And then suppose he was before you for a loan or a loan or a business deal, and you learned the compulsions under which, the pressure under which there was testimony.

I forgot to add—I probably will forget a great many things because it is hard to catalogue the crimes of these perjurial Government witnesses who are at least here in the hope of somehow, in some way destroying these men—I forgot to mention bribery.

Oh, yes, bribery. It seems that Louis Roth was quite expert in the field of bribery. Bribery of whom? Government agents.

Well, he thought so little of bribery that apparently that was just a sort of incident in his criminal career, and it was a rather amusing thing to me—you remember how Mr. Wessel turned to him and said, "Incidentally, Mr. Roth, did you bribe an OPA agent?" Incidentally. Just an incident—"Did you bribe an OPA agent?"

And Lubben, this sainted Lubben, this beautiful, lovely character, testified that he gave Roth money to bribe an alchoholic tax unit man; another Government agent.

What sweet, lovely, beautiful, sainted characters the (3138)
Government has brought before you on which it asks the destruction of three of your fellow Americans, a perjurer and a briberer.

And by the way,—and it is not incidental—with all the slime and filth that these characters have poured out, poured out these six weeks on my clients, let me ask you this: has any one in this case ever said or intimated that my clients or any of them ever bribed or sought to bribe anyone?

So the bribery in this case seems to be a specialty of the Government witnesses.

Now if you were considering the credibility, the reliability of Roth or Giglio, and you knew those facts, and then you knew the added fact that he has pleaded guilty to filing a lying, false and fraudulent statement to the RFC, and that either four or five, I forget which, additional indictments for other crimes of a similar character are now hanging over his head, undisposed of, that he has pleaded guilty to every count in this indictment save one, and that he hasn't been sentenced yet, hasn't been sentenced yet, and he had said, in effect, that he has an arrangement with Mr. Wessel that what recommendation Mr. Wessel will make to the judge about sentencing him for his crimes will depend

solely on Mr. Wessel's judgment—I think that is a fair
(3139)
statement—and solely on Roth's cooperation, but the judge of that cooperation is Mr. Wessel—now, do you think under those circumstances that Mr. Roth doesn't want to please Mr. Wessel?

Now let me make one thing plain. I am not charging, or will I leave it with an inference of a charge, that Mr. Wessel told him to lie. In my opinion Mr. Wessel would be incapable of that. I don't want to leave any cloud about that. But Mr. Wessel wasn't there when these things happened, and he knows how much, how much Mr. Wessel wants you to convict my clients.

Now, Roth is smart enough, I think, to see that. You saw it. I don't believe there is a question that I asked in this court—well, certainly a vast number of questions, that Mr. Wessel didn't object to.

You remember one occasion, as I was about to state a question, before I stated it, Mr. Wessel, so keen, so eager to prevent anything that he thought might be beneficial to my clients, he was on his feet before he had anything to object to. Roth wasn't in the room at that time, I don't think—maybe he was, I am not sure—I don't think so. I think he doesn't know now.

(3140)

Let me ask you this: now, if you knew, as business men, bankers, anything you like, what you now know about Roth, and he came to you and said "I want to borrow some money," or "I want you to go into this deal," would you trust him with a 25-cent piece, or even a 5-cent piece that I found on the floor. Would you trust him with anything?

Suppose he said "Yes, but now I am telling you the truth." Suppose he said, "Now I have repented. Sure,

I've been a perjurer all my life, a briber, but right now I am telling you the truth, now."

Well, wouldn't you say, "Well, maybe—maybe."

Would you change your position, the position of any of your depositors, friends or clients, or what not, on any blessed thing that Roth told you if you knew what now as jurors you know about? If you wouldn't do that—and I see that this aspect interests you—would you like to live with your consciences the rest of your lives if you went out and predicated a verdict on the testimony of this lying briber?

Now I said to you in my opening that Lubben had led a charmed life, as so indeed appears to be the case. He has never been prosecuted for perjury, never been prosecuted for income tax evasion, and you remember how hard

(3141)

I struggled, with what poor success, to cross-examine him about his taxes and his income tax return? I asked the Government to produce them and I couldn't get them.

I had thought, whatever his Honor rules, of course, is the law, but I had thought that that was a subject that was proper before you, and I said I thought so.

The Court: You are not going over my head to the jury, Mr. Stryker?

Mr. Stryker: No, sir, not one moment.

The Court: Let's not go on with that.

Mr. Stryker: I tried to make it plain to the jury——

The Court: Then don't discuss it.

Mr. Stryker: If your Honor please, I have said before that you are the judge of the law; I respect you as a judge and I respect your rulings and that they are bound by it. I can't make it plainer than that.

The Court: You are also bound by that, and I trust your summation will be conducted in that light.

Mr. Stryker: I am bound by them, but I am telling this jury what has happened here in this courtroom. I believe I have a right to comment on that.

(3142)

The Court: You have a right to comment on my ruling, as part of your defense, part of your theory here, sir?

Mr. Stryker: No, sir. I have a right to comment on what transpired in this room.

The Court: You leave my rulings out of it.

Mr. Stryker: I have endeavored to do that, your Honor, in my statement, which I thought was clear. All right.

Do you remember that Roth testified before the Kefauver Committee—of course, like all his testimony, or like so much of it, it was retracted, but in all events he testified, here he said it wasn't the truth, but he testified concerning the Ronayne conference, that when that was concluded Lubben said to those assembled, "I am going up to 253 Broadway to buy my peace."

In the same breath Roth says that now that wasn't so. At all events, he said it.

Now I don't know what happened at 253 Broadway. And let me say to you in all fairness that there is no evidence in this case at all that he did buy his peace by bribery, none, and I wish to leave,—I wish to make no statement leaving an inference that is not supported by the proof, and whether he bought his peace or not, the undisputed fact in this record

(3143)

is that somehow he got his peace.

Now, Mr. Bercu, a relatively minor character in this case, but he wouldn't have been at all minor if what he said hadn't been exploded, because the destruction of documents would be presented to you, of course, naturally, as a large piece of evidence as to the character of my clients.

Now Mr. Bercu, to whose testimony I will come—I have digressed—you remember I told you I was going to open this play with the scene in Bercu's office. Mr. Bercu was illegally practicing law without a license.

Now that isn't my statement, that is his. And the courts have so held.

In other words, a fake lawyer, a charlatan, and the fact that he was represented by Mr. Wessel's firm doesn't alter that at all. I didn't bring that out; Mr. Wessel did.

Now at long last let me keep my promise to come to the Bercu conference. Now let's see, let's take this up piecemeal and I want to be so accurate about it that there can't be any question.

Lubben swore that Giglio told him that he wanted Bercu's work papers as a condition for breaking up the

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partnership because Giglio didn't want to have these papers "to bother with at some later date."

Now let's stop right there as a condition for the breaking up of the partnership. May I have Exhibit 31? We start right there with an easily demonstrably proven lie. You will recall that there was a memorandum of dissolution agreement in evidence. I think I have the right number—which had been executed, I think, on March 6th—here it is, March 6th, signed by Giglio and Lubben, and witnessed by Roth.

(Mr. Stryker reads from Exhibit 31.)

Now, the point of the letter is this: Here in the record—and it is not my exhibit, it is the Government's exhibit, 31—the partnership had been broken up by this memorandum agreement. You remember that later on a more formal agreement was entered into, I think in June, and

yet Lubben swore that he wanted the Bercu papers as a condition for the breaking up of the partnership.

Isn't that pretty plain to start with?

And he said that as a result of the conversation he went to Bercu's office where Giglio demanded that Bercu turn over the work papers relating to the Eatsum partnership, and according to Lubben, Giglio asked him to step into an outer office, and he then heard some very loud voices and

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Giglio said, "I will get the papers," and Giglio went his way and Lubben went his way, but no papers were given when he was with Giglio.

That is the Lubben version.

Now the Roth version, the Roth version. In his direct examination Roth testified that Giglio wanted Bercu's papers returned—returned. He described a scene in Bercu's office. Giglio said to Bercu, "Are these all the working papers of Eatsum," and Bercu said "Yes." Roth said that he looked at them, too. Roth stated that both Giglio and Bercu wanted to keep the papers but as a compromise it was decided that Roth would destroy the papers in the presence of Bercu's assistant.

He then said that he went into the men's washroom, took a file of papers—you saw them on the desk; I think they were about that high (indicating), about that many papers —and flushed them down the toilet in the men's room.

Now you have a memory as to what is the rest of it, but I want to get this picture before you.

Now later on Roth says he met agent Cordes and that agent Cordes told him, Roth, that one of the greatest errors he had made was the destruction of the papers.

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Now you see since the papers weren't destroyed what definite perjury that was right here before you.

And then because there must always be some way, in a conversation, a back flip, a slap, a dig to bring the defendants into it, he goes on and he testifies that Giglio told him afterwards that he was foolish to tell Cordes that he had destroyed the working papers.

Now you see there are thousands of things like that. I must rely on your recollection. I can only hit the high spots.

You see how diabolical that is, how clever, and as it rolled along from the witness stand how seemingly convincing. On cross-examination he gave a further description of what happened in Bercu's office. He said there were two or three inches of working papers, and he just thumbed through them, like you flip a book, and he illustrated that on the witness stand—you remember I asked him to.

He said his whole visit to the Bercu office took five minutes, and then as though to exculpate himself and bring back some shred of his character for you, he said that he did this very hastily because the job was distasteful to him. Remember that? He wanted to get out of there as fast as possible.

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Now let's go back to Roth's description on his visit to Bercu's office. Bercu said, according to Roth, "Here are the working papers that I have on Eatsum Products Company."

He says he took it for granted, so did Giglio on that occasion, that those were all of the Bercu papers.

Roth then testified that he destroyed all the papers Bercu gave him and he swears, "I recall destroying all of them."

Now remember I brought out from one witness, I think it was Bercu—no, Roth—or whichever it was, one or the

other, that whatever was on the working papers in Bercu's office was also on the working papers that Roth had. They weren't destroyed.

Now you see how—you begin to get a little look at this case. He said that his only purpose in visiting Bercu's office that time was, as he admitted, to see to it that Giglio's accountant—to see to it as Giglio's accountant that the incriminating papers were destroyed.

Now he had the effrontery to claim that the papers were destroyed at the same time that he didn't examine a single sheet of the papers.

Do you remember it was at that point that I walked (3148)

up with an envelope of the Bercu papers, some of them, not all—all of them were later produced—and he said he couldn't identify anything but the printed name on the yellow sheets.

Now, then, trying to squirm out of the necessity of explaining how he could have destroyed the papers which were present in court, he then swore that Bercu did not state that he was giving the witness all his papers to be destroyed. You see, Roth is the kind of a witness who will testify to anything, anywhere; the facts and the truth are no inhibition to him.

By saying that, he flatly contradicted his testimony on direct examination that the following conversation took place in his presence:

> "Giglio: Are these all the working papers of Eatsum?
>
> "Bercu: Yes."

Now, if this situation was, as I say, standing by itself, and I had nothing else, would you not pause and reflect before you believed Roth? Or Lubben? But it doesn't stand by itself.

At this point this character Bercu was introduced before you, Bercu—remember him. I started to cross-examine him. He was smiling at me. I think he smiled less as time

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went on.

Now Bercu says that he had several months of talks with Lubben, and finally, after several months, agreed to have Giglio and his accountant come to his office and destroy Bercu's working papers.

He said he had the major working papers, described them, had them photostated, and that brings up another subject which I will come to a little later.

Now, Giglio and Roth came to his office, Bercu says, by appointment, and here is what Bercu says about it, quoting from his testimony here before you:

> "Mr. Roth and one of my partners, Mr. Weinert, went into a separate office and proceeded to literally tear up every sheet of work paper that had been given them, and those did include all of the work papers that I thought we had in the files at the time. Those papers were extremely voluminous. They ran to possibly two or three full drawers in a legal size cabinet."

Remember Roth—just that much (indicating), took him five minutes to flush them down the toilet.

Now the Bercu version is that it filled what was it, two or three full drawers of a legal cabinet.

Well, you have a legal cabinet over there (indicating).

(3150)

You can get a rough idea from that—two or three drawers.

Now then Bercu goes on to say that Roth and Weinert —and he believed two of the assistants—believed—were

destroying, tearing up those papers apart, and destroying them.

Now then the plot thickens, and the climax begins to emerge in this fraudulent, fraudulent conspiracy of three Government witnesses to swear away the liberties of three of their fellow Americans.

Mr. Wessel picked up the papers which the defendants had produced—bear in mind all these Bercu papers were produced by the defendants, through me, and he picked up those papers which I had shown Louis Roth two days earlier. He asked the witness to open the folder in which those papers were, and he looked at the documents and he said—he then asked Mr. Bercu, "Perhaps you might have these questions in mind as you look at these papers. Were they papers prepared by your company, people under your supervision while you were an accountant for Eatsum? Generally what kind of transactions do they reflect?"

Then came the involuntary utterance of Mr. Bercu—not loud enough for the reporter to hear, but which Mr. Wessel, standing alongside of the witness, heard, and

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very fairly repeated for the record, and this is what he heard the witness say—this is what Mr. Wessel said—"I will repeat what the witness said to me. He said 'These are fantastic. These appear to be our office file copies.'"

And Mr. Bercu, himself, said a little later that the reason for this remark that he had made sotto voce was because "I was under the very strong impression that these were the very papers that were destroyed or were to have been destroyed at Mr. Giglio's insistence, and I don't recall having seen them since the time of their destruction. I find it hard to understand how they appear in court now unless they are part, they escaped destruction with part of the

papers which I turned over to the Federal authorities in October '52."

Now bear in mind the only papers produced here was this file about, whatever it is, about that thick (indicating) that I had handed to Roth.

So you see Bercu didn't know what was coming.

Now, whatever papers Bercu turned over to the Government—I think it must be obvious enough—were not thereafter delivered to the defendants.

Now if anybody was giving anybody papers here in this court, these defendants were giving them, not the Gov-

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ernment.

Now, what remained of the charge that the defendants had destroyed partnership papers in order to forestall an investigation of their tax affairs when Bercu was then forced to admit, one, that he had photostated his major working papers, unbeknown to Mr. Lubben, before turning the papers over to Mr. Roth and Mr. Giglio; two, that his major working papers consisted of, one, the trial balance sheets, two, the loan and exchange account, and three, the audit reports for a number of months.

Now he said that the reason why he photostated these documents was because he foresaw an investigation. He said that these papers, these very papers, would be needed in case the Government should prosecute anyone for tax fraud, and he knew the great importance of these papers which he photostated in the event of a future tax prosecution.

He knew that if any of his working papers were going to be destroyed, these were the ones.

I am not saying that—I am reading to you as it was said in the transcript, in the record in this case before you.

Now I then showed him one after another, do you remember that, one after another, three groups of papers;

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one group represented the trial balance sheets—remember that was part of his category of major working papers—, from June 1 through October 31, '45, which he had just briefly described as part of the major working papers.

Then he looked at them and he saw they only went to, —the ones I gave him then only went to October '45, so he began to hedge a little bit because he didn't know I had the rest of them.

I showed him some further trial balance sheets for the last months of the Eatsum partnership. I then showed him a group of papers consisting of his audit reports right down to the very last day, the last one, right down to the very last one that was made in his office.

Now whereas he testified he had photostated only six or eight papers as important enough for the Government, I showed twenty pages of these documents, and I am reading from these notes because I have a document and I want to be accurate.

These last were papers covering the period from October 31, '45, and ending January 31, '46.

Now he had testified that he photostated three or four of these sheets, as I have said. We produced ten of them, consisting of the Eatsum partnership work sheets from

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June '45 to January 31, '46, right down to the very end of his connection with Eatsum.

Then followed two questions and answers. I want you to pay attention very carefully to these. I want to read to you just as they came from the mouth of Bereu on the witness stand:

"Q. Now, Mr. Bercu, what you have described as the major work papers of the Eatsum partnership vital for tax prosecution, these papers have not been destroyed, is that not the fact? A. It is a fact that they have appeared here, so obviously they haven't been destroyed.

"Q. Either by the defendants or anyone else: that is evident, isn't it? A. Yes, sir."

It isn't often, it isn't often, in my experience I don't think I have ever seen it to this extent, where the defendants are able to blow up and explode as though they put a nitroglycerin bomb under it, this poisonous, poisonous suggestion that my clients had destroyed papers and you are asked, you are asked to believe beyond a reasonable doubt, beyond any doubt of reason that you believe and are willing to believe to that extent, and are willing to destroy the liberty, the lives, the hopes, of three Americans.

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Now let me tell you something. You heard a lot about fraud and conspiracy. There is a so-called conspiracy count in this indictment which I will come to if I can in the time. I will tell you where the fraud is and where the conspiracy is—right there in the Government witnesses. There was the real thing, that conspiracy to frame up that story which blew up in their faces—that was the conspiracy and that story was the fraud in this case.

Now then, those other facts. On Weinert—by the way, Weinert, yes, indeed, he testified, didn't he. He said he recalled destroying the papers on an occasion some time back. On direct examination he said as far as he knew they were the—as far as he knew—the Eatsum partnership papers. Three times on cross examination he stated specifically that he did not personally look at any of the

papers before they were destroyed. He said that flatly and unequivocally.

Now Mr. Bercu also somewhere in his testimony mentioned that two other assistants were in this diabolic thing, two other assistants.

Well, at that point I think the Government had had enough of this and so those two other assistants were not

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called.

Now, what can you fairly argue and deduce from this picture. Lubben was beseeching Bercu for months before this alleged diabolical transaction now shown to be totally false—Lubben beseeching to get papers. Is it not a fair deduction that the papers he wanted were those essential to a tax prosecution of Lubben?

Now, no one of the agents sitting at this table took the stand to deny that Bercu's work papers, which the defendants had produced, were indeed the key working papers in a prosecution involving the Eatsum partnership.

Now there is one more facet to this. You remember that Bercu swore that after he made the photostats he turned them over to Mr. Twohig or Mr. Cordes. I think the words were "and/or," whatever that means.

He doesn't recall whether they were together, two men, Cordes and Twohig, or whether he gave them to one or the other.

Then immediately afterwards he said, although he hadn't been able to recall, he gave them to Twohig.

A little later in his testimony he said he turned these photostats over to Mr. Twohig in the spring of 1951, although he added it may have been as early as the fall of

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1949. Yet when Bercu testified in a pretrial deposition on October 7th or 8th of 1952, here in this city, at the Bar

Association, he swore under oath to this falsehood, that he had not retained copies, and that he had made no provision to do so.

Now the fact is that he made photostats and turned them over to the Government at least a year and a half before he testified in the deposition.

Now when I asked him about that he said that his recollection was completely at fault. You see, if a Government witness is caught flatfooted in perjury, then it is a triviality, just a little flaw of recollection.

The same applies to a false statement that Roth made right here in this room that I will come to presently. He says, "I had completely forgotton that I had turned over these photostats to Mr. Twohig or to Mr. Cordes long before the date of this deposition."

Now, who was present at that? Why, Mr. Twohig. Mr. Twohig was there. He is the man that finally Bercu says he turned these photostats over to, so when Bercu said that he hadn't made copies or made any provision for any, Mr. Twohig knew of his own knowledge that that was not true.

Well, now, let's see, what is this case? It is all right for a Government witness to lie under oath and perjure

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himself. It doesn't matter—nothing done.

Now then you will remember that Bercu also testified that he didn't actually subscribe to the deposition, sign it and swear to it, until many days after he made it.

Now there was a good opportunity for Mr. Twohig to say, "Well, wait a minute, you turned over these things to me. How can you say that? You had better go back to the stand and correct it." Was that done? No.

Just a word more on that. Bercu had turned over the photostats concerning which he made a false denial under

oath in his testimony on the deposition. He turned them over surreptitiously without the knowledge of his own client, Lubben, without the knowledge of the defendants.

Now those photostats—you see, there is a significance to these things; they just don't happen, but you have to understand them; why, why did Mr. Twohig permit him to lie falsely there? Well, you see, he couldn't know that these documents hadn't been destroyed at all, and he couldn't foresee that perhaps in the ordinary course of events, like some of the business men here who couldn't find their records, a lapse of time, nobody criticized them for that, they might be destroyed, and it was the hope, wasn't it, (3159) that sometime someone would get on the stand and not be able to have his papers there, and then unbeknownst to these people they could flash the photostats on. That is why Mr. Twohig sat by quiescently, acquiescently in the perjury of this fake lawyer Bercu.

If I might at this point, I would like to have a short recess.

The Court: All right. We will take a ten-minute recess now.

Don't discuss the case among yourselves or with anyone else at this point.

(Jury out.)

(Short recess.)

(Jury in.)

The Court: All right, Mr. Stryker.

Mr. Stryker: Those bells, they are so beautiful. Sometimes, as I have listened to them coming from a beautiful little church down there, I have thought, I have been carried away from the heat and turmoil of this court to a court of

justice where we will all go some day—lawyers, jurors, everyone, and where there will be a real searching of hearts.

I couldn't help think when I heard those bells, of the beautiful inscription over that church which, with the little

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Latin that I have, I could translate Beati qui ambulant in lege Domini—Happy are those who walk in the law of God.

And I thought also of an inscription opposite that, one of the great structures in New York, the synagogue there on 56th Street, where I lived for a long time, from the Prophet Habakkuk—I love to go by and read it—Do justly, love mercy, and walk humbly with thy God.

Now a word or two more about Mr. Lubben. Remember how he testified here that when he came from Puerto Rico, where apparently he now lives, that he asked for the College Town minutes, told Mr. Wessel that he lied there.

This was the first time, according to his word here, that he told any agent of the Government that he had been a perjurer in the College Town case.

Of course Mr. Twohig knew it.

Now the reason he lied, so he testified on direct examination, because he was afraid of the defendants, afraid of them.

Now there was a poisonous picture put in here, to prejudice my clients—afraid of the defendants. Real atmosphere, real poison, dropped in and rubbed in.

Now let's see, let's examine that. He testified in the

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College Town case, in the spring of 1950, wasn't it—'50.

Now he had been for at least two years in the tow of Mr. Twohig, talking with him, all the protection of the Federal Government for at least two years, yet he says, to exculpate him from his perjury or give some explanation or excuse for it, he was afraid, afraid of the defendants.

You see, first, first the false charge—they destroyed records. Now they must be painted in some black colors—he is afraid of them.

Now let's see, as I say, he had no more reason to be afraid then than now. The agents were all around him; and in August of 1950, August, this fear, this fake, lying perjurial statement of fear. Apparently he was in fear in this courtroom. Twohig sitting there. What became of his fear in Washington in August 1950? He was not tucked off in a little quiet courtroom; but before the whole glare of the world.

He testified to every poisonous thing that he could think of against these defendants. Where was the fear then?

By the way, I have often wondered—it is not in evidence here; we can only draw deductions, of course, from what is in evidence, but that testimony before Kefauver was on (3162)

August 22, 1950. It is in evidence that the three informations which were never prosecuted were filed on September 15, 1950, or about twenty-two days later.

Curious connection between those two dates.

Now, of course, it would be a helpful thing to the agents if before they dropped the informations on them they could lay down what we called in the old war a box barrage, just get them down there where there is no judge, no lawyer and no rules of evidence and let them sound off. I don't know, and I can only ask you to take the facts in evidence, but at all events, those two events were closely connected chronologically.

How do you suppose that Mr. Halley got the information on which he predicated this great hearing of his?

You ask yourselves, is there any other way in the world that he could have gotten it except from one of the agents?

Fear—what a lying statement that was.

You remember Lubben testified that he met the agents Twohig and Cordes in July or August 1948, almost three years before he testified in College Town, saw them dozens of times thereafter, one of the places at his house—his

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house.

I think the evidence is clear that Mr. Twohig began his investigation not of the defendants but of Lubben. Then in 1948 the attack shifted to the defendants.

Well, one thing more—this fear—a poisonous, poisonous thing, of course, dropped in there for the purpose of poisoning your minds.

Let's look at it a little further. In March—on March 22, 1949, a year before he testified and perjured himself in the presence of Mr. Twohig, in the College Town case, he brought a lawsuit, he brought an action against Mr. Giglio for taxes, claiming that Mr. Giglio owed him under the agreement $17,000 of Federal taxes and $5,000 of State taxes. Well, now, where was the fear? Where was the fear of Mr. Giglio in 1949 when he came right out and sued him in open court?

And then you remember it was brought out in the Kefauver case investigation that Lubben testified that Giglio stated to Lubben and to Lubben's lawyer, a man by the name of—what was his name, Lubben's lawyer—Carlson, yes, that Giglio said to him in some conference, "Why don't you sue me for $100,000," in answer to which Lubben said, "You don't owe me $100,000."

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Now this bears, that bit—I will ask you if you will be kind enough to just bear it in mind, because it relates vitally to another aspect of the case to which I will try to get.

Now obviously for the purpose of absolving himself from a civil liability, which was all that was involved in

the case where he committed perjury, obviously with that purpose in mind he swore to that jury that he had left the partnership on March 9, 1946, which was before the date one of the shipments involved took place.

Then when the lawyer for the College Town asked him about the dissolution agreement on June 5th, 1946, Lubben denied that he had signed it in June, claimed that he had signed it in March, although it bore the notary public's acknowledgment of June 5th, 1946.

Thus he sought to repudiate the dissolution agreement which he signed and acknowledged in June, 1946 by denying that he had signed it then, denying that he had acknowledged it. He did this in order to relieve himself of civil liability or hope to relieve himself in the College Town case.

Now just little facets here and there on this wonderful character—Lubben. Here he admitted that he did sign the

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dissolution agreement in June, and when I asked him whether this was not one of the lies he told in the College Town case he said that in this respect his College Town testimony was a mistake of recollection.

Isn't it plain enough, isn't it plain enough to you, could anything be more plain that he didn't commit perjury in the College Town case because of his fear of the defendant, but did so only to protect himself from a money judgment?

Now let's take up some more of this fear, because the two most vicious attacks on the defendants are involved in these false claims of destruction of papers and the supposed fear, fear of the defendants.

Now let's take a look at that further. You will remember that when they dissolved there in March, there was an agreement by which he paid $75,000 to Mr. Lubben in the inventory and $100,000 in notes—you remember that? And

those notes were paid over a series of weeks or months, running into about a year, I think, and then finally he stopped payment on the last $12,000 note—paid all the notes, and then he stopped payment.

Do you think he would stop payment on a note if he had been in fear of Mr. Giglio?

Now he gives a picture of this corn box and says—

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and this runs right through all the case, including the testimony of Mr. Present—I mean, it is all predicated on that, that Mr. Giglio took the whole $140,000 that remained at the end of the corn deal.

Now, that is the picture that runs throughout the calculations of the Government. Let's take a look at that. Now do you suppose that if Mr. Giglio had not given him his half of the corn box, that Lubben would have gone on paying all of these notes during this year or more? The question answers itself.

Now when Lubben sued Mr. Giglio in 1949, what did he claim; what was the prayer for relief? $70,000? No. The twenty-five, seventeen of which was for income taxes.

He wasn't very afraid of Mr. Giglio then, was he? He brought an action in open court against him.

Now after Lubben sued Mr. Giglio in New Jersey, there was a meeting at Mr. Lubben's office—maybe I have already stated that. "You don't owe me a hundred thousand." I have already stated that.

Now then, we get the same picture, a poisonous picture, of course, poisonous, that Roth was being threatened by Mr. Giglio. I am sorry I have to keep referring to testimony, but I certainly don't remember three thousand pages.

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It is the only way I can get this clear to you. I won't be too long, but after all, all I have in my hands is the most sacred thing on earth, the liberty of three men.

Now let's see if I can make this a little faster. This requires close attention, and I couldn't do it without having these definite things before me.

Mr. Wessel asked Mr. Roth this question:

> "Mr. Roth, have you ever been threatened by Mr. Giglio?' A. Yes, sir.
>
> "Q. At what time, sir? A. One of my counsel, former Justice Ferdinand Pecora, who was with me at the District Attorney's office prior to the first indictment for the purpose of cooperating with the Government, which at that time the investigation of this tax matter was pending—Mr. Leone was the assistant district attorney and took testimony for about five minutes, and it was adjourned, and within about thirty-six hours thereafter I received a telephone call from Mr. Giglio and I met him and he says, 'I understand that you are talking to the Government about these tax matters.'
>
> I said, 'I'm following the advice of Judge Pecora.'
>
> (3168)
>
> "He said, 'All I can tell you is this, be careful what you say to them, and make sure you tell them all the facts, and even if they hold you incommunicado,'—he put his hand around my shoulder, and he said, 'you have an older son.'"

Really dramatic—a poisonous story, of course.

Now, let's see: the plain implication of that testimony is that Mr. Roth went to the United States Attorney's office prior to the first indictments in this case for the purpose of cooperating with the Government, and that he was only deflected from this purpose because of Mr. Giglio's threat.

Of course that is all it can mean. Now the story that came out on cross-examination proved this to be one of the more fantastic lies in this case, because it developed on cross-examination Roth did not desire to cooperate with the Government in 1952, and that Roth was therefore not threatened by Giglio, and that he never wanted to cooperate with the government and never intended to cooperate with the Government until he was threatened with jail in connection with this RFC fraud on which he was indicted, a case which has nothing whatever in any way, shape, form or manner to do with my clients.

Now, follow the sequence, if you will. It is rather close. (3169)

In March 1952 Roth was indicted for filing a false income tax report with the RFC. In June or July '52, he pleaded guilty to making a false statement, to one count in the charges made against him. He was never sentenced in connection with that plea and has not been yet.

About eight or more weeks after Roth pleaded guilty Judge Pecora said, and I am quoting from this record, "We are going down to see Mr. Leone."

The conversation there was in relation to Roth's personal tax return, and it was in that connection, and that only, that he asked permission to go before the grand jury to explain his own personal tax return.

He pleaded guilty at that time to one count of this RFC fraud, which indictments were several months before Mr. Leone.

At all events, on September 11, 1952, he went before the grand jury in this building to explain his 1945 return.

Now at the trial, this trial, Roth admitted that his 1945 tax return was false, that is, his own; that they can't wish or foist or stick on somebody else's name.

He admitted that he lied on this occasion to the grand
(3170)
jury and that he did not lie by prearrangement with these defendants or with anyone else.

He told us here that he lied to the disappointment of Judge Pecora and that he consequently confessed to Judge Pecora that he had lied.

Thus, despite his claim at this trial that he was ready to cooperate with the Government in 1952, but was deterred by Giglio's threats, he was compelled to admit on cross-examination that far from cooperating with the Government he lied before the grand jury when he was called to explain what—his own personal tax returns.

Now subsequently he was indicted on his personal tax return. Thereafter pleaded not guilty. First indictments in this case were found on October 20, 1952. Roth was named as a defendant in nine counts. With the other defendants he also pleaded not guilty.

Thereafter he prepared for trial on these indictments by working on the books and papers. His lawyers joined in a motion, and these indictments were dismissed by Judge Goddard—that is in the record—in March 1953.

Also, Judge Goddard dismissed the indictment based on Roth's personal tax return and Mr. Roth stated here in court that he was very happy these indictments were
(3171)
dismissed.

It is plain enough, isn't it, that he was lying up there, not for the defendants, not because of this threat, but to absolve himself of his own false income tax return.

But you usually can get more than one version from a man, from these Government witnesses, Roth and Lubben, and so we then got another version.

Now this is the man—please let me not bore you by repeating—that you have got to believe beyond a reasonable doubt—he and Lubben—if you are going to do what Mr. Wessel asks you, strike down and destroy these defendants.

Now he said that the reason for his so-called failure to cooperate was "I was not requested by the Government to come down to continue cooperation," and further, "I was not called by the Government to cooperate and I did not cooperate."

There was a pretty good reason why the Government didn't call him down to cooperate, and that reason was pretty well brought out before a judge sitting in this building, Judge Skelly Wright, on July 22, 1954.

Now you will remember that he was indicted, still unsentenced, on his RFC fraud, and the problem there was,

(3172)

the question was—that was July 22, 1954—whether he should go to jail at once or not, and I had a great deal of trouble, you will remember, trying to get him to tell me anything about what happened at that hearing.

You see, there is method in all these things—we unravel them. The reason for that was that he hoped to prevent me from showing what did happen through his testimony, so he said—"I just heard sounds."

He is there, flanked by Judge Pecora and Mr. Rosenblum, a former assistant here, but he heard sounds, that is all.

He said, "I was just a piece of clay." Clay. Now you know what sculptors do with clay—they mould it.

Now I say it is a proven lie, then, that Roth did not plead guilty to the indictments presently before you because he desired to cooperate. He pleaded guilty and he did

this three days after the appearance before Judge Skelly Wright, in the hope of saving his skin.

That is why he is here. That is the basis, the motivation for everything that he has said.

And another thing, when I pointed out to him here on the stand that he couldn't be cooperating with the Government or even attempting to cooperate with the Government

(3173)

while his lawyer was making motions in his behalf to dismiss the indictments, and while his lawyer was trying to avail of his services to prepare for trial, he gave another reason for his failure to cooperate, again exculpating this time Mr. Giglio from any interference with his desire to cooperate with the Government; said that he did not cooperate with the Government "but on the advice of my attorney he told me he is going to retain all my legal rights at the same time that I am ready to cooperate with the Government."

Now that is a good one, isn't it?

Now Mr. Leone was here briefly on the stand, and referring back to this September 11th, when Judge Pecora brought Roth down to Mr. Leone, he stated here that he started to interrogate Roth when he was informed that the grand jury was waiting, and Mr. Roth went voluntarily before the grand jury.

That jury, that grand jury was investigating Roth's personal returns.

Mr. Leone told you here on the witness stand that Roth, far from cooperating with the Government, in fact tried to extricate himself when he appeared before the grand jury, and that he lied to the grand jury and was never called back by the grand jury again.

(3174)

Now, remember, please, and I hope you will pardon me for two things, first for taking so much of your time, and second, I hope you will pardon me for a thousand things that I can't get to in three hours. First, these tax returns. Now, no one has said that any of these defendants are tax experts or know anything about it, about taxes or tax returns. They had, heaven help them, Roth. No doubt in this case Roth prepared, drew these returns. No question at all.

And the only evidence in this case, if you can call it evidence, bearing on the question, the vital central, pivotal question in this case, knowingly and wilfully, are little conversations dropped in by Mr. Roth at the appropriate time, and you can see when you unwind this case, take it apart, every time he is shown a tax return or a document he has a story.

My people did something or said something to fit in. In other words, you have to imagine Mr. Giglio, who certainly was a busy man with this development, attempted development of sugar—and no one has denied but what that was a bona fide and a very praiseworthy effort—you have to picture, as it were, Mr. Giglio flying in and saying, "Wait a minute, I have got a tax return coming up or a document coming in, I must be sure that I step in and make my daily confession to Mr. Roth."

(3175)

Now bear in mind two aspects to this case: first, were the tax returns incorrect? That is the first question.

Second, and if they weren't, that is the end of the case. Second, if any of them were, had it been made incorrect by the wilfull or knowing act of any of the defendants?

That is this issue in a nutshell.

Now I am afraid some of it will be a trifle boring, but I don't think liberty is boring, and it bears on that.

Now in the bill of particulars the defendants are accused of omitting an inventory that existed on March 31, 1946, in the Tavern return, which if included in the Tavern tax return would increase the net income which the partnership earned.

All right, now Tavern is supposed to have made its last sale on November 23, 1945, and certain companies are alleged to have sold merchandise to Tavern after November 23, '45, which Tavern paid for. Inventory was stored in the warehouse, so Mr. Roth tells us, and subsequently taken over and sold by American Brands.

Now, Mr. Roth did not testify that he had any tax

(3176)

motive in leaving that inventory out of the tax return. Remember that? He did not testify that by leaving out of the Tavern tax return and picking up the sales on the American Brands books, where they are reflected in the American Brands tax return, that he accomplished any tax saving. He did not testify that Mr. Giglio knew of any tax implications on these transactions, when they took place.

Now, curiously enough, the only person who testified on this subject was Mr. Present, who is testifying from the books and records, and on the basis of Lawn's—Giglio's —I am coming to Mr. Lawn in a minute— on the basis of Roth and Lubben's testimony.

Now, Mr. Present didn't pretend to be around when the Tavern inventory was put in the warehouse or when the tax returns were presented. He was testifying from the books and records. He is not telling you what the intent of these parties was, either in 1945 when the inventory was put in the warehouse or 1947, when the tax return was filed.

Is it not reasonable to suppose that if there were a fraudulent intent connected with this inventory that Louis Roth would have testified that the reason why the inventory was left off the Tavern return and picked up on the Ameri-

(3177)

can Brands return is that there was a tax saving involved in handling the proposition that way, and that Giglio knew it? Did he give any such testimony? None—just none.

He didn't testify that there was a tax saving involved, and he didn't testify, either, that either he or Mr. Giglio knew of any tax saving involved, only Mr. Present, the Government's expert, mentioned tax saving—nothing, of course, about any intent or knowledge on the part of any of the defendants.

Now the Government charges that $32,000-odd of laboratory research was not a true expense. Don't worry, I am not going to tell you that story again. You have heard it before and you heard it at great length here from Mr. Gordon; I think it was about, as I recall it, eleven pages of testimony in which he showed you what he did, and the way in which it improved production and sanitation and so forth.

No one has disputed that.

Now, this $32,000 item in the bill of particulars, under Tavern Fruit, that I mentioned, when I started, of course is the Goldenberg item; Goldenberg who changed his name legally to Gordon.

Now, Roth testified that Mr. Gordon received a salary

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salary of only $7500 to $8000. He has said that if his salary was charged to the research account then $24,000 of it was wrong.

You get a rough idea not only of Giglio, of the idea of his integrity, but of his intelligence.

Now, if Mr. Goldenberg's salary was charged to the regular labor account, then the entire $32,000 was wrong, so Roth says.

In other words, what Roth was saying was that Gordon received a salary of $7,500 to $8,000 which on the partnership was inflated, was inflated to $32,780.93.

Almost the same way that we exploded the Bercu conference, Gordon exploded that one.

Now I want to call your attention to the fact that the inventory which I have already mentioned and this item of Gordon's engineering expense are the only two items charged in the bill of particulars which would adversely affect Tavern's tax return.

Now one of them was blown up out of the case with Gordon's testimony.

In his direct testimony Roth was questioned about other items which have no relation to this case because they are not charged in the bill of particulars. I discuss them now because they were intended to prejudice you against the

(3179)

defendants, and they can be disposed of in exactly the same manner as I shall dispose of the Gordon expenses or as I have disposed of it.

Here I have got it: increased the capacity from 50 barrels to 300 barrels, save $50,000 a year and so on.

Now you see that Roth's testimony that the Gordon $32,000-odd expense was inflated, that that testimony was totally destroyed by the witness the Government called.

Now you remember that Mr. Roth did not specify a single other item that was false. He merely said they were like the Goldenberg item.

Well, the Goldenberg item was one hundred per cent proper and legal and the Government called no other wit-

ness to prove any other so-called false expense listed on the Tavern books.

It is fair, I think, for us to assume that there was no false expense, and that Roth testified as he did only to cooperate with the Government in order to save his own skin.

Now, let's see, now you get another little slant—this part is hard for me, and I hope you will be patient with me, but when you get in the jury room what you want (3180)

from me are as many facts as I in my poor way am capable of giving you.

While Roth was testifying about the so-called false expense items, he mentioned in a casual way to Mr. Wessel, "By the way, Mr. Wessel, without any books and records I can only go by memory."

Mr. Wessel said, "I understand, sir."

And, of course, he was talking at that time about this Tavern item.

Roth continued: "I could be more exacting or a little bit more definite on books and records but like this I just got to draw my memory back, based on conversations and procedure and happenings in the business."

Now, without the books and records of Tavern, Roth said he could only specify the Gordon account in this category of false deductions for expenses, yet Roth claimed that a similar procedure of drawing cash and attributing the withdrawing to a false expense account was pursued with the American Brands and related corporations.

Now the books of these corporations, every one of them, were in court. Roth did not have to go by memory in the case of these corporations. He didn't have to "draw his memory back."

He told you that he had been working on these books (3181) with the agents for hours, day after day, in preparation for this trial. The books were right here in court. Yet he did not point to a single entry in those books which he claimed or could have claimed was false, and he had no more particulars about the corporation books, the corporations whose books were present, than he gave about the Tavern partnership whose books were not here.

I submit to you his testimony in this respect as in almost every other respect was a tissue of lies, designed for the purpose of cooperating with the Government to save his own skin.

Now in the Eatsum return, $140,000 resulting from the corn box transaction was omitted. It was omitted from the information return but $70,000 of this amount, exactly one-half, appeared on Mr. Giglio's and Mr. Livorsi's personal tax returns under the heading of "Other income."

Now you may remember—I think it was called miscellaneous income, if I remember the title right, before that time Mr. Roth had always thrown in $5,000 or $10,000, just in ~~case, then $15,~~000, now this time $50,000 or $35,000 more than the usual amount put in this miscellaneous account.

$35,000 is one-half of $70,000.

(3182)

Same thing occurs with Mr. Livorsi's return. So whether omitted in the Tavern return or not, the Government lost nothing, and we are not here dealing, ladies and gentlemen, with crossing this "t" or dotting that "i". We are dealing with the fundamental problem, fundamental question, the large question of whether or not these defendants ever intended in any way to defraud the Government.

Well, I am on the $140,000. Let me run through that, it is quite interesting, really.

Now, the Government's whole theory of the case is predicated upon the testimony of Lubben in regard to this particular transaction, and their claim, as I understand it, is that $140,000 of this deal went in its entirety to Mr. Giglio, that Lubben got no part of it.

Now let's take a look at that contention, resting as it does entirely on the word of Lubben.

He did not admit on the witness stand, it is true, that he got $70,000, but there are facts in this record which definitely compel the conclusion that he got it.

Let me give you those facts. When Lubben left the Eatsum partnership and continued the factory in the Bronx under the General Confections the early part of March 1946, Mr. Giglio sold Lubben the inventory merchandise on hand for approximately $70,000 cash, $100,000 in notes.

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I have already been over that.

He paid those notes down to $12,000. I have already been over the fact that in 1949, during which supposedly the $70,000 was due Lubben, he didn't sue for it, he sued for $25,000.

I have already been over the fact that in the conference in Lubben's lawyer's office, when Mr. Giglio, I suppose in a spirit of fun, said, "Why don't you sue me for $100,000," Lubben made this very significant reply, "You don't owe me a hundred thousand."

Now are those facts consistent? Are those facts consistent with Lubben's claim that Mr. Giglio got the whole $140,000 and therefore owed him $70,000?

I leave it to you as business men, and you ladies.

The Government claims through the testimony of Lubben and Roth, and through their testimony alone, that

the partnership received the benefit of some additional cars of corn syrup delivered to Lubben after he left the partnership.

Now let me just scrutinize that carefully. This part of the case is built up, as I have said, on Lubben and Roth. Lubben identified some documents which related to carloads of corn syrup which had been shipped to General (3184)
Confections. Remember that is his company in the Bronx. which he started immediately after this Eatsum partnership broke up.

Now, no one in the case disputes that certain carloads of corn syrup were shipped to Lubben's company, General Confections, General Confections.

As a matter of fact, the evidence is undisputed that while we were unfortunate enough to have Lubben as a partner for a few months, and this particular corn deal he said began in August, and ended, I think, sometime in December, Lubben ran that deal while he was with Eatsum, and when he left Eatsum he ran a corn deal of his own under the name of Reserve Trading.

Now, Lubben produced his big black book out of which the Government took one sheet, namely, Exhibit 30, to 31, and on that one sheet is one entry concerning this transaction and it reads as follows—this is from Lubben's book —"June 1, 1946, received from Mike Cohen as deposit on overage account for some corn syrup we are selling him." The amount of the deposit received from Mike Cohen is $12,000. Then the entry continues:

"We have to pay 8¾ cents a pound to L. Roth."

This page out of Lubben's records does not state how many pounds of corn syrup were involved.

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Furthermore, the Government did not offer in evidence a single additional page of Lubben's record, so that the only inference that I think could fairly be drawn is that Lubben's records show no transactions at all with the defendants Giglio and Livorsi, concerning corn syrup deals, and that there are no further entries in his records with respect to the alleged transactions with Roth.

So it follows, I think, that Lubben's records indicate that there were no transactions with the defendants Giglio and Livorsi, and only this single entry with respect to Roth.

Now all that this entry shows is that Lubben received a deposit from Cohen of $12,000; that he had to pay 8¾ cents a pound to Roth.

It was a curious fact that Lubben did not even attempt to state the total amount of money that he paid to Roth. All he said was that he had to pay about $8,000 a car.

On several occasions, I remember one occasion very distinctly, this is his testimony, "that I paid him, and I believe Mr. Hankermeyer paid him another time, sir, but Mr. Roth got the overage, sir."

Hankermeyer, of course, was dead, and Lubben's testi-

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mony was not supported by a single entry in his books.

As a matter of fact, the absence of entries in his books flatly contradicts his story. When asked to state the amount of the coverage which Roth received by pound, he said he couldn't remember the amount by pound, but the amount seemed to stick in his mind being about $8,000 a car or $7,500 on each car.

Now let's turn to Mr. Roth who was cooperating with the Government in this case.

Roth testified that when the partnership terminated there was an uncompleted contract for ten cars of corn syrup on which there was an estimated profit of approxi-

mately $25,000; that Lubben was to receive one cent a pound for his efforts to complete the contract and the proceeds were to be turned over to the partnership. Proceeds were to be turned over.

If there were ten cars, at an estimated profit of $25,000, the profit of the car would, of course, be $2,500 a car.

Yet in almost his very next breath Roth testified that the partnership received as a result of the sale of four or five carloads of corn syrup approximately $6,000 or $6,500 a car, thus in one breath the profit is $2,500 a car and in (3187)

the next breath it is $6,000 to $6,500 a car.

Finally, the Government comes here and says that the profit amounted to $41,560.66 or $8,300 a car.

Now, this is a little—I have got to be close here in my reasoning to show it to you. Furthermore, if Lubben had paid money to Roth, and Roth had paid it to Giglio and Livorsi, or either of them, where are the details of these payments in Roth's testimony?

Roth didn't testify that he received any specific amount from Lubben or paid any specific money to any of the defendants. All that Roth stated was a conclusion that "the partnership received some money."

When, how, how much, to whom it was paid, not mentioned.

Now that, I think, is very typical of the prosecution in this case. Oh, yes, I think one of the most fantastic aspects of this case is the fact that Lubben swore in his direct examination that he had a conference in the spring or summer of 1950 at Ronayne's office, with the defendants and Louis Roth.

You may recall that conference, because it was important enough for Mr. Wessel to go back after Mr. Lubben testified, to question him about it again the next day.

In his opening remarks about the conference, Lubben (3188)
swore as follows, that he couldn't figure out his tax return for the year 1946, so he took a good guess and came up with the figure of $22,000 or $25,000, which he asked for at this conference.

Mr. Ronayne is supposed to have said, "Well, what are you asking $25,000 when you should get a hundred?"

Lubben said, "What do you mean a hundred?"

And Ronayne said, "Well, look at it here."

Ronayne showed the partnership information return—information return—where it said that Lubben received close to $100,000.

Lubben then said, "I know I didn't get the money, and I told them I didn't get the money," and then Ronayne is supposed to have said, to have turned to Giglio and Roth and said, "You so-and-sos—I thought that this paper was correct."

And then as Lubben described the scene, the defendants started mumbling, having an argument among themselves.

Lubben then announced that he was going to 253 Broadway to tell the whole, as he put it, stinking rotten mess.

There wasn't much fear there, was there, of Mr. Giglio, when this happened, but that is an incidental point.

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Now, now the odd—and to me—fascinating fact about this whole episode that I am discussing is that the Government put Mr. Roth on the stand, and Mr. Roth testified that Lubben received over and above the investment in the Eatsum partnership, the sum of $124,000 which is more than the $100,000 shown in the Eatsum information return.

And then Mr. Present took the stand and testified that Mr. Lubben, through some calculation, I suppose, received $117,000 from the Eatsum partnership over and above his

investment, a figure greatly in excess of the $100,000 shown on the Eatsum tax return.

The fact that Mr. Present and Mr. Roth disagree in their computations as to how much Lubben received and the fact that they disagree to the extent of $7000 out of $124,000 shows that computations may be wrong just as a matter of accounting theory.

They may be wrong by virtue of the manner in which one accountant handles depreciation or by the manner in which he writes off certain assets. There are many reasons for differences among accountants, and a return is not necessarily faulty or false because one accountant's theory may differ from another's.

Now, of course, the Ronayne conference was paraded

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before you for the purpose of poisoning you against the defendants. Lubben, on the stand, was posing as an outraged citizen who had just learned that his former partners had claimed in an information return filed with the Government that he, Lubben, had received a hundred thousand over and above his investment in the partnership. The outraged Lubben, outraged, berates his partners; and their lawyer—and their lawyer, according to Lubben, is so outraged he turns upon his clients and calls them so-and-sos because Lubben did not receive the hundred thousand dollars.

Now there is another aspect in this situation. Lubben had not reported the more than a hundred thousand he had received net from the partnership. He didn't report anything like it. This is from the testimony. He didn't report anything like it.

Therefore, he maintained in Ronayne's office that he hadn't received it, and here at the trial the Government proved that he received well in excess of a hundred thousand from the Eatsum partnership.

You will recall that Lubben testified that when he left the Ronayne conference he went to 253. Now I ask you to consider, reflect what happened at 253. There is no evidence of it here. All you can do is draw on the evidence that is (3191)

here.

I wonder what happened when he told Mr. Twohig that the partnership had filed an information return showing that Mr. Lubben had received $100,000, whereas in fact Mr. Lubben claimed he had not received a hundred thousand.

I wonder if the agents said to him—I wonder—this is not evidence, it is an argument based on evidence, based on conclusions from the evidence—"why, you so-and-so, you received a hundred fourteen thousand"—that is what Mr. Present now tells us—I think it should be 117.

Do you think the agents told him that? Do you think they told him they were going to prosecute him for filing a false return? The answer, of course is that Mr. Lubben never was prosecuted. Mr. Lubben was wanted for something else. Mr. Lubben was wanted as a witness against these defendants, unimpaired by any trial or conviction for perjury or income tax evasion or anything else.

I am coming a little more to that later on.

Now, the key to the question of whether or not Mr. Giglio's individual tax return and Mr. Livorsi's individual tax return understated their income for the year 1946 (3192)

hinges on a peculiar question of law which I don't think his Honor will say is a question for you to determine. That question of law involves what a member of a partnership must report on his personal tax return. What he must report is a technical question covered by the term, "distributive share."

No jury, even the most intelligent, I think, should be called upon to decide what a partner's distributive share consisted of. That is a question which would be difficult for anyone except experts.

Now, Mr. Present's views on what constitutes proper distributive share of partners may be interesting; they are not entitled, I am afraid, to too much weight.

The proper place to litigate an issue of this technical and complicated character is in the tax court, where lawyers and judges peculiarly experienced in tax questions operate, and where difficult questions of this kind are litigated rather than in the hurly-burly, the heat, the passion, of a criminal trial.

Now I charge that the Government did not litigate this issue in the tax court with these defendants because it was afraid to do so. I charge that the Government did not litigate these issues in the tax court with the defendants because the Government knew it would lose on that issue.

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Do you recall Mr. Present's testimony that it was decided at a very high level of the Government not to prosecute this case by way of civil suit, "since it would jeopardize the criminal prosecution that was pending at that time"?

Now, let's examine that statement with care. Now if the Government did prosecute its case in the tax court and won its case, if it had gone there and had sustained its position, that certainly would not have jeopardized the criminal prosecution; it would have helped it, wouldn't it? But if the Government went there and litigated this issue before the tax court and lost the case, that would have greatly militated against the prosecution of this case.

So the Government abated the taxes—what was it, a hundred twenty-five—and they did not care to litigate in the tax court.

When do I go to, your Honor, one o'clock?

The Court: Mr. Stryker, I don't want to cut you off at any point.

Mr. Stryker: I appreciate that. I will try to do it but I have a great deal of ground to cover, as you see.

The Court: All right.

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Mr. Stryker: Now, what is this, then? Where do we come to in this pass, with these taxes under which we grunt and sweat?

The Government then it would seem here, is more interested in destroying the liberty of these men than in taxes, or litigating the case where it could receive a—where it would be in an atmosphere which was less fraught with heat than any criminal case necessarily or inevitably is.

Now let's look at another aspect. The American companies were going down hill financially all during 1947. No one here disputes that. They were spending on this research program not only their profits and their capital but, in addition, the Giglio group were taking money from their other interests; namely, Loraine, Eatsum and Van Dyk, to bolster these failing companies.

Now, no one in this court has said the Giglio group had no right to take the Loraine funds and lend them to the American corporations. The whole objection on Mr. Wessel's part was that the Giglio group only owned 50 per cent of Loraine and not 100 per cent.

Now let us assume that in that contention Mr. Wessel is right and that the Giglio group did only own 50 per cent of Loraine stock; did that preclude them from lend-

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ing the American corporations $179,000 from Loraine, especially since there is no evidence that Mr. Damaro, who,

Mr. Wessel says, was the other 50 per cent owner, ever objected to the loans?

Has Mr. Wessel put Mr. Damaro on the stand to say that he had any objection? Unless it was at the direction of the Giglio group, what other reason would Loraine and Eatsum have for lending money to the American corporations, and on that point Mr. Holzer proved that the Giglio group and Loraine put into the corporations capital and loans to the extent of $285,000.

He also proved that Giglio and Livorsi took back from the corporations $142,000 as loans, leaving a balance due to Giglio's group and/or their companies of $142,000.

Did you hear that refuted—this $142,000 owed them which they never got because the companies went into receivership, and the assets of the corporation were sold to satisfy creditors.

What you must consider is whether there was an intent on the part of defendants to cheat the Government by diverting and misappropriating the assets of the American corporations.

Now if Giglio and Livorsi took out of these corporations

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the sum of $142,000 as loans, and at the same time Loraine put back $179,000, or $35,000 more than the Giglio group took out as loans, what difference does it make whether Giglio owned 50 per cent of Loraine or 100 per cent of Loraine? If there had been an attempt to cheat the Government by taking out moneys in the form of loans, why did Loraine put anything into these corporations at all? What a childish conspiracy for the man who is robbing the corporations to cause one of his own companies to put back money at the same time.

Did they intend to cheat the Government of taxes by taking the money out of the corporation as loans? If they

did intend to cheat, what kind of a conspiracy, what kind of a conspiracy is it when at the same time they are pouring back twice as much money into these failing companies they were trying to bolster up, because, gentlemen, these men, young men, ambitious, hopeful, were trying to do something. They had an objective for the general public—but I don't want to claim any too eleemosynary theme—they were trying to extract sugar from blackstrap molasses.

Now, that was their objective. They didn't want to fail. They wanted to succeed, and as far as I could gather

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from the testimony of Mr. Hennessey, they actually did just get to the point where they could do it when the whole house of cards fell.

Now they weren't in this thing to evade taxes, to cheat the Government. If they had been, you wouldn't have such a pitiable showing as you find in the bill of particulars. There would be hundreds and hundreds of thousands of dollars, and I have analyzed the things they have got in there.

Was there any testimony here that anybody connected with Loraine objected to Loraine pouring this money into these dying American corporations? There is nothing in this record to refute the unquestioned fact that Loraine put this money into the American corporations because Giglio wanted to do it.

Did the Government call Mr. Damaro to prove this wasn't so? Suppose Mr. Damaro took the stand and testified it was against his wishes that Giglio put this money into American Brands? Then it would make the conspiracy look even sillier.

The fact remains that Loraine invested a fortune in money and merchandise in the American corporations while they were dying, to help hold them up. These boys

wanted to win. They had the same kind of spirit that has
(3198)
made this country.

The fact remains that Loraine invested a fortune in American corporations while they were dying, and if Mr. Giglio and Mr. Livorsi withdrew, in the form of loans, money in the American corporations a sum far less than what Loraine put in, that proves the very contrary of the conspiracy to misappropriate and divert.

Furthermore, during this very period of time Eatsum, which was then wholly-owned by the Giglio group, was putting into the American corporations the sum of over $25,000.

I ask you again, if these people were diverting and misappropriating assets from the American corporations, would they be doing that with one hand while they took it out with the other? That doesn't make sense, and I don't think that the Government will succeed in convincing you that this was a fraud, although they may try to confuse the issue by claiming that Giglio either did or didn't own a hundred per cent of Loraine.

Now you have heard a lot about one asset, namely, the American Agar plant, which was the research plant on Fairmont Avenue in Jersey City, the one into which so much money and labor and time and hope were poured.

This plant was valued on the books of the corporation
(3199)
at about $190,000. I don't have to tell you business men the difference between the value of a plant on the books of a corporation and its value when sold in liquidation or auction.

Mr. Wessel kept harping on the fact that the plant was sold for only $15,000, and I believe he hoped that you somehow would draw the inference that there was something

corrupt or unusual about that situation. It did not come out until the very closing moments of this trial, when we got back some papers from New Jersey which were filed in the receivership, that one man who bought this plant at auction in the receivership sale, had a chattel mortgage on the machinery of $34,000 to cover the balance of installation work which he had completed but for which he had not been paid.

So when it came time to sell the plant, the receiver could not sell it without paying off that chattel mortgage. The holder of the chattel mortgage, a Mr. Aster, first put in a bid for approximately $4,000, which was rejected, and then he increased the amount to $15,000, and it was accepted.

The machinery, therefore, cost him not $15,000, as Mr. Wessel kept stating, but $49,000, namely, the $15,000 in cash and the $34,000 mortgage.

(3200)

Selling machinery which has a book value of $190,000 at a forced sale for a total of $49,000 is not a mean achievement. If you have ever tried it, some of you may know.

Now when the corporation returns were filed in September 1947 an estimated loss carry-back form was also filed, telling the Government that these companies anticipated losses in 1947, which would be in excess of their 1946 profits.

The companies then were thrown into receivership by their creditors in December 1947, and the assets of the corporations, as you know, were sold by the receiver.

The receiver failed to file tax returns for the corporations which were in his control from December '47 to September '48. The corporations were finally discharged from receivership, and the only things remaining were the corporate books and records which the court ordered returned to the defendants. Instead, the Government stepped in and seized them.

That will appear from some letters produced by, I think, Mr. Hennessey.

Mr. Wolfram: No, Mr. Kohn.

Mr. Stryker: Mr. Kohn, the lawyer, that is right. The Government just seized them, and the defendants never

(3201)

have been given them to this day, except for the opportunity such as we have had to examine them.

Now when it became evident to the defendants that the '47 and '48 returns had not been filed by the receiver, they procured the necessary documents from the receivership, including the Nadel report Roth prepared, and Holzer filed the 1947 and 1948 tax returns.

You heard Mr. Holzer testify, from the actual documents, that the profit for 1946 was $267,000 as shown in these documents. Also testifying from the same documents, including Exhibit 89, which are in evidence in this court, he shows that in '47 the losses were $205,000, and in '48 the losses were $207,000, and taking the three-year period as a whole, the net loss for three years was $140,000. Therefore, no tax could have been due.

Now we have some things—we don't have much, we'll sweat and groan under the tax load, but there is here and there one or two little things that is given to the hard-pressed taxpayer, and that is the carry-back.

If you make money in one year and you lose money the next year and the next year, you can carry back and wipe out what you made. Of course I am referring at the moment to corporations.

Now there is no mystery at all in this case about the

(3202)

losses sustained by the American corporations. When sugar rationing ended these corporations were in trouble. Mr. Holzer testified without contradiction and without cross

examination, I might add, that these corporations, beginning with the month of February, 1947, never had more than $4,771.07 in their aggregate bank accounts at the end of any given month.

These corporations simply did not have the cash to pay their income tax for the previous year. From the month of February on, their books indicated that they were overdrawn in the bank every month, with the exception of the month of September, where they had a cash balance of $200,000.

Now I have been talking about cash balances. The picture is the same if you consider the matter of the corporations' net worth. Mind you, when I speak of net worth, I am talking in large part of such assets as plant and equipment which cannot be sold, and on which the corporations would have to take a big loss in order to convert them into liquid assets.

No better evidence is needed of what happens to a book asset than what happened in the Fairmont Avenue plant of Agar, which was carried on the books for $190,000, and which realized $49,000 in liquidation.

(3203)

The asset position of these companies, including assets which could not be liquidated from March '47 on, March is the month when these returns should have been filed, as Mr. Wessel constantly reminds you, was such that these taxes could not be paid, and he gave you a chart showing that. Now there is no mystery about these corporation losses. They are proven by the books of the corporations for the year '47; they have been proved by the final liquidation of the assets in the Jersey receivership: the business of these corporations ended when sugar rationing ended.

The assets they had were wiped out in the receivership.

To sum this picture up, there is no dispute whatever in this case that these corporations began to lose money at the beginning of 1947, that they continued to lose money throughout 1947, that they were forced into an involuntary receivership by creditors in New Jersey.

There is another feature of this case which I have not mentioned, and that is that the Government was notified of every step in the receivership proceeding, every one.

You have had the affidavits of notices and all that. I had the clerk produce the original papers here, you re-

(3204)

member. It was notified of every step. It filed a claim for taxes; it was notified of the sale of the assets; it did not protest or try to prevent the sale.

That is the undoubted, undisputed fact of record in this case.

By failing to file its claim, by failing to protest, the Government has agreed as effectively as anyone can do, that these assets could not have brought any more than the receiver got.

No one has suggested anything to the contrary.

Furthermore, when the New Jersey Chancery Court adjudicated that no taxes were due the Government because the American corporations were entitled to a loss carry-back which wiped out the 1946 profits, that was a determination which the Government neither protested nor appealed from.

I have told you several times that the Government, as far as I can see this case, was not at all interested in collecting taxes. They are interested, or someone connected with the Government is interested in one thing only, not in getting for the Treasury any money that may be due them, but in destroying the defendants.

Now, does that seem to you the spirit of our laws, the spirit of our tax laws? Have we come to a point where

(3205)

we have such bureaucracies that they can pick and choose and because of malice or any other reason select their victim and keep as wholesome as they can those whom they expect to use against that victim?

Have we come to that pass in America?

Now I must hurry on. There are probably, I should think from my notes, maybe a hundred points that I could implement and prove to you, but I certainly can't do it in the time, as generous as his Honor is in letting me go over, but I also have to think of your time.

Now let's take the consolidated return. All right. No one has conceded more completely than I have at the opening, and I definitely brought it out here from one of the witnesses, that the American Brands Corporation did not own 95 per cent of the affiliated companies. There is no doubt about it. That is a fact.

Now I have also shown that the Government sustained no loss by that, by this elaborate and boring undisputed computation that I have given you here.

Mr. Holzer did testify, I am reminded, that the result would have been the same from the Government point of view, and amplified it, whether the tax was filed by an affiliated return or by individual returns, and I have heard

(3206)

no one dispute that.

Now we are dealing here with fundamental rights, with intent of people. Let me show you the intent on that subject, all there is.

Well, in the first place, the stock books of the American Brands and the other companies were produced by the defendants, not here, but to the Government.

Those books definitely show, as I have said, American Brands did not at that time have on its stock ledger 95 per cent of the affiliated companies. There is no dispute about that.

Now let me show you another way of looking at this case, from the standpoint of justice and intent. If the defendants had even understood this carry-back proposition—I don't mean carry-back—consolidated proposition—and I don't know whether you are better than I am; I will make a confession that I didn't until I studied this case; I am a lawyer; I ought to know—but if they had known that, and they were these diabolic characters that the saints who have testified against them depict, would they have produced these stock books? Just ask yourselves that.

If they were involved in something that was wrong and that they knew was wrong, do you think they would come

(3207)

and bring those stock books right up to the Government, and hand it to them?

Now if they were the diabolic characters that the Government saints depict, you gentlemen deal with corporations, you can take it as a matter of your own knowledge as well as from the testimony of Mr. Holzer, that to effect a transfer on the stockbooks of the corporation would take a tiny bit of time.

So if they had been diabolic characters, with a criminal intent about this affiliated thing, well, it would have been simple to buy some new stock books and make the records in the stock books, whatever they were.

They didn't do it. I say that far from evidence of criminal intent and attempted fraud, when you analyze this picture you can turn it around and see that it proves the direct opposite.

Now, because there was a statute about that—and this American Brands didn't have 95 per cent of the stock—in the absence of some diabolic criminal motive or knowledge of willfulness, I am unable to believe that any jury of the United States would send people to jail on that.

Now maybe the time goes slowly for you but you ought to see how little that goes (indicating) when I have all these (3208)

things to work on. I have got to be brief because I am getting exhausted.

Livorsi—Livorsi—why, I have sat here through weeks of this trial and hardly heard his name mentioned. His name is mentioned in three counts in the indictment, only three. He is accused of filing a false return on his own behalf for the year '46. He is charged with concealing his own assets, and he is charged with a conspiracy along with the other defendants.

Now that conspiracy count—I won't have time to do much with it. There is such a thing in the law as a conspiracy, but a conspiracy count is a favored device of prosecutors. In it they take a rake and comb up any little shreds around and rake them into this charge and call it a conspiracy.

Now you have seen a real conspiracy, a real one, the real thing, when these rogues got together to lie about the destruction of Bercu's reports.

This isn't a conspiracy. This is a repetition of the charges that go before, almost verbatim.

Well, he is mentioned in that. I think the theme for Mr. Livorsi is given to us by Mr. Lubben. Although I hesitate, frankly, to base anything on anything he said, but here it is—"We can eliminate Mr. Livorsi"—this is his (3209)

language—"because he very seldom ever asked or said any-

thing about the business. He just asked, 'How is the business', that's all."

There is no evidence in this record that Mr. Livorsi ever did anything other than sign a return which Mr. Roth prepared and filed.

There is no evidence of any incriminating conversation or anything that Roth was able to think up to supply, to fit in with any document he chose. There wasn't any in his case.

Mr. Roth didn't even claim that Livorsi knew that his return was false, and indeed, the charge that Livorsi's return is false depends entirely upon a very finely spun theory concerning the distributive shares of the partners, which I had hoped to develop before you.

Now Mr. Roth didn't say that Livorsi did a single solitary thing in connection with anybody else's return or in connection with the American Brands return. As a matter of fact the only thing that the Government brought into court against Mr. Livorsi was the fact that he sold his house in September of 1946, and got $64,000 in cash in connection with the sale.

Now I want to call your attention in that connection to a bit of testimony adduced by Mr. Wessel from Mr. McCue, (3210)
the lawyer, I believe, who handled that.

"Now, Mr. McCue, did there come a time when the Livorsi estate was sold by Mr. Livorsi? A. There did, sir.

"Q. And did you represent him and his wife, I take it, in the sale of that estate? A. I did, sir.

"Q. Are there dower rights in New Jersey; is that the reason wives are included? A. Yes, sir."

Now, if you will take a look at the deed, itself—I don't remember the exhibit; I am too busy to find out—but you will find that she was not signing merely as a dower right.

but that she was part owner of the property, whether a larger amount than Livorsi, I don't know.

Now they take that circumstance, he sold the house, and they say he concealed his assets.

Now did you ever hear anything more ridiculous in your life than to base a charge of concealment on a transaction that is recorded in the County Clerk's office?

If anything is open for the inspection of the public it is the recording offices of the counties where the land lies.

(3211)

Did they pass private deeds or private notes that could be concealed? No. They put it right on the record, right there, where the whole world can see, and I say that what the whole world can see in Foley Square is not something that is concealed from the whole world.

Now the money—all right, so he wanted it in cash. Now does he go into a back alley and get some check casher or something and slip it to him at midnight? No. He goes straight to a reputable bank and has his transactions with the president of the bank. Is that concealment? Is a man who wants to conceal his transactions acting in that way? Is he providing himself with a witness of indisputable repute, a bank president?

I say the charge is fantastic as well as false.

Now, Lawn—I have got so much on that, although there is not really much. I have got to do the best I can with the running-time, and your Honor is generous enough not to stop me. I know I can't finish at a quarter to one, that is sure.

The Court: Don't try, Mr. Stryker. Go ahead.

Mr. Stryker: Thank you very much, sir; thank you. Now, let's get Howard Lawn and put him in a true perspective. In the first place, he is not charged with filing a single

(3212)

tax return of his own—not one, not a single one.

Nowhere in this case are Mr. Lawn's personal income tax returns involved. Nowhere in the indictment, which is a paper which sets forth the boundaries of the charge, is there an accusation that Lawn filed or aided and abetted in filing a false return.

Nowhere in the indictment or elsewhere is he charged with concealing assets of his own.

Now what is he charged with? I have got this in such detail that every word will interest you, I know, but I can't. One reason I am not worried about it is I think it is so plain to all of you.

Mr. Lawn is charged with this—that is what it gets down to—helping to conceal the assets—which was it—Giglio or—Giglio and the American corporations. Now, what does he do? Well, he gets—they are going to have a house transfer, and he gets a lawyer of undoubted repute, and by the way, all the lawyers involved out there are men of unquestioned standing. No one has disputed that.

He gets a lawyer who acts in the transfer of the property.

Your Honor, I am in a real quandary, and I want some

(3213)

help.

The Court: All right.

Mr. Stryker: I know how exhausted they all must be, and I, too, from this, and I just can't finish, and I won't be doing justice here if I don't let them have at least this Lawn picture.

Would it be all right, would you think it was all right if the jury—if your Honor decides that, let's say, we take a recess, where I could get a little rest, I mean for lunch, and come back and give me a few minutes more in this Lawn picture?

The Court: All right.

Well, Mr. Stryker, the only thing——

Mr. Stryker: I don't want to rob Mr. Wessel of any of his time.

The Court: I don't like to make Mr. Wessel start off without the jury being a little fresh, too. I mean it is awfully hard on him.

Mr. Stryker: I need a little time.

The Court: How much time do you think you need?

Mr. Stryker: Well, let's see—well, I should think I could do some kind of justice in twenty-five minutes, and stop there.

The Court: All right. You don't want to take it now?

(3214)

Mr. Stryker: I am perfectly willing if your Honor is.

The Court: If you are not, fine. If you could finish up now, we will stay here until ten after one, and then we will let Mr. Wessel start say at two-thirty or two-fifteen.

Mr. Stryker: Can we extend that a little bit by taking a five-minute recess?

The Court: Certainly. If you are tired, let me know.

Mr. Stryker: I really am tired, and I imagine the jury is.

The Court: All right. Let's take a recess now.

(Jury out. Short recess.)

(Jury in box.)

Mr. Stryker: Count 7 of the indictment, ladies and gentlemen, charges that Mr. Lawn, a former assistant United States attorney for the District of New Jersey, and in charge of the criminal branch there, and unimpeached by anything in this case, charge 7 of the indictment says that Mr. Lawn, along with Giglio and Roth, attempted to defeat and evade the payment of taxes owed by Giglio in that they did conceal the assets of William Giglio.

(3215)

Now, we sat and listened to the testimony, didn't we, here for about six weeks, until we are all exhausted, and the only thing that we heard about this particular charge is the fact—and it is a fact—that Howard Lawn suggested the name of Solomon Tepper, T-e-p-p-e-r, a reputable member of the New Jersey bar, as a lawyer to handle the transfer of Mr. Giglio's house to Mr. Roth in September 1947.

The only time that Mr. Lawn is mentioned in the conspiracy count is in some overt act, that he had a conversation with Mr. Tepper. That makes him a conspirator, so the Government would like to have you believe.

They don't even call Mr. Tepper to the stand.

Now let us assume—and I emphasize that it is only an assumption, not a fact—certainly not the fact—that Mr. Giglio intended to conceal his assets by transferring them openly and on the public records to Mr. Roth while he took back the $25,000 mortgage from Mr. Roth, which was also on record where everyone could see it.

Let us assume that this was a concealment of assets. What possible fraudulent purpose can the Government attribute to Howard Lawn merely because he suggested that Mr. Tepper, a friend of his, handle the transaction of selling the house. That is the full extent of Howard Lawn's

(3216)

alleged participation in this so-called concealment of assets.

All that Roth said is that Lawn was present when he and Giglio discussed the transfer of the house to Roth and that both recommended Tepper.

He added that Lawn didn't act in the capacity of an attorney.

Can you on the basis of such a showing, convict an unimpeached, distinguished graduate of Harvard and the

Harvard Law School, and a man accepted by the authorities: the United States authorities of New Jersey?

Can you convict a man on that kind of thing? Not if I am still living in America.

Can you convict him of concealing Giglio's assets? Concealing? Well, he goes—Giglio wants to transfer his house, so he gets him a good lawyer—Tepper.

Tepper handles the deal, and the transfer, the deed and the mortgage are all recorded in the open light of day in the County Clerk's office.

They are just as public, probably more public than as though they nailed them on the front door of the court house or a church, because when people are interested in real estate transfers that is where they go to find out who owns the property.

(3217)

Now I say to you, I say that not only does the evidence refute that point charged, but I say it is just that, a false charge. I not only deny it but on behalf of a man whom I have come to know, some of whose life is before you, the vice-president of his Temple, to try to strike down a man on that kind of thing I say is just a horrible, horrible thing.

Now, let me go on. Count 9—Mr. Lawn is charged with misappropriating, converting and diverting the assets of American Brands Corporation.

Since we have never been furnished with a bill of particulars of this charge, it is rather difficult for me to discuss it, but I will take everything that was said in the Government's case that could possibly, as far as I can see, relate to this charge, and show you that it does not come within light years of proving that Mr. Lawn was guilty of that charge.

Mr. Present testified that the net withdrawals by Lawn from the various American companies in '47, amounted to

ten thousand-odd dollars, and in the same period, 1947, the net withdrawals on behalf of Lawn International amounted to eighteen-odd thousand.

Mr. Present then went over this period and broke it up into smaller segments, and let us assume that what we are

(3218)

interested in on this question of concealment is what Lawn took out of the corporations, because that is the way the Government seems to be presenting this issue.

Now the most interesting feature of this charge, from my point of view, is that not a single one of these items were disallowed in the corporate return.

You look over the bill of particulars, which is a document in evidence, the same as the indictment. Not one, not a single item disallowed. Not any evidence about it in the case. That is not the Government's position as reflected in their own bill of particulars.

The Government says that the returns of American corporations were false in that these corporations filed a consolidated tax return whereas in truth and fact they were not entitled to file such a return.

The Government, in its indictments, as amplified by the limited bill, says that this is the only respect in which the corporate return was false.

That is all. Just the fact that the stock, 95 per cent, wasn't on the stock books.

I have discussed that, I think, enough. But the Government—let's see, Mr. Present when he testified here said that none of these items of withdrawals were disallowed in the

(3219)

corporate return; therefore, there is no charge in the indictment or the bill of particulars that any of these items of withdrawal were improper so far as the payment of taxes is concerned.

The only reason I am discussing it at all is because I don't want to miss discussing the evidence by which I assume that they are trying to make a charge that wasn't made in the indictment or the bill.

However, I am looking at it with you. Now the Government, as I get it, however, turns around and says, the mere fact that Lawn drew ten thousand-odd from the American corporations in '47 and that Lawn International drew eighteen thousand-odd from the American corporations the same year in some way concedes a diversion. Not even a suggestion in the record that any of this money withdrawn by Lawn or by Lawn International was drawn for improper purposes.

There is not even a suggestion in this record that any of this money was drawn in order to "misappropriate, convert and divert assets," of American Brands, which is the charge in count 9 of the indictment. It is a very odd circumstance, I think you will agree with me, that Mr. Present should testify to the moneys drawn by Lawn and Lawn International from the American corporations in '47, when the man

(3220)

who kept the books of these corporations and the man who had to be told where every dollar went to—I am referring to Roth, the accountant, who was on the stand here and testified for three full days on direct examination, and I fear just as long on cross—Roth did not specify a single item of this money drawn by Lawn in '47 from the American corporations which was misappropriated, converted or diverted by Lawn.

For that matter Roth, while he was on the stand, did not specify a single item of money drawn from the American corporations, by any of the defendants, which was misappropriated, converted or diverted.

Do you not suppose that if the money had in fact been misappropriated, converted or diverted, that Roth would not have said so? Do you not suppose that Roth would have told you what part of the moneys to Lawn or to any other defendants was misappropriated, converted or diverted?

Do you not suppose he would have told you that if he could have?

Be the fact, he did not, and all that is left on this record is that certain moneys were drawn out of the American corporations in '47 by Lawn and Lawn International.

(3221)

I hardly think that I need at this late stage, ladies and gentlemen, remind you that this is a criminal case where destruction is involved, where liberty is involved, and that the Government must convince you not by a preponderance of evidence, not by evidence like that, but beyond a reasonable doubt that these charges against these people are true.

Now, —oh, yes, now let's see, here are some additional facts: Lawn was not a partner in Eatsum. He was not a partner in Tavern. Lubben testified that Lawn told him of his terrific connections he had in the corn market. We got that in there from Lubben. What I neglected to tell you—I am trying so hard to hurry—is, I am now talking about this so-called conspiracy count. I should have said it. Lubben said that Lawn told him of his terrific connections in the corn market. Now just take that for a moment and look at it. You see there is a gentleman who occupied high office in New Jersey, in the United States Attorney's office, just as high an office as Mr. Wessel occupies here, so it is easy for Lawn to say, Well, he must have terrific connections—I mean for Lubben to say he must have terrific connections. That is an easy bit of perjury for a liar under oath as well skilled as he is.

(3222)

Now will you bear in mind, please, that when the Giglio group and the Lubben group parted company in the spring of '46, the Giglio group did not have a single corn deal after that. They never had before or after.

Lubben, who had started the corn deals in Eatsum, continued the corn deals in Reserve Trading, as you know, his own company.

In fact, the corn deal ceased so far as the Giglio group was concerned when Lubben left, and should put to rest forever Lubben's false contention that Lawn has terrific connection in the corn market—a typical Lubben.

Bear in mind, also, as I discuss this count, that the Government's case rests solely on the testimony of Roth and Lubben.

How tired you must be of hearing me say that. However, Mr. Wessel says to you that Lawn did this or Lawn did that—if, when he says that to you, whenever he says that to you, say to yourselves, Who said so? Did Lubben say that? Did Roth say that?

When he will talk to you about what was said and done, ask yourself who said it? Now, was it Roth, was it Lubben? Take the testimony of these two admitted perjurers out of the case and what have you? Ask yourself that question when you hear Mr. Wessel discussing the facts.

(3223)

Now, here is another Lubben. Lubben said that Lawn was present "to the best of my recollection"—what kind of evidence is that—"when Giglio discussed the formation of other companies because the profits of the corn syrup and candy business were becoming terrific."

Lubben said that Giglio intended to dissolve the companies before it came time to pay the income tax.

Now assuming that you give any credence to Lubben's pat story of a conversation which he said he had with Giglio,

are you going to put Lawn into the conversation because Lubben says "to the best of my recollection" Lawn was there, too?

Roth was the accountant. He did not say anything like that plan was ever intended, nor did he say anything like that ever happened.

Now take it from the viewpoint of what was not proven. Roth did not say that he discussed the Tavern information with Lawn. Please follow me on this.

Roth did not say that he discussed the Eatsum information return with Lawn or that Lawn had anything to do with the Giglio return.

Roth did not say that he discussed Livorsi's personal

(3224)

return with Lawn or that Lawn had anything to do with it.

Roth did not say that he discussed the American Brands consolidated return with Lawn or that Lawn had anything to do with that.

Roth did testify that after the American Brands consolidated return was filed, Lawn told him that Lawn International was not an affiliated corporation, should not be included.

Roth testified that he then filed a separate return for Lawn International.

When Mr. Present took the stand he said that including Lawn International in the figures presented to the Government, in connection with the consolidated return, was an "inadvertent error"—that is Present talking—on Roth's part.

It was more than an inadvertent error; it was just plain stupidity on Roth's part, just as it was, of course, plain stupidity on his part to file a consolidated return for these corporations when the same picture could have been presented in individual returns.

And by the way, do you remember Roth is the only signature that appears on that consolidated sheet—do you remember that—Giglio signed the return—Roth is the only

(3225)

signature on that paper, and you remember how—this is a digression—how, when he said well, of course, he wasn't signing it, he saw the others weren't signed, of course his address was there, so he thought he would make up a nice story, however perjurial, he didn't sign returns that he thought were wrong.

Then I showed him this particular thing, this consolidation return, and then I think his answer was, that was an error.

All right, I will go back. It is very short now, I hope. Mr. Wessel has tried to make much of the fact that Lawn is supposed to have told Roth that he wanted to furnish Dun and Bradstreet with a favorable financial report of the combined corporations, and he did so in order to establish a good rating for the corporations.

In view of Mr. Roth's other testimony you, yourselves, can judge whether this conversation ever took place.

But if it ever did, it had no relation to the filing of false corporate returns or anything else in this case.

Roth stated that Lawn was instrumental in organizing these corporations in January '46 in anticipation that this process of substitute sugar would be effected.

(3226)

At that time Lawn is supposed to have said to Roth, "The only time that I know that we will be successful is when the Department of Justice prosecutes us for the Sherman Law."

That little piece of atmosphere is completely irrelevant to this charge, which is that Mr. Lawn conspired with these other defendants to do certain things, to defraud the Government of its taxes.

Roth testified that he filed form 1138 to extend the time of payment of corporation taxes on the ground they expected carry-backs. This was filed a short time after the American Brands tax return. It was signed by Mr. Giglio and Mr. Lawn. It is Exhibit 90 in evidence.

We have not only proved that the losses of these corporations equal the amount set forth in the document, namely, $350,000, but we have established from the evidence that the losses of these corporations exceeded $350,000, which brings me to Lawn's participation in the receivership proceeding.

Roth testified that Walter Kohn was employed through Lawn to represent the corporations in the receivership proceeding. Lawn, he said, attended a meeting at Kohn's office and Roth explained at that meeting the entire amount of the loans that he, Roth, had received from American

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corporations, were, in fact, chargeable to Giglio.

Roth also explained that the ledger sheets of Loraine Corporation showed that the money American Brands had received from Loraine was to be applied as money received for the account of William Giglio.

Roth then described a conversation which was supposed to represent the theory of the defense in the receivership, namely, that loans receivable that were due from the officers would be offset by the moneys that came into the corporation by either cash or merchandise from Loraine Food and Eatsum Food.

Now let us assume for a moment that Roth's testimony to Kohn was false. We submit it was. Let us assume Roth was passing on false information to Kohn.

Let us assume there was something wrong with the theory of this defense.

There is nothing whatever wrong with it as I shall demonstrate in a moment, but let us assume for the moment there was something wrong.

There is no proof in this record that Howard Lawn knew that Giglio was not a hundred per cent owner of Loraine. There is no proof that Howard Lawn knew anything about the ledger sheets which Mr. Roth claims were altered to show that an obligation to Loraine was charged

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over to an obligation to Giglio.

Of course, of course, there are still little darts of poison put in to injure, one prejudicial item after another.

Gentlemen, there is this case. One last word with you. I have done all I knew how. I wish I had done better, to hold this trust, the liberties of three of your and mine, my and Mr. Wessel's fellow Americans.

I hope I haven't tired you too much. I hope I have done nothing that meets with your disapproval, because I think that this is a case that goes right down to the bedrock of our institutions.

This is no case for the Internal Revenue agents to decide. This is a case for an American jury to make up its mind about, and when the time comes, ladies and gentlemen—you know, there are lots of people that want to amend the Constitution, to do away with juries. A lot of people would like to have the kind of thing they have in Russia, the kangaroo courts of Nazi Germany, but here we have juries—you, you are the sole and exclusive judges of the facts in this case.

Now, when you get through with this case I hope you will all have many happy years, but one way of having a

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happy life is having a conscience that doesn't trouble you, and I submit in all candor and in all truth to you that if

any juror—I hope there isn't even one—were to vote "Guilty," if in his conscience before God Almighty, who in my belief is watching this trial, voted that way, I wish you all nothing but luck, and I don't believe you will sleep well the rest of your lives.

Now, I don't know, my poor words are about too poor. I feel this case with all my heart and soul. How I feel about it is not evidence.

I just want you to know of the feelings that I have for these people. When I think of that fine fellow over there, a former assistant United States attorney, and these other two gentlemen whom I have shown—I have shown are not guilty of these charges—and when you come to think of destroying three people on the testimony of perjurers, I don't believe it can happen—that is all—and so I end with you with a word or two—I thought about it as I heard those bells—of David, the Psalmist of Israel:

Fight, O Lord, against those who fight me; war against those who war upon me; let those be put to shame and disgrace who seek my life; let those be turned back and confounded who brought evil against me; let them be like

(3230)

chaff before the wind, with the Angels of the Lord driving them on, for without cause they have set their snare for me, without cause they dug a pit against my life, unjust witnesses have risen up, things I knew not of they laid to my charge, they pull at me without ceasing, they put me to the test, they mocked me, gnashing their teeth at me, O Lord, how long will Thou look on? Do me justice because You are just, O Lord, my God; let them not rejoice over me; let them not say in their hearts, ahah, this is what we wanted, let them not say we have swallowed them up.

Ladies and gentlemen—ladies and gentlemen—you are carrying on the sacred traditions of this country that we

all love with a passionate fervor. You are carrying on the spirit of the boys at Boston who got so fed up with taxation that they threw the tea into the ocean, and then took up their pitchforks at Concord Bridge, and then wrote the Constitution with a Bill of Rights. All those things are involved here.

You may never have another opportunity just like this one again. We all have high points in our lives. This is one, and I am appealing to you with my heart and my soul. I have tried to appeal to your intelligences by giving you in the limited time as much of these facts as I could.

(3231)

I am not ashamed to appeal to your hearts, not a bit. Liberty—will you strike these men down on this testimony, in this favored country? Will an American jury do that? Not if I understand the people of whom you are the fine representatives.

If people may be destroyed by that, then there isn't any very sure liberty for any of us, your husbands or your brothers, or any of us, and so I say to you, at long last, liberty, freedom, long may this land be bright with freedom's holy light, protect us by Thy might, great God, our King.

The Court: Mr. Foreman, Ladies and gentlemen of the jury, I will ask you to return, if you will, by two-thirty. I caution you now—I have more or less perfunctorily told you not to discuss the case, as you recessed each time—it is very important now as counsel start to sum up and you begin to think about how the facts all play together, that you not discuss the case with anyone, particularly one of your fellow jurors; if you go to lunch with another juror, thoughts until it is finally submitted to you, and then you can all discuss it together. All right, we will return here at two-thirty.

(Recess until 2.30 p.m.) (3232)

The Court: All right, Mr. Wessel.

Mr. Wessel: May it please the Court, Mr. Stryker, Mr. Foreman, Members of the Jury:

Although I had not originally intended to start out this way, so bitter has been the attack upon the Government table that I am going to take out Exhibit 154, which comes at a much later point than what I originally planned to do today, and show you how, out of the mouths of these men themselves, without a single witness on the stand, without a single document prepared by anybody but themselves, and signed by them, they convicted themselves.

Exhibit 154—this is taken exactly unchanged from the tax returns for 1946 filed and signed by Giglio and Livorsi, nobody else. There hasn't been a single change by a socalled Government agent or attorney. There hasn't been any conspiracy on the part of any Government agents or attorneys to modify something. It's just taken from their own tax returns.

They showed a total tax liability for one year, by their own admissions, of $573,000, and they paid the United States Government $16,000. There is no question about

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that, ladies and gentlemen.

I hope when you retire to the jury room you will take with you the tax returns of these individuals and the corporation that they signed. Don't worry about any testimony or anything else; take their own tax returns as they signed them, and just compare the figures with this exhibit which you can also take with you, or call for at any time, and you will see that there is nothing modified about this; there has been no conspiracy between Bercu and Lubben and Roth or me or anybody else. This is strictly what they said, and they paid the Government $16,000. They didn't pay it when they filed the returns, they paid it on estimates, and I will talk about that later.

When Mr. Stryker said to you that we are worrying about $40,000 in Eatsum or $30,000 in Tavern, that just wasn't so. This involves $850,000 in taxes, but it involves it in such a way that you can't just say, here it is undisclosed income; here it is this, here it is that; it's all over the place.

You have got a conspiracy here, and that is the meat of this case, a conspiracy case. It is not the counts that Mr. Stryker has been talking about. He did not talk about

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the conspiracy case and he had a very good reason for not doing so; he couldn't because these men's own words, without witnesses, their own words convict them of conspiracy, and that is the heart of this case.

What the American Brands Corporations were formed to do and what they accomplished in 1947 and 1948 and up to the date the indictment was filed is precisely what this case is about.

Now it is true there is a cash box in Eatsum; it is true there is undisclosed inventory in Tavern, and a lot of other things, but the heart of this case is fixing, it is bribery, it is a dozen other kinds of things I am going to come to in the course of what I hope will be as short a summation as possible.

I would like to leave this just sitting in front of you during the course of my summation, because I think that that one exhibit speaks for itself.

I vouch for Lubben. The Government put Lubben on the stand because it thought that Lubben could be vouched for.

I vouch for Roth also. There is no question about

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what they did back in 1946. You can't convict people who were engaging in crimes like these men did out of the

mouths of angels. You have to convict them from their own partners, from the people who were doing the things with them.

What kind of people do you get? You get William Goldenberg with two previous convictions. We had to put him on the stand. You have no choice about it.

You get Louis Roth with a dozen different violations.

You get Lubben who is in the black market. You can't help that, you have to.

Who else do you put on the witness stand? You can't go out and get a judge and put him on the witness stand. He doesn't know anything about it. If he did he wouldn't be a judge.

I vouch for them (and I will explain precisely why I do in just a moment, but I vouch for them. When I say "I," I am referring to the District Attorney's office, and I merely represent them. We vouch for them because we think they are telling the truth.

During the course of the direct testimony of Mr. Roth and Mr. Lubben and Mr. Goldenberg I brought out, I think,

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every crime they committed. I didn't hide anything from you. I brought it out in my first questions of Mr. Goldenberg with "Have you ever been convicted of a crime?"

He said, "One."

I said, "Wasn't there a second?"

On Mr. Roth, I think I brought out 15 or 20 different crimes. He is under indictment now for a lot. He has pleaded guilty to ten, I believe, but he has admitted about ten more here. He can go to jail for 200 years. I brought those out because I felt the jury was entitled to know exactly what kind of a person he was. Is he telling the truth now or isn't he telling the truth now.

Lubben similarly. He lied in College Town, there is no question about that. That was brought out, I know, on my direct examination. I didn't try and hide it from the jury.

I don't think there was anything that was wilfully withheld from you in an attempt to make you believe that this person was a guiding star.

Let's turn to Lubben for a moment. I want to come to the evidence, because, after all, that is what we are talking about in this case. Are these men guilty or are they not (3237)

guilty? It isn't a question of whether we at the Government table are guilty or not, and it isn't a question of whether Lubben is guilty or not. It isn't a question of whether Roth is guilty or not. He has admitted it; he has pleaded guilty, and that is not before you. The only question before you is the guilt of these defendants.

I am going to refer to Lubben and Roth for a few moments only because upon their testimony in part you will predicate whatever decision you finally come to.

Now, Lubben: I want to read from the record, because it's been a long trial, six weeks now, and my paraphrasing may be inaccurate. I am sure you will want to hear some of the things I do read from it.

There were several times during Lubben's testimony when the inner man came out. That inner man was a person who, up until August 22 or about August 14, 1950, was a perjurer and a black marketeer and practically anything else you want to talk about, though I don't know of any income tax violation that he was guilty of. I don't think it makes any difference. I just don't know any. He (3238)

certainly did not admit any. He certainly admitted many other crimes on August 22, 1950; as he said himself on this witness stand, it just didn't make any difference any more.

He was under the public glare of the klieg lights down in Washington, in the Kefauver Committee, and from then on it just wasn't anything else; there wasn't any reason to lie any more. He just figured, "Well, I will go ahead and I will tell the truth now. There is nothing else to do about it."

Well, he was attacked, as you recall, for many days here, and most bitterly, and here are some of the things he said when finally the pressure got too great.

Question by Mr. Stryker:

> "Q. Now have you lied in this court because of fear? A. I have told the truth, sir, to the best of my ability.
>
> "Q. You have told the truth? A. I have been in the black market, sir. I have told the truth. I testified in the Kefauver quizzing. I have paid my sentence, and I am going to get it finished."
>
> (3239)

I am not repeating it in quite the tone that he did. I don't think I can.

Again a sarcastic question:

> "Q. When you tell a lie it is not perjury? A. No, sir. I went out there, went home, went to my priest, I confessed my sin. I am sorry for it."

I won't read all of them. There isn't too much time, but there is one that I do want to read. The examination at this point was about Lubben having gotten off scot-free, and, incidentally, when you think Lubben got off scot-free, don't be so sure about that.

Mr. Present testified that his returns back to 1940 were under examination. Well, that is one question.

But more than that, he testified, as he said in great detail here, in the Shotwell case. He testified in the Welleck case. He testified in a dozen other places, and he was subjected to exactly the same kind of thing he was subjected to in this court.

I ask you whether any of you wouldn't prefer to go to jail for six months rather than go through that 10 times

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or 20 times?

But here is the question by Mr. Stryker:

"Q. Even at the start, during the period of your uncooperation, you weren't afraid of a prosecution for your own returns; is that right? A. I can't explain——

"Q. Mr. Lubben, pardon me a minute. I don't want to interrupt you. Isn't my question clear? If it isn't, tell me and I will try to make it clearer. A. Well, sir, you ask a question and I open my mouth. I said two words and you say, 'Isn't my question clear?' You don't even give me a chance to answer. I am trying to tell the truth. If I have to go to jail, if I have done something wrong, I will go to jail. And I won't be in here trying to bull out of it, I will go. I have had for ten years I have had this stuff, sir. It's getting just too much for me.

"Q. Are you telling the truth in the same way that you told the truth in the College Town case? A. I told you, sir, I lied in the College Town Candy Company. I told the attorney I lied. I told my

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priest I lied. God knows I lied. What more do you want, blood?

"Q. No, I would like the truth. A. Yes, sir, you are getting it.

"Q. I don't care about your blood. A. You don't want the truth. Pardon me, sir, I didn't mean to say that. Excuse me."

That was Lubben on this witness stand, and I want the words to sink in, because he took an awful beating here and I think he told the truth.

Now Roth: There has been a good deal of suggestion that Roth was threatened with a jail sentence; that he testified here and lied deliberately in order to get whatever he could possibly get by way of my recommendation.

I would like to read you part of what he said. He was questioned about promises that I might have made to him, and what the arrangement was:

"Mr. Wessel said to me, at the same time directing his remarks to Mr. Rosenblum (his attorney), 'You have an opportunity to withdraw your plea and I will not use in court for prosecuting you anything that the Government has learned,' or that I may have told the Government since the time that I (3242) pleaded guilty.

"Now I am talking about a conversation that existed around January 3rd or 4th, 1955.

"Q. All right, go ahead. A. This is the conversation:

"'If you do become a Government witnes the only thing that I could do for you is solely a hundred per cent in my judgment as at the time of sentence to present to the Court the exte[illegible] of your co pera-

tion. We are not permitted by law to make recommendation to the Judge. The final determination rests with the judge.' That is the only—if you want to call that an arrangement or understanding, that is what happened, sir.

"We adjourned, my counsel and I, and for about three or four hours' discussion, and about two or three in the afternoon, by an appointment that Mr. Rosenblum made with Mr. Wessel, I told him that I chose not to withdraw my plea, but to continue the cooperation that I commenced back in 1952 with Judge Pecora."

A little further on:

"Mr. Wessel told me, incidentally, on January (3243)
4, 1955, that the reason that he waited so long because regardless whether I would or would not become a Government witness he was ready to go ahead with the trial and prosecute me, if I chose at that time to withdraw my plea he was all ready to go ahead. It was my choice at that time.

"Again, Mr. Bauman, the chief of the Criminal Division of the United States Attorney's office, said to me, at an earlier time, if the Government accepts my cooperation, the only thing I can hope for is at the time of sentence a presentation of the facts of cooperation and to what extent I cooperated will be presented to the judge. They are not empowered to make a recommendation."

And finally, at the end, the Court asked a few questions of Mr. Roth:

"Q. Mr. Roth, do you think that Mr. Wessel's recital to the Court on sentence would be more favorable if he ever finds out that you lied to hurt any of these defendants?

"The Witness: Oh, the opposite. I think it would be, I would incur his enmity, if one could use it.

"The Court: Do you think that the Court's (3244)
sentence would be more favorable if the Court ever finds out?

"The Witness: That I lied?

"The Court: Yes.

"The Witness: I think it would be double or triple what may have been in the Court's mind.

"The Court: Thinking back with that in mind, is there any of your testimony whatsoever that you want to change?

"The Witness: None whatsoever, except possibly dates, you know, recollection of dates.

"The Court: All right.

"The Witness: But as far as facts and circumstances, none."

Now, that is Roth and Lubben. And the Government has been charged here—and this is the defendants—the defendants in this case are charging the Government with conspiring to fabricate evidence. We have been charged, the agents, myself, have been charged deliberately—and there is no question about this—with having gotten Roth, Lubben, Bercu and Weinert together and fabricated a story.

Now that means we had to take four persons and put them on the witness stand and have them all get together

(3245)

and say something about some documents having been destroyed.

Weinert was passed over very lightly. Weinert was one of those four. He was the man in the bathroom with Mr. Roth when these documents were torn up.

Now I am going to come back to this question of destruction of documents in a little while. Actually, it is a very, very minor part of the Government's case. When the case opened, I should say, I don't think I even mentioned it. If I did, I did it only in passing. It's become a rather major cause celebre because of the attack made upon the Government.

When I say the "Government," I should say just people at this table, because we are not the Government, and the judge isn't the Government, and you are not the Government. Combined we make up the Government, but because of that attack I have been forced to explain and show what it is that happened in Bercu's office.

And now if I can get down to the issues of this case, because—and I am coming back to Bercu—the issue in this case is whether or not these defendants are guilty, first, of

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the conspiracy to defraud the Government, to violate the tax laws, and, second of all, of a number of what are called substantive counts: the first nine counts.

It breaks down into two different kinds of activity. There is what I think you might call the crude fraud stage, and then there is the clever fraud stage.

Now, the crude fraud stage is the Eatsum and the Tavern business, $140,000 in the cash box. Well, that is pretty crude. A Government agent, even if he is not very

bright, or a Government agent who is not very bright knows there is something wrong with having $140,000 in a cash box.

One witness, I know, testified that the money was so—there was so much money in that cash box, they had to take the coin tray out and throw it away; it was overflowing.

Anybody who finds out about that knows there must be something wrong; it's got to be black market money, and it's got to be tax evasion money. That is crude.

This distribution of partnership income in Eatsum, that is crude.

(3247)

The Tavern business is crude. A little later came the corporations, which took over the partnerships, and I will explain how that worked out, too, and that is where you get the clever fraud; and that is where Howard Lawn first comes into this, in a real sense. That is how Howard Lawn, who Mr. Stryker says has no great part in this case, that is how Howard Lawn fits into this case, and that is why it took the Government ten years to break it.

There has been about 500 pages of testimony with regard to this receivership. It's as complicated an affair as you could possibly want to find. I think I will be able to explain the fraud in it very simply. You can see it, after all, but to show exactly what happened would take not only this afternoon but tomorrow and the next day. I am not going to try. I am not sure—well, I wouldn't try to do it.

But the fraud and the receivership I can show you when I show the Loraine books with the doctored names in it. You will see that. There is no question about the handwriting; there is no question about the change from accounts receivable to loan from William Giglio, that is there. Well, that is all Howard Lawn.

(3248)

Now I said, when we first started, six weeks ago almost, that preliminarily the question before you is one of criminal intent, consolidations and undisclosed inventory, undisclosed sales, and things like that can be perfectly proper. We all have made mistakes. I have made mistakes in my tax returns. We have all made mistakes, and will undoubtedly continue to do so.

The question is whether, when a mistake—well, not a mistake, but when an error is there, whether that error is a mistake or, in fact, results from an intention to wilfully defraud, whether it is done knowingly, wilfully and fraudulently. That is the question before you.

Now this crude fraud back in 1945, when it started in Eatsum and Tavern, and continuing on until the partnerships ended in 1946, this crude fraud—you can easily see the intent there. You can see intent when you have $140,000 in cash. There has got to be intent. Everybody knows he has got it. He has got to do something with it. If he doesn't put it down in the tax return, there is bound to be tax evasion.

When you get into corporations however, and things

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shifting around from one company to another, and receiverships and so on, then proving intent becomes difficult.

Howard Lawn's part was, first, as I say, to create this very clever operation, and, second of all, to be sure that the necessary criminal intent could never be proved by the Government.

Now he was chief of the Criminal Division of the United States Attorney's office; unlike what Mr. Stryker said, had a much higher position than I have, and, I am sure, knew a great deal more about criminal intent and the necessary elements of proof in a criminal case than I do. He knew what the Government would have to do in order to show that something was done wilfully, knowingly and

fraudulently. In fact, he even discussed criminal intent in so many words.

I want to read that part of the transcript. "There were a number of"—this is Roth speaking—"There were a number of conversations with Howard Lawn regarding criminal intent, and the word 'intent,' that the main part of a criminal case is if the Government cannot prove intent or criminal intent, and that is what we have got to work around in order not to show intent, then the Government's

(3250)

claims on all these matters will fall."

Well, it is true. It's a tough job showing criminal intent on a corporate consolidation; it's a very difficult job. And if we didn't have lots and lots of evidence, which I will come to on consolidations, you probably wouldn't find intent there. That is the kind of mistake a business man can make, sure, and especially a business man who is not an accountant or doesn't have some legal background.

I will show you where the intent is in the consolidation, and it is very clear. But these words of Howard Lawn as to what intent means are the key to his being in the conspiracy.

He got a lot of money out of this. In the beginning, before the corporations got really active, he was getting $250 to $350 a week from Tavern. You haven't heard of him doing anything in any great business sense, nor representing anybody in a legal sense very seriously. He must have been doing something to get that.

You heard about his $15,000 legal fee from Tavern. That is in addition to this $250 to $350, and Tavern partnership didn't even last very long.

In the corporations, he got a quarter interest in Amer-

(3251)

ican Agar, into which they had poured a couple of hundred thousand dollars. That is quite a bit of change.

He had drawings, he had Lawn International, he had lots and lots of interests there. There must have been something that he was doing to get that.

Well, what did Giglio say about that? Now, this isn't Roth, this is Lubben talking:

> "Well, when I was introduced to Mr. Lawn he had his office down there."

I should say that Mr. Lawn had an office at 19 Rector Street, those Hollywood offices, right next to Mr. Giglio's.

> "Mr. Giglio told me that he was a former United States District Attorney, and that he had a terrific entree with some of the highest Government offices and that he was a part of the organization, and that he felt that Mr. Lawn was there to prevent any trouble."

Well, I will continue the answer:

> "He said that it was much better to consult someone before you did anything than after, because they would keep you; that there wouldn't be repercus-

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> sions, and Mr. Lawn would be in Mr. Giglio's office quite frequently, but not all the time, sir, when I would go into discussions with Mr. Giglio."

Throughout—I won't read all the references, but throughout the testimony of the several witnesses, and primarily Lubben and Roth on these subjects, because nobody else was around to tell us what happened in this partnership.

We got two of the partners. Well, one of the partners and the accountant who was there. The others, men like Goldenberg, well, they did not know.

For example, Howard Lawn brought in the firm of Rabkin & Johnson, one of the outstanding tax firms in the city, to give advice. During the course of Rabkin & Johnson being there, there were discussions about whether or not things such as obtaining extensions could be criminal, and at one point Mr. Roth testified that Rabkin said that getting an extension isn't criminal by itself, but if it is done with the intent to evade taxes, then it is criminal.

James A. Ronayne was brought in. Mr. Ronayne was

(3253)

originally brought in by Mr. Giglio, so Mr. Roth testified, because he was the squad leader at 253 Broadway, the terror of tax evaders, were the words used by Mr. Lubben; 253 Broadway is where the United States Treasury Department special agents make their home. They operate out of there. And, as Mr. Lubben said, "They are the terror" —quotes—"of tax evaders."

Mr. Ronayne was a squad chief over there. In particular, at the time he was hired, in the middle of 1945, he was the squad chief over one Coyle—this is all in the record—and Coyle at that time was investigating part of these operations.

So it is a pretty clever idea to go out and hire the squad chief, and they used Ronayne from then on.

Now people who hire James A. Ronayne, a man who knows tax law, who is a lawyer, who is an accountant, who has an inside into the Treasury Department special agents, who hire top tax authorities like Rabkin, an accountant, not like Roth, not alone like Roth, but like Portner, who was brought in too in 1947, when they have people like that around, they know what they are doing, they know

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precisely what they are doing.

Howard Lawn alone was enough to know, but now when you add all these other persons in giving advice at all times, you can be pretty sure that they knew exactly what the legal consequences in a criminal sense were of their activities, and, turning back to Exhibit 154, they knew the legal consequences of filing returns showing $573,000 owed, paying $16,000, and at the very time that they did that, Giglio was concealing his estate through Roth, Livorsi was getting $64,000-odd in cash money in a bank over in Jersey, they were getting rid of Van Dyk, they were doing a number of things that I am going to come to when I discuss concealment. It isn't just a mistake, there are so many items in this concealment count that you will see, and I will take out the checks and show them to you, that they must have known that they were violating the laws.

In fact, as I recall it, Ronayne said, when he was told that Giglio had concealed his estate through Roth, he said—and Ronayne was a special agent, or, at least, had been a special agent, and knew exactly the problem of a special agent in investigating a case like this—Ronayne said—this (3255) is Roth talking:

> "He told me I made a very grave error, because that is positively a concealment, and if I ever get into trouble I will be a conspirator to a concealment, but he says, 'Well, let's hope nothing is going to happen. It's done now, and you can't undo it.' "

I am going to come shorty to the organization of the corporations in Jersey and all the things that happened with the corporations, but a little more about criminal intent, because that really is your main function here.

It's been admitted, conceded that the consolidation was improper, and there is no question about that in this case.

All you must find, for example, on consolidation is, was it done wilfully and knowingly with intent to evade and defeat taxes.

Now, fixing, bribery—and, as I recall it, Mr. Stryker said in his summation that Lubben bribed, but that his clients had never been guilty of anything like that.

When Mr. Roth first came in to Giglio, hoping to get a good account, the very first thing Giglio said to him was,

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"Can you get it? Can you reach Harry Pfeffer in the OPA?"

Now, Roth wasn't successful, as I recall his testimony. That isn't very important. But the very first thing was, "Can you reach him?" And from that point on—and that is one of the first things that happened in this case, that is, in the evidence before the jury—from that point on you have got a story of fixing and attempted fixing that is unparalleled, so far as I know, in a tax case.

Now, for example, Mr. Stryker, in his summation just a short time ago, made reference to the fact that shortly after Mr. Roth was downstairs in the United States District Attorney's office, in this building, a very short time after that, Mr. Giglio said to him, "I understand you have been over to the District Attorney's office."

Well, I don't know of anything more confidential to a law enforcement agent or attorney that the witnesses he is talking to, what's said. How Giglio got that information I have no idea. It certainly isn't in this record, in any event.

Giglio did say to Lubben, and in the presence of Lubben

(3257)

and Roth, and Ronayne, incidentally, that he knew about everything that was going on at 253 Broadway.

If you recall, it was Mr. Ronayne who told Roth, "Don't file the tax returns in the Second District downtown where you have been filing your estimates; file them uptown."

Well, now, why Mr. Ronayne wanted that done is a little difficult to imagine. The offices were down at 19 Rector Street. That is the place you should file from. They had filed their estimates and their tentative returns in the Second District. I don't say there is anything illegal about filing in the wrong district, there isn't but when you file in the wrong district for a purpose, for a reason, for a motive which is unlawful, you clearly are acting unlawfully in connection with a conspiracy.

There is no evidence as to why Ronayne wanted the returns filed in another district, but I can leave it to your imagination.

Roth, of course, couldn't testify as to what was in Ronayne's mind. You will recall, incidentally, Mr. Roth testifying as to Ronayne's having said that he couldn't get

(3258)

rid of Jim Twohig. Well, thank God he didn't get rid of Jim Twohig. He didn't, and Jim Twohig is still here. Ronayne's attempts to get him transferred out of 253 Broadway to some other district, however, are in evidence.

Mr. Lawn's connection with the United States Attorney's office over in Jersey, that is a particularly interesting section of the testimony.

I am referring to all this on intent. It has to do with other subjects, also; this particular bit of testimony I want to read to you deals with the $15,000 legal fee that Howard Lawn got from Tavern.

I will refer to that now in connection with Tavern, because I want to read this bit of testimony to show intent. It deals with both the question of intent and the question of whether or not that legal fee was properly a loan.

You will recall the testimony, and the checks, about Howard Lawn having gotten the $15,000 legal fee from

the Tavern Fruit Juice Company. I hold in my hand Exhibit 61A, which is the check signed by Frank Livorsi to Howard Lawn, and endorsed by Howard Lawn.

(3259)

Now, I should say at this point—and every other time that I refer to a document—that this isn't, as counsel would say, the testimony of Lubben or Roth, this is a piece of paper. There is nothing there's been no question about the authenticity of this piece of paper or anything else about it. It is perfectly proper evidence before the jury, and I might say that while it is true that a good bit of the testimony that relates to the earlier period, that is, Eatsum and Tavern, comes from Lubben and Roth, there is a large volume of evidence of a documentary nature which is unimputed and cannot be questioned in any way, so that even if you have some questions about Lubben and Roth because of their background, you can't deny the documents. They do speak for themselves.

Now here is a piece of paper, Exhibit 61A, a check signed by Frank Livorsi, the signature unquestioned, to Howard Lawn, endorsed by Howard Lawn, $15,000 check, dated November 7, 1945.

That was kept on the books of the Tavern Company until after the close of Tavern's fiscal year of operations as a legal expense, and here is another piece of paper, also perfectly proper, legitimate evidence, not the testimony of

(3260)

anybody, a piece of paper that lists legal fees, $16,600. The tax return filed soon thereafter lists legal fees, $1,600; loans receivable, $15,000.

Sometime between the date of this piece of paper, Exhibit 58A, which is an income statement of Tavern, and this piece of paper, the tax return, there was a change in the books. The legal fee was changed around into a loan. Well, now, what's the effect of that?

As far as Tavern is concerned, of course, it is beneficial taxwise to Tavern because it means that it has a $15,000 greater reduction, but as you recall, Tavern wasn't going to pay any tax anyway, so what difference does that make? Tavern is a partnership. It is not going to pay any tax. The partners, Livorsi and Giglio, were not going to pay any tax either, as this exhibit shows, so it did not make any difference to Tavern and the partners in Tavern how this $15,000 was carried, but it made quite a difference to Howard Lawn, because if $15,000 was a legal fee it meant it was income to him, and if the $15,000 was a loan, it wasn't income to him.

So—and this is the evidence in the record—at about (3261)

the time he was preparing his personal return, this shift came, from legal fee to loan. Now that is the background of what I want to read.

Roth was called to testify in New Jersey about this problem, and this is one of the meetings in the Pennsylvania Station that were referred to. This is Roth talking, and I think I had better read his testimony rather than try to paraphrase it:

> "I received a subpoena to testify in New Jersey regarding Mr. Lawn and I got in touch with Mr. Giglio and I told him I was served a subpoena to testify. We made an appointment to meet at the Pennsylvania Station, which was a very usual meeting place between Mr. Giglio and myself and Mr. Lawn, about two or three days prior to the time that I was to testify there. And Mr. Lawn told me that 'They are going to ask you questions at the grand jury regarding my personal income tax and the item of $15,000.' He wanted to know what I remember about it. I told him that on the books

it was originally indicated as an expense. Then it was changed around into income.

Q. It was changed around into income? A. No, it was changed from an expense of the partnership

(3262)

to a loans receivable due from Mr. Lawn, and the manner in which I explained it to him he told me is incorrect, that is not the way that happened. He was very vehement about it. We had a very vigorous argument or discussion. Mr. Giglio was with him."

Now this is the part I was coming to:

"And while I do not consider it a threat, but we were at the 31st Street exit of the station, up against the arcade, and he grabbed a hold of my arm vigorously and said that I am all wrong, and that the manner in which I am explaining it to him will positively put him in jail.

"I said, 'Well, that is the way it happened.' That was the end of the conversation.

"Q. Did you have any further discussion with Mr. Lawn on that subject after you testified? A. There was some additional discussion at that particular time because he told me that Mr. Richmond, the then United States Attorney, is going to be the one that is going to ask me questions before the grand jury, and not to be concerned about it because he was very friendly with him.

(3263)

"About a day or two after I testified before the grand jury I met Mr. Lawn. He asked me what I testified to. I says, 'I just want to forget the whole thing.'

"He says, 'It doesn't make any difference because Mr. Richmond is a friend of mine. I will know what was done and what was said.'"

Now if that doesn't show criminal intent, I don't think anything does. Yes, I will dwell on this a little because I think this is the key to the whole case—criminal intent. It is in any criminal case, of course.

As counsel has told you, there is nothing wrong, in filing a tax return, if you make a mistake, and I don't think any Government agent, official or otherwise who tried to attack somebody for making that kind of mistake would last very long in office. It is whether or not the act is done with the intention to commit a crime.

You will recall some testimony about a conversation Mr. Roth had with Mr. Lawn about the informations which had been filed back in 1950, and Mr. Lawn referred to a conversation he had with T. Lamarr Caudle, who at that time was—I don't think the record identifies him—but in

(3264)

any event, a conversation with T. Lamarr Caudle in Washington, and this is what Mr. Roth said:

"Mr. Caudle was, he told me Mr. Caudle was very much annoyed that a former Department of Justice man, an information should be filed against him. It just isn't done. He told me Mr. Caudle telephoned Mr. Saypol, the United States Attorney in this district, and asked him to cancel the information or withdraw the information. He also told me that the conversation between the two officials was quite heated, and Mr. Saypol said, 'I will not cancel it just by telephone conversation. But if you will send me official orders or direction, I will cancel it.'"

Mr. Caudle never sent Mr. Saypol official written

orders cancelling, authorizing him to cancel the information. He just did not want to it in writing, and I have interpolated that last sentence.

And finally, these words of Louis Roth, almost in desperation as to where all these attempts at fixing had gotten him, because Mr. Saypol had refused to dismiss the informations and they resulted in indictments finally, and finally

(3265)

in this trial, and here is the meeting at Pennsylvania Station, which Mr. Livorsi and Mr. Giglio were both present at, with Mr. Roth:

> "Mr. Giglio blamed me in the manner in which I kept the books, that a great deal of this fault and this trouble is due to me, and I pointed out to him in front of Mr. Livorsi that it isn't my fault, that it is the fault of our depending on the contacts and influence of Jim Ronayne with the Treasury Department to forestall any future tax examination, any fraud, any indictment, and we lulled ourselves to sleep with Howard Lawn's contact with the Department of Justice in Washington, in New York and in New Jersey, in order to prevent any indictments, and gradually we are going on the road to ruin, because all that protection and contacts have fallen down."

One last thing which I will deal with, limited to the question of intent, and I didn't intend to spend too much time on this, but I will spend 10 or 15 minutes on it because it has become a matter of some significance in this trial, and that is the Bercu episode, about which counsel made so much reference.

(3266)

Originally—and this is what I thought the evidence was going to show, and what I think it did show—this evidence was designed to show that these defendants wanted to destroy documents. I knew of no evidence as to the particular documents which were destroyed, that is, a description of all of them, merely the fact that they wanted to destroy documents, because that fact alone bears on criminal intent.

Honest people don't go around destroying anything; there is no reason to. There was, as far as I knew, at the time of Lubben, Roth, Bercu and Weinert being put on the stand, no issue as to whether it was this piece of paper or that piece of paper. It was a question of having destroyed documents.

Lubben testified that he had a meeting in Mr. Bercu's office, and Mr. Stryker referred to this, with Giglio, at which time Mr. Giglio asked him to go outside. He heard some heated conversations. Mr. Giglio came out and told him that he was going to get the documents. Roth testified about it, and his testimony was quite detailed and, I think, accurate.

(3267)

He said that they originally went up there to get the documents, not to destroy anything, to get the documents. When they got to the office of Bercu, Bercu did not want them to have the documents, he wanted them himself.

Even Mr. Stryker asked a question of one of the witnesses here indicating that he knew that accountant's work papers belonged to the accountant and not to the client.

Mr. Bercu wanted his work papers. Mr. Giglio wanted the work papers. And Mr. Roth said that they came to an agreement, they destroyed them.

At that point Mr. Bercu and Mr. Giglio retired after an envelope or a folder had been given to Mr. Roth. Mr. Roth went into the bathroom with Mr. Weinert, they tore

up and flushed down the toilet some of the documents, and the rest were carried out because there apparently was too much. Roth said there was one folder about so big—I am not being entirely accurate. Weinert said there was a folder about that big. I think he added a half an inch to it; about that much.

(3268)

Neither Roth nor Weinert knew in any great detail what was in the documents that were destroyed. They were both quite clear as to the volume, that is, it was a fairly large folder, but it wasn't 20 folders.

Bercu, however, testified—and he hadn't had the experience that Mr. Lubben had and that Mr. Roth had in testifying, nor the experience I had the other day when I found out that I had left out a word in one of my statements and, taken out of context, it looked as though I had made an admission of some very serious consequence—and he said they destroyed all the documents, and so forth and so on.

Actually, he saw—as the testimony bears out—only one folder turned over, and then he retired. He didn't see anything else. The rest of his testimony was surmise and guess. He knew of one folder being given; he knew that the rest were supposed to be given for destruction.

Now what actually happened, I assume—and I don't know—is that they destroyed the one folder, a folder, one folder, but the rest were taken out surreptitiously, because they came to get those papers and as long as they thought

(3269)

Bercu was satisfied they were being destroyed, they were going to get them anyway.

In any event, if you recall in court—and this is the important part—during Roth's testimony, Mr. Stryker, with some emphasis, brought out Exhibit 131, which is this folder, and handed it to Mr. Roth, after identifying

t generally, and said, "Open it up." Mr. Roth opened it up, looked at them, and said "I don't knew whether these are the papers or not."

I want to read that part of the transcript:

> "Q. I show you a batch of papers that I took out of a red envelope and ask you if you can identify any of those papers. I am first asking you if they are not on yellow sheets? A. Yes, sir.
>
> "Q. Look at them. A. Yes, they are on yellow sheets.
>
> "Q. All right. Now look at them and see if you can identify them," and so forth.

A little later on Judge Walsh said:

> "These are yellow papers. Now let us go on."

There was no question about the color of these (3270) papers. They were all yellow, every one of them.

Then I put Bercu on the stand, and when I put Bercu on the stand, after a period of time, I called for this envelope, and I handed it to Mr. Bercu, and then the famous words, "these are fantastic," were spoken, which I repeated, and I want to get the transcript, because I want to be sure I am accurate on this to the last word in detail.

I asked:

> "If your Honor please, I would like to show the witness the red folder which was shown to Mr. Roth, but which was not marked for identification, although I requested it.
>
> "The Court: I thought it was."

I said:

"Two pages were marked AAA-1 and AAA-2, but the folder itself is not," and so forth.

The folder was then handed over, it was marked Exhibit 131, which it is, right in front of you.

The witness said this business about "these are fantastic," and then I said:

"Q. They are white sheets that you are holding (3271) in your hand? A. Yes, these are, so far as I can judge, the original. They are office file copies of the statements typed and presented to our clients in the regular course of business.

"Mr. Stryker: Could I see what he is looking at?

"The Court: Yes."

Later on I said:

"I would like your Honor and the jury to recall the color of the pages shown to Mr. Roth in court the other day.

"Mr. Stryker: I think as long as that comment is made, you will remember that I showed Mr. Roth white and yellow sheets."

I think the record is perfectly clear that the white sheets were never shown to Mr. Roth. When I say the "white sheets," referring primarily to these exhibits, 131, which are the office file copies of the audit reports, those are apparently the most important documents.

Now there has never been a charge in this case that any particular documents were destroyed. I never knew which

documents were destroyed. In court I now can assume
(3272)
what was destroyed.

The only exhibits here produced by the Government were photostatic copies that Mr. Bercu had given to one Government agent, and he said it was either Twohig and/or Cordes, and Mr. Present said that he had received them from Mr. Bercu's secretary, which was Exhibit 136, and that is a schedule entitled—photostatic copy of a schedule entitled "D. G. Lubben Special," and as to that there are no copies in this group of papers produced here in court. That is perfectly clear.

What else is destroyed, I just don't know, and it doesn't make the slightest bit of difference, because it is clear that some documents were destroyed. There was a meeting in Bercu's office, there were papers torn up or intended to be torn up; some papers, and they may have been papers back in 1942, were flushed down the toilet to fool Bercu, maybe, but they may have been flushed down the toilet. But the point is that there was an attempt to hide evidence, to conceal evidence, an attempt to do so, and that is the important point of this whole business.

Now the fact that Roth did not tear up his copy hasn't got the slightest bearing on this case, because Roth at that
(3273)
time was one of the conspirators. Why should he tear up his copies. They might need them.

Later on, if you will recall, however, Mr. Giglio did get Roth's copies, on two different occasions.

One time he came in with one Dominick Gangi into Roth's office, and he took some of those transfer files, which he said were similar to the ones he saw in this court room. On another occasion he got other papers from Mr. Roth.

The point of the whole line of testimony, the point of it only deals with intent, an attempt to conceal evidence.

Now (if I may get down to the heart of the case—and I am sorry I have been as long as I have—the heart of the case is really this clever fraud which resulted finally in Exhibit 154, and a good deal of other evasion, but 154 is so positive, so unquestioned, and so clear, and so incriminating, that I hesitate to mix it up with anything else.

It is beyond question a final proof that these defendants intended to violate the tax laws and conspired to do so.

(3274)

About this business of forming corporations: Now they had Tavern partnership and Eatsum partnership. As I say, those were fairly crude frauds.

Tavern ultimately ended up in one of the corporations. It was American Brands Corporation that actually took over Tavern's business. That isn't important.

Eatsum ended up American Brands Wholesale Corporation. That isn't important. But the business of the partnerships did ultimately go over into these corporations.

Now what was the purpose of forming these corporations? First of all, you will remember that they were all Jersey corporations. None of them was a New York corporation, even though they all had their principal places of business at 19 Rector Street. They were all in Jersey. They were all formed by the father of the United States Attorney there, Mr. Rossbach. They were all thought of, first conceived by Howard Lawn.

Let me read about that.

Well, I don't have the page reference, but the word I am looking for is "instrumental," the word in the transcript. This is Roth testifying:

(3275)

"Howard Lawn was instrumental in the forming of these corporations."

Instrumental.

Now here is a conversation with regard to this subject testified to by Lubben, when he first learned about the formation of the corporations to take over these businesses:

"Q. Did you ever have any discussions with Mr. Giglio or Mr. Lawn with regard to the formation of other companies? A. Yes, sir. One time, I would say, sir, this probably happened in September of 1945"—I interpolate, the first corporation was organized in October of 1945—"when I was called into Mr. Giglio's office. He asked me to step in. Mr. Roth was there, and Mr.—to the best of my recollection, sir, Mr. Howard Lawn was there. Mr. Giglio told me that the profits from the candy business and primarily the corn syrup business were becoming terrific, and that he wasn't interested in paying a lot of income tax and something had to be done, and done quick."

I think I had better read that over again:

(3276)

". . . and that he wasn't interested in paying a lot of income tax and something had to be done; and done quick. And Mr. Giglio told me that it had been decided to form a number of companies and the companies were to be, if I remember correctly, there was American Brands and American Agar and American this and American that and American Trucking and American Wine Company and a lot of companies, and these companies were going to be dummies to this extent: We were going to form the corporations and these companies would set up, they could give Eatsum Food Products an invoice for something that was being used in the raw mate-

rials,' which could easily be swallowed up. I mean those were the words, they could be gone through the company. They would give us an invoice, and then Eatsum Food Products would pay this invoice with a check, in a legitimate, in a regular, routine manner, just as a check, and this money would then go out of the company into this other company, and we would do this with five or six different companies. I say the names were always 'American this and (3277)

American that, and these companies would operate for five or six months, or the utmost, nine months, because there was some rule or regulation there that —but anyway, they were going to be dissolved, he said, before it came time to pay the income tax, so that nobody would know about that company, and then they wouldn't have to pay any income tax. In other words, they were going to load Eatsum Food Products with phony invoices, and he says, 'Louis will go into more detail with you,' and then Louis went into some of the finer points, that is, bookkeeping angles, and so on and so forth, and I didn't want that. I mean it was certainly too complicated and I wanted no part of it, and I told them then and there. I am not trying to paint myself as an angel, as any angel or anything else, sir, but I didn't want that. I was in the black market, much to my sorrow, but there was never any intent on my part to defraud the Government on income taxes. I paid my taxes and I wanted no part of this."

The Court: All right, we will take a ten-minute recess now. Don't discuss the case. (3278)

(Short recess.)

Mr. Wessel: In evidence, ladies and gentlemen, as Exhibits 39 through 44, are the various certificates of incorporation of the New Jersey corporations, the American Corporations, and Lawn International, Inc.

Even though the books of the defendants' own companies show the information in these records, we produce these records to you because wherever there was an official certified document from a public place that we could put before you, we did so, so that we have to reply on nothing except the very best evidence in existence.

Now, when I come back to the consolidation I will refer to this problem again, but so careful was this fraud that when you look at the affiliation schedule in consolidation on the consolidated corporate return you notice that they have set it up so that American Brands Corporation was organized January 7, 1946, the first of all five, and therefore logically could be the parent of all five.

The fact is that even the dates of incorporation in the schedule are dead wrong. The first company to be organized, as the certificates show, was the last corporation,

(3279)

American Agar. That was in October of 1945, three months before American Brands Corporation was organized. American Brands couldn't possibly be the parent of the others, except if they had some kind of a stock deal which never took place.

So careful was this fraud, in other words, that they even falsified the dates of incorporation so that the correct kind of a relationship would appear.

As I said, these were all organized in Jersey, which, as you will recall, was Howard Lawn's home state and where he had all of his connections; where he knew the United States Attorney; where he knew the Quinn, Doremus firm, where he had once been a partner; where he was

later able to quite successfully operate a receivership which concealed a very large part, substantially all the assets of the American Brands Corporations.

But getting back to the formation of these corporations, the purpose, the intent behind it, why it was done. Roth speaking again referring to conversations between Mr. Giglio and himself:

"The conversations extended over a period from (3280) approximately October, 1944, to January 1, 1946. I would like to correct that, October 1, 1944, until the inception of the Eatsum partnership which was around May of 1945. The conversations had reference to magazine"—and I don't know what that word is—"making investments in diversified interests because he told me he has a great deal of money, wants to legitimatize it, and invest it and what is the best plan to proceed.

"I suggested to him two plans: one by purchasing stock in a small corporation on the assumption that that stock is 50 per cent interest in the corporation, and the balance sheet would be worth $25,000; that no individual who has a successful business will want to sell a half interest for the exact amount of book value; that in order to purchase the stock for just the book value, he should pay his goodwill in currency to the individual who pays—who sells the stock. That is one method I suggested to him, because at some future date were he to sell his interest he would sell it for a substantially larger amount than the $25,000 purchase price. (3281) and in that manner get the benefit of the currency that he would pay out for goodwill."

Well, now, that is a little complicated, and I am coming to something, but the purpose of it, as he explained it there, was to legitimatize moneys, somehow put them in the right place so they can eventually be gotten out.

Now that is precisely what happened, and although you hear of this Tavern undisclosed inventory in connection with Tavern, actually it is most important a part of the concealment of assets. They took Tavern income, hid it, through American Brands Corporation, finally drew it out in the form of drawings back through 1947, and when they got through with this receivership they wrote off all the loans that they had. That is what this Tavern undisclosed inventory is. That has been portrayed to you up to this point as nothing more than a shifting of some book figures between a corporation and a partnership.

As a matter of fact, as I recall Mr. Stryker's summation, he said that there wasn't any evidence in this record that Mr. Roth discussed this with Mr. Giglio, that Mr. Roth had a tax motive in hiding this inventory, or that

(3282)

anything in this record referred to the purpose behind the Tavern undisclosed inventory except what Mr. Present said, and, of course, Mr. Present is an expert witness and couldn't possibly know what happened back in 1945.

Well, let me read you this, because there is positive testimony in this record on that subject:

> "Q. I now ask you, did Mr. Giglio know there was a closing inventory in Tavern Fruit Juice Company partnership at the end of the fiscal year operation? A. Yes, sir.
>
> "Q. Did you discuss that matter with Mr. Giglio? A. Yes, sir.

"Q. When was the discussion? A. To the best of my recollection it was approximately October, November, 1945.

"Q. Was anybody else present? A. I do not recall anybody present.

"Q. Would you say what was said by Mr. Giglio and by you?"

(3283)

See if this doesn't tell what his tax motive was:

"A. I drew a schedule of income of Tavern Fruit Juice Company and indicated to him the estimated amount of tax liability that the individual partners would have to pay. At that particular time one of the corporations was just commencing to operate, American Agar, and I knew, based on tax regulations, that operating a corporation in the year 1946 would result in less of a tax as a result of the cancellation of the excess profits tax commencing January 1, 1946, and I suggested whatever sales it is possible to transfer over into the corporation will result in a lesser tax due to the Government than making the sales under the partnership, and inventories was manufactured except in a warehouse, sales were made on the American Brands Corporation commencing January 1, 1946, of the merchandise that was not declared as an inventory on the Tavern partnership from October, November, December, 1945, November, December 1945."

Mr. Roth testified very clearly to what he spoke to Mr.

(3284)

Giglio about in connection with his inventory and to the purpose behind it, and the purpose, of course, was to take the money out of the partnership, where the individual

partners would have to pay a tax on it, put it into a corporation which would then have a very low corporate tax if it were ever declared, but, finally, get the money out of the corporation without ever paying any tax anyway. Exhibit 154 shows that they did not pay that tax.

Now the corporations were formed. Howard Lawn has been described to you as an unimportant person in this case. Well, this report, that is, the Nadel report in the receivership, Exhibit 88 in evidence, describes Mr. Lawn as chairman of the board of directors, American Brands Corporation; chairman of the board of directors, American Agar Corporation, stockholder in all the companies, director.

You will recall testimony by Mr. Present to the same effect, based upon his analysis of the minute books and stock books, and I should, for just a moment, if I can digress, on this question of why the defendants did not destroy the minute and stock books, it was all right here in other ways.

(3285)

they didn't have to—if they destroyed them we had the same evidence right in the Nadel report. We also had the same evidence in the record here; Louis Roth knew who the stockholders were.

But the fact is that back in 1948, when Nadel wrote this report, he had extracted for the court in Jersey who the stockholders were, who the officers were and directors were of the various companies, and there couldn't be any purpose to destroying those records.

Now this document, Exhibit 88, is probably as good a summary of all these corporations as you can have in one place. The books themselves are extremely voluminous, the testimony runs over many pages. I would like to talk about it for just a moment, and in doing so also refer to the testimony of Mr. Holzer. Perhaps I should refer to Holzer first, and then to the document.

You will recall that I did not cross examine Mr. Holzer, except for no more than three or four minutes. It may have been a mistake on my part and it may not have been. I am going to show you why I did not in a moment, and show you, then, why, perhaps, it was a mistake on my part.

(3286)

You will recall on his direct examination he made reference to the two tax returns for American Brands consolidated corporations for the years 1947 and 1948, filed in 1950, after criminal informations were instituted.

On his direct examination he said, "They were filed from my office, in response to a question by Mr. Stryker: "You filed them?"

On cross examination I asked:

> "Incidentally, also, Mr. Holzer, if I understood you correctly, you said you filed '47 and '48 tax returns from your office; is that correct? A. Yes, sir."

And then I asked him:

> "You filed consolidated returns from your office, sir, knowing they were not properly consolidated? A. The answer to that, sir, I did not prepare the returns or analyze the returns.
>
> "Q. But you submitted them to be filed, didn't you sir, knowing they were not consolidated? A.

(3287)

> No, sir. First of all, at that particular time, all that I did was follow through. They asked me to come over"——

And there is a longer answer, and I stopped. Perhaps I shouldn't have stopped, because of this. I am just picking

There is an item of concealment. The Rector Street offices, sold, turned into cash, receiver isn't going to get those at all. Turn them into cash; the cash comes out of the companies.

Counsel referred to the plant, this plant in New Jersey. Well, now, there are two very important distinctions. There is an important distinction which I thought I had made clear yesterday, but apparently I did not. The plant was owned by William Giglio's family: Florence LaGrange, his sister-in-law; Raymond Giglio, his brother; Margherita, his wife. The fixtures belonged to American Agar. The plant belonged to William Giglio. $25,000-odd—$22,500 a year rent. This is part of the petition of the receiver for instructions:

(3311)

> "Your petitioner further shows the testimony further disclosed the said American Agar Corporation paid no rent whatsoever to Cornelison Holding Corporation, which landlord corporation was owned and controlled by close relatives of one William Giglio, the president of American Agar Corporation, and testimony at the receiver's hearing was given by the said William Giglio to the effect that the rent was $22,500 a year."

That was William Giglio's. Now the plant into which American Agar had poured, or the fixtures into which American Agar had poured a couple of hundred thousand dollars were part of the plant. There is no question about that, either.

Those were sold to Mr. Astor, as these documents show, and they were sold for $15,000, plus the mortgage that he had, because he installed most of this stuff, plus something else, plus a waiver of this rent. Apparently Mr. Astor had

out one example, because it is an important example, and if you should call for the Nadel report when you are deliberating, you will see it just as clearly as you can see this court room.

You recall he gave a good many figures from the various companies for net worth: "On the American Brands Corporation, the American Brands Wholesale Corporation, we have directly from the books again, without any adjustments whatever, and assuming the same inventory positions, we have a net worth"—and then he gave a number of dates —October, 1947, 51,966.59, the same figure for November and the same figure for December—$51,000.

Exhibit J to this report, American Brands Wholesale Corporation, surplus, $217,000 odd. There is no question about this that I know of, $217,000.

Mr. Holzer's testimony was referred to by Mr. Stryker. I ask you, if you consider it significant at any time, please

(3288)

call for this document in your deliberations: The receiver's report, that is, the report of the accountant to the receiver in New Jersey, unquestioned so far as I know.

Mr. Present testified in great detail, if you recall, to the drawing from the various companies by Mr. Giglio, Mr. Lawn, Lawn International, Mr. Livorsi, and Mr. Roth. Mr. Holzer sought to impeach that.

I think maybe I had better read again. The question was asked:

> "Now, Mr. Holzer, how much was the total of the checks drawn to cash from these corporations?"

Reference had been to the various American companies in the preceding answer. Maybe I had better read the preceding question so we have no doubt about it:

bought the building and had paid that $22,500 back rent to the family of Giglio; a little more concealed asset.

You will recall, also, the testimony of both Hennessey and Petillo, two of the defendants' witnesses, to the effect that Mr. Giglio was still in that building doing business

(3312)

back there in 1950.

There is so much, I will try to go over it quickly.

The concealment of Mr. Giglio personally—and, incidentally, I should say this: it is true, there has been, I suppose you would say, little testimony about Mr. Livorsi. There has been very little testimony about him. He was a 50 per cent partner. Apparently he wasn't the business brains of the organization. It seems clear that he did not engage in the business decisions, and for that reason he isn't in most of the counts. He is only in his own personal tax count, that is, filing his own tax return, part of Exhibit 154. He is in the concealment count, and that is the $64,000-odd in cash money, and I don't care what Mr. Stryker says, that is criminal intent and that is guilt, if I know it, $64,000-odd coming out of a bank which he throws into his pants like a pound of butter. I want to read that testimony in a minute. And there is the conspiracy count.

Now he is not in the other counts because there is no evidence that I know of in this record at all that ties him into it, and so he isn't charged with it. He knew how much

(3313)

money he got, there is no question, or, at least, I think that is a very fair assumption on all the evidence. He knew how much money he personally received. And when he signed his own tax return—and it is signed "Frank Livorsi," right there; of course, Louis-Roth did not sign it. He thought he was smart. He wasn't nearly as smart as he thought he was. He didn't get out of anything by not signing, but he did

"Q. Are these overdrafts that you speak of, do find them in the books of the various American companies? A. They are in the general ledgers of these American Brands Corporations.

"Q. Now, Mr. Holzer, how much was the total

(3289)

of the checks drawn to cash from these corporations in the year 1946? A. May I have the receiver's report, please?

"Q. What? A. The receiver's report, Nadel's report.

"Q. What book do you want? A. The receiver's report.

"Q. The receiver's report, all right. A. On the receiver's report for the year 1946 the American Brands Corporation, (singular) the total amount of cash checks drawn was $84,000."

There followed a good deal of testimony about checks drawn to cash. I believe you will recall an objection interposed at one time that he was testifying about only one company. I did not cross examine about this subject.

This exhibit, cash drawings by these defendants, which is Exhibit I and Exhibit H, is entitled "American Brands Corporation," singular; it is only one company. This does not in any way change anything Mr. Present said.

The figures—and you have them in mind; I won't go

(3290)

over the details of that—the figures that Mr. Present gave for the checks drawn to cash were not modified, changed or impeached in any way by what Mr. Holzer said; not in the slightest.

I hope, if you should call for this report, if you feel you need it, you will look at Exhibits H and I, and you will see

not sign this because this was another of those returns that he knew was phoney from way back. Mr. Livorsi knew how much money he was getting, that he was reporting. He knew how much money he had received. There can't be a question about that fact.

So he is charged with filing this false return. He is not charged with anything to do with the Tavern return. He is not charged with anything on the Eatsum return. And so the fact that there is no evidence in the record about that is only proof that he isn't guilty of those crimes, and there is no question about that.

Well, now, he is clearly, however, a 50 per cent partner with Giglio, entitled to receive half of all and did receive

(3314)

half of all, and the things which relate to concealment generally, for example, such as the concealment of the American Brands Corporation assets, were just as much a concealment of assets that he had as they were a concealment of anybody else's assets; the net result of getting the money out of American Brands Corporation, part of which went to him as well as to the others, was to conceal his own assets.

Now what are the items of concealment under Giglio? Mr. Stryker has referred to just one. He says the record is barren of any concealment except the Giglio estate.

Well, I have just numbered here 12 separate items.

First, the concealment of the assets that he and Livorsi had in the Tavern partnership by tranferring it into the American Brands Corporation, and I described that method before, and then taking the money out of the corporation and getting rid of all the assets of the corporation.

Two—and this isn't true of Mr. Livorsi; at least, there is no evidence about it: Transfers to his wife. This came out in a very peculiar way, and that is through the examina-

(3315)

when you look at these checks drawn to cash, $900 weekly at the end of 1946, not $982.37 or $973.66, representing some kind of an expense, but a flat weekly drawing, which is exactly what Roth testified to when he testified to Mr. Giglio having made regular drawings from the various companies.

You perhaps recall Mr. Roth testified with regard to Tavern, that they sat down weekly, Giglio took out between $2,000 and $2,500 a week, and he arbitrarily allocated them to various expenses, one of which was the Goldenberg expense I am going to come to, but you will recall that there was that weekly drawing of phony moneys, phony expenses, I should say, which were arbitrarily allocated.

Now let's look and see what the allocations of these figures were. At the end of 1946, $900 figures start, about October, September 27, they go before that, most of it charged: special drawing; a good bit, house expense. I

(3291)

haven't the slightest idea what "house expense" is, but house expense. 1947, $900 for the first several weeks, dropping down to $400, as the money starts coming out of the company. There isn't too much left. Don't forget, sugar rationing ended in the beginning of 1947; the spring of 1947, is what Roth testified.

Mr. Hennessy testified that Agar stopped operations about April of 1947. The exact date of the end of sugar rationing isn't in evidence, but all of this black market stuff stopped at that point, and from then on you start taking the money out, getting rid of it somehow, however you can.

Well, here is one way they did it. This is concealing assets, by the way. It is just as clear a method of concealing an asset as is hiding an estate.

Now, $900, dropping down to $300, odd figures, most of it charged to entertainment. Now think about what this is.

tion and cross examination of John Petillo, a defense witness. He was put on the stand apparently in some way to prove that the fact that Giglio went through a bankruptcy in 1950 in some way proved that he had no money or no ability to pay back in 1947.

Well, what it proved was this, that everything that Giglio had his wife owned. I think I had better read some of that. It is very compelling testimony. This is the defendants' witness talking:

> "Did you locate any assets of Mr. Giglio? Did you find any? A. Yes.
>
> "Q. What did you find? A. Well, the only assets I finally located was a washing machine and the clothes that he owned."

Now on cross examination what happened to that?

> "Q. Now you say the assets were sold at public sale in the amount of $100; is that correct? A. It was a private offer, accepted by the court.
>
> (3316)
>
> "Q. Was that sale—— A. Of course, it was public, but no one else appeared on the return date to make any other bid.
>
> "Q. Who bought it? A. His wife."

Cross examination of Petillo—they were trying to find whether or not he had any equity in his insurance policy:

> "Q. Didn't you report to the referee in bankruptcy, a letter dated July 26, 1950, that Mr. Giglio told you that his wife paid the premiums and that in every other matter he said the same thing; that is, the assets belonged to his wife? A. That's right.
>
> "Q. Wasn't that the result of your investigation that substantially all of Mr. Giglio's assets belonged to his wife? A. That's right."

These businesses stopped business in the beginning of 1947, so Mr. Stryker just told you a short time ago. What do they have all these entertainment expenses for and what (3292)

are all these special drawings about, selling expenses, travel, what are all those expenses for if they weren't doing anything, what's the reason for it? You might note particularly September. You start getting a great number of checks drawn at that point, right around the September 15th date, which has been so important throughout this trial, the date the tax returns were filed. That is a good part of the Nadel report, the receiver's report, that I think is important in showing, one, concealment, two, intent.

Now, the first so-called consolidated statement of financial condition: This is what the company had on December 2, the day they went into receivership, this is what they had: Assets of $461,000-odd. $461,000-odd. A net worth—and that means after everybody was paid, including the Government—a net worth of about $46,000. Well, it's a little bit over $46,000. There was plenty of money on December 2nd, plenty of assets on December 2nd. I shouldn't say "money," I should say "assets." And that brings me to another point, by the way.

Mr. Holzer had a nice, big chart for you on which he (3293)

put down bank overdrafts, or something like that. In any event, it had a tremendous amount of figures on it, showing minus balances in the banks, per books. That is something else I did not but should have cross examined about.

The actual bank balances—and you can look at the books if you want to—well, in the first month, January, he showed a deficit of 3 or $4,000 on the books. The actual bank balance was $45,000, as I recall it, or thereabouts.

And that, I suppose, includes that Agar plant over there.

Without reading it all, Mr. Petillo said he went to the home; the home was nice. He saw the furniture. The

(3317)

furniture belonged to the wife, a Magnavox and a few other items of equipment there. He did find out, however, that Giglio had owned a car 13 days before and had sold it for $1,400. That is exactly the same kind of thing he did back in 1947 when he sold out all of the assets of American Brands and his estate and everything else just at the time the tax return was filed.

Another item of concealment: his family corporation interest in Cornelison; that is the company that owned the plant out in Jersey.

Van Dyk: Now this is a particularly interesting one. He and Livorsi had a 50 per cent interest each in the Van Dyk Industrial Corporation. Remember I told you at the beginning September 15th is an important date.

They sold the interest—here is a check—September 19, 1947, four days after the tax returns were filed: "Pay to the order of William Giglio $15,000."

Now, I think you will recall that. This was his interest in that company that had some research work. He and Giglio and Van Dyk had a stock interest in it. Signed on the back, "William Giglio."

(3318)

And then you recall Roth said he set up a special bank account, not the regular one; he set up a very special bank account in the Pennsylvania Exchange Bank, deposited this check. As soon as it cleared, he then wrote three checks, and deposited it in American Brands Corporation, and no penny of this ever went for taxes either. Another $15,000.

Of course, on both Giglio and Livorsi one of the prime methods of concealment was the failure to withhold taxes

The next month there was a deficit of $2,000. The bank thought it had about $60,000 in the bank. There was never any overdraft on those banks, never. Those banks wouldn't have stood for companies doing business like that. That is just by the books.

Well, now, what does that mean? That is these drawings they were taking out. The end of the month they had lots and lots of drawings.

They also had a lot of loans receivable, by the way. But just because at the end of the month, let's say, September 30th, Mr. Giglio, Mr. Livorsi, Mr. Lawn, Lawn International take out a check for $15,000 or $30,000 or $50,000 or whatever else it might be, that might lower the bank

(3294)

balance per book, it might very well do that, but the bank still has the money and they may not cash the check until the middle of the next month, or maybe the middle of the following month, when they think there is enough money in the bank.

There is no question but that they took the money out. There is no question, but that there was always lots of moneys in the bank and if Lawn or Giglio or Livorsi had not cashed their checks the Government could have been paid.

Well, what happened to all this in the receivership. And that, although apparently Mr. Stryker has referred to concealment as consisting only of concealing the estates, the receivership is probably the most important single method of concealing that exists in this case, because it is a concealment not only of the assets of the corporation, but it is, of course, a concealment also of the assets of both Giglio and Livorsi, because naturally they held stock, they were the principal owners of most of these companies, according to the evidence, and one of their primary assets, of course,

on their corporate salaries. They never withheld a single penny; and that isn't depending on the testimony of Roth, or anybody else, it is dependent upon the tax returns. It shows there was no withholding, supported by the testimony of Roth and the testimony of Present, who analyzed the books.

Again, the filing of late partnership and personal returns. There is another method of concealing. If you file your partnership return when it is due—and remember these partnerships all ended back in 1946. The returns were due a year earlier. The returns were filed over a year late. They were due a year before September, 1947. But, of course, if they were filed when they were due by the time they got around to filing their personal returns in Septem-

(3319)

ber, 1947, and concealing their assets, the Government might have done something, even in its slow-moving manner. It might have realized that these information returns should result in a tax, and maybe we had better go and see if there are assets there.

Well, what did Roth say about why he didn't file these returns when they were due?

If the partnership information return was filed on June 15, 1946, the Government at that time would be apprised or have knowledge or some record that there is money due from William Giglio, Margherita Giglio, Frank Livorsi or Dorina Livorsi. In order to avoid for the Government to have knowledge, the information return was not filed at that time but was filed—but the information return was filed at the same time that the individual tax return was filed: one year later.

They did not care when they should have filed. And they were advised, incidentally, by Rabkin, counsel they employed, that the failure to file properly and the obtaining

was the stock in this company—these companies, and if (3295) they owed the Government money and did not pay it, the Government could, of course, go against their stock interests and ultimately get at the corporation.

So in order to conceal both the assets of the corporation and the assets of the individuals, they had somehow to get rid of these companies.

Well, now, they had accomplished that pretty well by December 2nd. They had accomplished it in the sense that the money wasn't there. If you look at the current asset position, you will find that there isn't a single bank account listed, and there are a couple of accounts receivable, total of $17,000, almost no money left. The loan was gone. There was a plant there, and I want to come to that plant, because there is quite a bit of difference between plant, building and fixtures in building. But there was about $17,000 in cash. The rest of it had already been taken out.

Well, now, where was it? Loans receivable, $107,000, William Giglio. Well, that is one asset.

(3296)

Another asset, loans receivable Frank Livorsi, $34,000-odd; Louis J. Roth, $18,500; others, $6,645; special drawings, $11,500.

You have to go inside to find out where those special drawings and where those others are.

Advances to affiliated companies—affiliated companies—Lawn International, Inc., $32,000-odd; Tavern Fruit Juice Company, $12,000.

Well, now the money is gone, so we have accomplished the concealment by this point, but here you have a company that has some assets, and if the Government, slow as it may be to get around to it, ever finds out that this company has got these assets, it is going to go get them

and collect them. So it is absolutely essential somehow to wipe off from these books all this money.

On the liability side, due to affiliated companies, Eatsum, $25,000-odd; Loraine Food, $179,000—you have heard a lot about Loraine here—and then there are $210,000 of various other liabilities, principal among which is the United States Government's claim, which at that time was in the amount of about $116,000, assuming a consolidated basis.

(3297)

Well, now, counsel has referred to the Loraine Food Company as being an advance or a loan of some kind from Loraine to the various American Corporations. The evidence doesn't reveal one single dollar of loan from Loraine to anybody.

Loraine was one of the companies that was selling goods, and the stock ownership now and the record appears to be: Damaro, 50 per cent; Giglio, 50 per cent, and I assume, based upon the other evidence, that Giglio's 50 per cent was split equally between himself and Livorsi, because they apparently were 50 per cent partners in everything.

Loraine was selling goods, just like American Brands Company was selling goods through American Brands Wholesale Company, selling its goods. This was an account receivable; Loraine had an account receivable. It sold goods through some of the American companies, and therefore when it gave them the goods it was entitled to get paid, and as of this time, those companies owed Loraine a net of $179,000.

Well, now, they got this very clever idea of balancing off these various debts on one side with credits on the other.

(3298)

I don't want to go into all the details of that, but I do want to explain the fraud.

Now, first—and this is the principal thing you can put your finger on and see—you don't have to listen to a lot of talk about whether or not there is a debt or a loan or a liability or this or that. Here is something you can actually put your finger on and see. Roth testified about it, but these books are in evidence, and the books are real solid, sufficient evidence right by themselves. And incidentally, here is a case where Walter T. Kohn, one of the defendants' own witnesses, supports the Government's contention as to what happened in that receivership. This is the Loraine book, and if you look at the five pages marked Exhibits 79A, 14, 14A, B, C and D, you find the title of the account has been changed. It is very clearly in a different handwriting, and the account receivable on the Loraine book has been changed to a loan receivable.

And these were the very papers that Roth gave to Kohn, and Kohn, although he wouldn't admit that these were the sheets, admitted that he gave five similar pieces of paper into the receivership and presented them in evi-

(3299)

dence.

That is the fraud right there. This is the only part, this is the only part of the whole Loraine book, or, I should say, all the Loraine books which ever went into evidence in the receivership.

I want to read what Nadel said. You heard it before, but it is important enough to say again: "I have made an examination of all the foregoing books and records of the foregoing corporations with the exception of the Loraine Food Corporation. The books and records of the latter corporation were not available for my examination as it was the contention of the directing officers of the Loraine Foods Corporation that this company is not involved.

associated or affiliated with any of the American Corporations."

Now, how did all this come about? Here, again, Howard Lawn guides. This is nothing Louis Roth can think up by himself. He is not that good.

I will cut it down as much as I can. Roth testifying:

"During the months of October and November, (3300)
1947, there was discussions about receivership, bankruptcy, dissolution of the businesses, and at that time it was Mr. Lawn's suggestion that a receivership in the State of New Jersey, being that the corporations were New Jersey corporations, would be more advantageous than bankruptcy in the federal courts in the State of New Jersey." A receivership.

Walter T. Kohn was brought in, Walter T. Kohn being an old friend of Howard Lawn's.

Incidentally, he did not come in till later. I think I had better give a little bit of the background of this receivership. They were thrown into receivership, this company with $416,000 of assets, by a $3,500 claim. $3,500 was the claim of the DuPont Cooperage Company. That is the amount that threw this $416,000 company into receivership.

The receivership continued for some while with an attorney named Louis Goldberg, apparently not successful.

Walter T. Kohn was brought in. There were meetings in his offices. Lawn was at those meetings. At that time they got this idea of balancing off the various liabilities (3301)
against the assets so that the receiver would discharge the companies and say, "There is nothing owing; you are all right."

Kohn went over to the receivership also. Kohn went over to the receivership, introduced into evidence these various papers, but the receiver still wasn't satisfied.

If you recall, Mr. Kohn testified; he admitted that the receiver threatened to sue for these loans. He was a hostile witness, but he did admit several things, because I had the minutes of the receivership.

After long examination:

> "Do you now recall Mr. Ravin, the attorney for the receiver, saying, with regard to the $195,000 owed to the corporation by Giglio, Livorsi and Roth, that it would be the receiver's duty to institute suit to recover that? A. I remember now, after reading that, that he may have said something like that."

Well, what happened next? They weren't able to put this over on the receiver. There were creditors there and they wanted to get paid. They were not successful in putting this over on the receiver at all. They had to get out

(3302)

of this receivership because they might possibly get sued and then they would really be in trouble, so they took it away from the receiver, completely away from him, and, if you recall, Mr. Kohn testified that there was a voluntary agreement among the creditors whereby they were going to get 10 per cent to be paid from outside sources. Not one single penny of it ever went to pay any of these general creditors. That all went for administration expenses, and the documents in evidence establish that beyond any question at all.

In spite of what Mr. Kohn says that taxes come before administration expenses in some instances, it just isn't so. In fact, Mr. Petillo, another witness for the defendant,

whom I will come to shortly, testified that bankruptcy never discharges any taxes. Neither does a receivership. Neither did this receivership.

In any event, they took this thing away from the receiver. They said, "All right, we will voluntarily pay the general creditors 10 per cent of our own moneys. It is going to come from some place, not your money at all, provided you will let us out of this thing." (3303)

And the receiver said, "Fine, that is a good way to get rid of the thing," and they got rid of it. There was never any final order doing anything to anybody. All they did was to let the companies out of the receivership.

Mr. Kohn testified on direct examination by Mr. Stryker at some length about how this receivership discharged the federal tax liability. I don't want at length to read from the documents in evidence, that is, the final order and the offer of Walter Kohn, but perhaps I should just refer to one or two paragraphs of them, if any of you should think there actually was a discharge of federal tax liability at all.

Kohn's offer, and this is the only thing that was approved by the receiver, after saying, in large part, "We will change the title of the receivership to eliminate Loraine, and we will change this, due to affiliated companies, around to loans payable," after all that business was put in, then said with respect to item (c), which was the tax liability, the American Brands Corporation and affiliated companies claim the right, as set forth in the report of Nadel, to make application to the Internal Revenue Department for a carry-
(3304)
back loss for the year 1947-1948 as against the net income reported in 1946.

They claim the right. The final order accepts the offer, so they have the right. So they have the right, and they file such claims. There is no question about that.

But it doesn't say that the claim was a valid claim. There is no question about that either. It did not discharge anything, and Kohn was finally forced to admit that he had said in the receivership, when he asked to get the books back:

> "Didn't you tell the receiver, in the presence of a dozen other attorneys on September 13, 1948, that the books will be needed in connection with the payment of federal taxes because in the proposed offer it is provided that we have to take care of the federal taxes in the amount of a hundred thousand dollars? A. I shouldn't be a bit surprised that I may have said that. I won't deny that I said it. We were entitled to the books back."

Later on he admitted having written to the accountant for the books back, and asked for the books again.

(3305)

> "Do you recall having written a letter to Mr. Nadel on January 17, 1949, long after the receivership terminated, saying in part:
>
> "'What I was particularly anxious to know is how much remains for distribution and I will see if I can't make some kind of an arrangement with the federal or state governments'?
>
> "Did you say that? A. I may have said that, yes, sir."

He didn't think that there was any discharge of federal taxes at that time, and there wasn't any discharge of federal taxes at that time. Actually, it doesn't make the slightest bit of difference, not in so far as the crime is concerned, because the crime is complete with regard to the filing of the tax return falsely, when you file it. You may be in a

peculiar sense lucky enough to have a loss later on, but that doesn't in any way change the crime. If you owe some money, if you have to pay and you falsely and wilfully and knowingly and fraudulenty file a return, trying to evade taxes, and later on go through bankruptcy, or through receivership, it doesn't in any way change the crime. It can't change the crime, not at all. Otherwise, everybody charged with tax evasion would very quickly go through bankruptcy,

(3306)

receivership or something like it.

The receivership was brought into this suit by the Government. Like everything else, it's been turned around so that it will be in some way directed against the Government, but it was brought in as one of the various and several methods of concealing assets both of the corporation, American Brands, and all of the corporations and the individuals.

It is getting late. I will refer quickly to a number of other——

The Court: Mr. Wessel, I don't want to squeeze you. If you are going to be considerably longer I will let you go over until tomorrow. Now the choice is yours.

Mr. Wessel: I think it would be better if I were to finish tonight, your Honor.

The Court: All right. Are you able to take another bit more? All right, go ahead.

Mr. Wessel: General methods of concealment. I will try to be as brief as I can. It's been a long time, and I am sorry. These are methods of concealing the assets of the corporation.

Filing late returns—well, you have all seen the returns;

(3307)

they are in evidence. There were no extensions given until September, 1947. There were extensions up until I believe, May 15th. They were attached to the tentative

tax returns that were filed, but there was no extension until September.

Well, clearly they had to file these returns late in order to get rid of all the assets before the returns were in, because, you can't tell, a collector might have come around with a warrant in between and they wouldn't have gotten rid of all the assets, so part of the concealment required that all of the acts—that the returns not be filed until substantially all the acts concealing the assets were completed.

These tentative returns: now these are rather amazing documents. Here were corporations; Mr. Stryker has referred to net income of eleven million. Actually, that is, I think, gross, but it isn't very important. Here were corporations making lots and lots of money, filing tentative returns on March 15, 1947. This was before the end of sugar rationing, according to the evidence, when they were still doing pretty well, and all you have on the three returns

(3308)

selling the house. That is the full extent of Howard Lawn's for American Brands Corporation, American Trucking & Forwarding and American Brands Wholesale, is one little item down at the bottom: "estimated tax, $100." Attached is the extension to May 15, 1947, stating, "You get an extension until May 15, provided you file your tentative return and pay one-fourth of the estimated tax." The filing of the return becomes a condition preceding, and so forth. Clearly not in good faith, and Roth so testified, "$100 each," and you may recall that they even filed a claim to get back this $300. Mr. Holzer's work back in 1950, after the informations were filed.

Here is that claim. He didn't sign it; William Giglio signed; Holzer didn't sign it. He was smart enough not to sign it, but it is care of "Herman Holzer, 24 Commerce Street, Newark, New Jersey, Room 1131." This is the claim for $300.

Perhaps I should, to cut this down in time, if I can, also refer—this is part of the concealment, but it also has to do with consolidation. You will note that these three tentative returns are not on a consolidated basis. They are filed on an individual basis. Everything that was done in these companies was done on an individual basis, until they finally (3309)
got around to September 15, 1947, and filed a final return.

Now another concealed asset: The Rector Street offices, you have heard a lot about. They were these magnificent Hollywood offices in which Lawn had his office next to Giglio, Lubben had an office while he was there, everybody had offices. There was a nice sliding panel behind a bar in Giglio's office. The thing was maginficent. It cost a lot of money.

Lubben testified that he was charged $10,000 on one occasion and a few thousand more on another occasion as his share of the Rector Street offices. Mr. Present pointed out from the books that Tavern had a share of about $18,000 of the cost of those offices, and what the cost on the other companies was was not in evidence, but they were expensive.

Well, what happened to them? These things get lost in the 3,000-page record, but right at the time the returns were filed, September, 1947, these furnishings and fixtures, some time, as Roth said, between September 1st and September 25th, were sold to Commerce International.

> "Mr. Giglio told me that he negotiated for the (3310)
> sale of the fixtures, the lease, the assets, to Commerce International for $10,000.
>
> "Q. Do you know whether the companies received that amount of money? A. Yes, sir.
>
> "Q. Do you know whether any part of that sum was used to pay taxes? A. I do not know of any."

schedules showed that he did not carry any such loan as an asset when he went into bankruptcy. Of course, if he had, the trustee in bankruptcy would have to go through Giglio and collect the $15,000, and you heard Mr. Petillo, their witness, say he would have a lot of fun collecting that amount of money.

One other question. There has been some discussion about this subject, and I will spend a minute on it: the phony partnerships in Tavern, the two wives that were in there.

Here is what Roth said about that:

> "Mr. Giglio at that time—this is when Tavern was first organized—brought out the interests"—I think it is "bought out the interests of Tavern Fruit Juice Co., Inc. and contemplated organizing the partnership, and I suggested to him, as a means of tax reduction, to organize it in the form of a family partnership, including his wife as a partner, and Mr. Livorsi's wife as a partner. He adopted that suggestion and that is the way the partnership was organized."

(3342)

The other evidence shows that they put up no money, did no work, they were there strictly as dummies. And finally—finally—the final proof on that subject is that when it came time to file tax returns, Giglio and Livorsi picked up their wives shares, they carried their wives as exemptions on the tax return, they even took as part of this $16,000 the small amount of money that their wives had paid as advance taxes, estimated taxes.

Now Eatsum—and I refer to each one of these separately, because, of course, each count in the indictment is a separate crime, and the intent that pervades generally, and is most focused in the conspiracy count, pervades every one of these counts, but you still must find the evasion in each

count, and that is why I am separately referring to Tavern, Eatsum, consolidation, and so forth.

Now on Eatsum—and first of all, this partnership business, and there has been an awful lot about it. I can't say deliberately or otherwise, but this last witness, Diamond, and what he did and what he was designed to do, I think I ought to explain.

Now, there is no question but that Diamond couldn't come into this court and testify to you jurors as to what (3343)

the law of distributive shares was. There is no question about that. It can't be done.

As Mr. Stryker said, it is a complicated question. If Mr. Diamond had testified on that subject I would have to take out cases and say, "Now, this case holds that," he would say "no" or "yes" or what he might do, and eventually you as jurors would have to decide what the law was on that subject, so he didn't answer those questions, he couldn't answer those questions. And Mr. Stryker, when he finally summed up, said, "Of course he couldn't answer those questions. It just proves how complicated this field was. How could these people have possibly intended to violate the law?"

Well, that isn't the charge at all; not in the slightest. Of course, the law of distributive shares may or may not be complicated.

I don't know what his Honor is going to charge, but it doesn't make the slightest amount of difference. The fact is that this was a phony partnership from the beginning, from the very, very beginning, and I think the evidence is so positive, and so clear on that that you can't possibly have any doubt.

(3344)

Now, had there been some written agreement that might require interpretation, then possibly—possibly you might have some question as to what these men should or should not have declared, but that isn't the fact at all. The original agreement back in May of 1945, or June of 1945, included Loperfido, Hankermeyer, Stone, the two wives.

Lubben was positive about that, as to what these people were. They were dummies, nominees.

Let me read a little bit of the testimony on that, because I think it is important. This was a discussion that Roth testified to:

> "Approximately one week before we were at the Tavern office, Mr. Max Goldhill, who drew the limited partnership papers, suggested to Mr. Giglio at that time to have as many active partners for his 50 per cent share as possible because that would reduce—as long as he contemplated earning a great deal of money in the partnership that would reduce the ultimate tax liability that he would have to pay if he would be the only 50 per cent partner or divide his 50 per cent only with Frank Livorsi."

Now, let's stop at that. You don't reduce your tax

(3345)

liability by giving half your money away. There is no point to that. If I make $100,000 a year, which I don't, but if I did make $100,000 a year, I would be gaining nothing by giving $50,000 a year away. I would certainly reduce my taxes, it is true, but I wouldn't have the $50,000.

The only way I would gain is if I gave the $50,000 away in form only, but not really; and got it back and paid the other person's tax, and I am going to show that is exactly what these people were doing. Then I am going to stop right there.

of extensions, if the proper intent was present, might be criminal.

Mr. Rabkin pointed out that it is all right to get exten-

(3320)

sions to file tax returns provided that there is no intent as a result of those extensions to evade payment of the taxes and that the reason for the extensions is a substantial and correct reason and not a false reason.

Well, of course on the partnership returns they did not even try and get extensions.

The estimated tax returns: Giglio's are in evidence. You undoubtedly recall the testimony of Roth, that he filed the first one, Exhibit 17A, estimating a tax of $4,000, paying the quarter as he was required to do, picking out the figure arbitrarily, but at least doing something. When the second quarter came around he decided he would up it a little bit to $10,000, and he went in to Giglio and he said, "Let's increase this to $10,000."

Giglio said, "No. I need the money. I want to use it for research," or something. That is right about the time, by the way, that he bought this $100,000 estate.

So they did not file the second one, and they did not file the third one, even though Roth wanted Giglio to file that one.

Finally, in January, of 1947, Roth insisted that an

(3321)

amended estimated tax return be filed. Apparently he had some feelings for law; maybe not too much, but some; at least, he was trying to protect himself against possible prosecution.

And Giglio said to him, "All right, I will put it in if you want to increase it," which they did, to $26,000, "but I will be damned if I will pay it," and he only paid $1,000. And

They took their moneys, $100,000, $500,000 or $1,000,000, and they split it up ten different ways. Now, the person who received $100,000, or was put down on the books for $100,000 was the kind of person, Loperfido, Giglio's cousin, Gordon—excuse me, not Gordon; Stone and others, who wouldn't care about any fraud so long as he wasn't personally going to be liable for anything.

So as long as Loperfido was down for $100,000, his only problem was, "Don't get me into any tax trouble. You pay my taxes."

Well, of course Giglio and Livorsi would be very happy to pay his share of the taxes, because that would be in a lower bracket. The only one who would lose would be

(3346)

the Government. Loperfido would lose nothing; lost nothing; in fact, he got a nice salary. He lost nothing at all.

Giglio lost nothing because he paid taxes on a lot lower share. The Government was the only one that lost, because it lost taxes in the bracket where these men—in which their earnings were.

Now that is what happened. Here is some more on that—this Lubben talking, and we have got papers in evidence on this, too, solid paper evidence. Lubben:

> "When the time came for the time to sign the papers I was only selling a 50 per cent interest in my business, and Mr. Roth told me that on the other side Mr. Giglio had Mr. Livorsi and his wife, and Mr. Loperfido, who was his cousin, and Mr. Livorsi's wife, and he said it would be much better if I divided up my 50 per cent with other people, so I arranged to take in Mr. Hankermeyer, who was my cousin, and Mr. Stone, who had worked for me. I believe Mr. Hankmeyer gave me some money, and Mr. Stone, but I believe the check Mr. Stone gave

it is even typewritten right in there: "Amount paid with this declaration: $1,000."

Well, another method of concealment was not to file the proper estimates, as required to do.

Well, I have discussed the drawings from Tavern and the expenses taken out of the American Brands Corporations and the phony expenses. I haven't discussed the phony expenses in Eatsum. I think I ought to.

Another method of concealment: When Lubben left, you recall Eatsum had made a lot of money. Lubben testified that the original $67,000 investment increased in eight months to $800,000. He actually did pretty well, incidentally, but he got $117,000 net, which was very good. But he did not get the major portion of it.

(3322)

Well, what did they do when Lubben left? They set up a special bank account, authorized Roth to sign checks, and they started milking the money out of Eatsum. I will use Roth's testimony on that.

> "Was any money drawn out of the Eatsum bank account for the purchase of supplies during that period after Mr. Lubben left? A. Yes, sir.
>
> "Q. Will you state how that was accomplished, Mr. Roth? A. By drawing checks to the order of cash and cashing them and charging them to purchases and supplies despite the fact that there were no sales during that particular period."

Well, that is crude fraud, but that is one method of concealment, because Eatsum was a very subtantial asset.

I suppose the principal method—I shouldn't say the principal method, but the clearest one in so far as intent is concerned, is the estate. And as to that there has been a great deal of testimony.

me in payment of his part came back and I don't know whether it was made good, but I always con-
(3347)
sidered my 50 per cent was my 50 per cent and that was how the partnership was formed.

"Mr. Roth told me that Mr. Giglio wanted to have his investment spread over these people for tax reasons, and that I would be very smart if I did the same and put it in the name of certain people. I believe Mr. Roth called them nominees."

Giglio talking to Roth; this is when they were making out the final partnership return. "Giglio said: 'File it in accordance with the partnership agreement. If and when there will be any kicks, I am responsible for David Lubben's tax return. I don't expect any difficulty from Frank Loperfido, as far as Frank and my return. Jim Ronayne will take care of all those items. When we receive an examination there may be surcharges by the revenue agents but it will be taken care of by Jim Ronayne.'"

This business of paying other people's taxes, it is a rather crude kind of fraud. This is an earlier time, but it was done all the time.

You will recall Lubben testified that after Eatsum dis-
(3348)
solved, after he left the partnership, they called him down; they wanted him to sign $500 salary checks. Well, here is what he said about that. He wasn't going to get the $500 from those checks, but he said it wouldn't make any difference to him because they would pay his taxes anyway.

Here is what Lubben said:

"All right, sir, once after March in 1946 I was called down to Mr. Giglio's office, and one of the reasons I was called there they had a stack of checks.

Again, here is a situation where the testimony is primarily from people who are friendly with these defendants: Joseph McCue, Vincent McCue. Vincent McCue being a (3323)
former partner of Howard Lawn's, Joseph McCue being his brother. Their testimony on the subject of the concealment of the purchase of the Giglio estate and subsequent sale, is corroborative in all respects of what Roth testified to.

Now Lawn is fitted into every part of this, but Mr. Stryker has suggested that perhaps he didn't fit into this one. So here is what conversation Roth had in connection with this concealment, just before the filing of the tax return:

> "The conversation took place about five or six days prior to September 11, 1947. Mr. Lawn was present, Mr. Giglio and myself. The conversation took place in Mr. Lawn's private office. Mr. Giglio told me, 'I owe you some money that you advanced to me and a great deal of that money I used to make amortization payments to the mortgage company on my house in New Jersey. Now I am going to sell you the house and I want you to give me additional money in order to keep up the payments, and in that way I will have a roof over my head in case the Government assesses me and and will not be able to take the house, and at the same time I will give (3324)
> you protection for the money I owe you.'
>
> "I said, 'That it all right with me.'
>
> "Mr. Lawn agreed that it would save Mr. Giglio's home and protect me, and he said, 'I will have a New Jersey lawyer draw up the papers and I know an attorney in New Jersey who is an attorney for a mortgage company. He will draw up the papers.'"

I don't know, it was April or something like that. A stack of checks for me to sign, and to the best of my recollection they were $500 apiece. I had been drawing $500 salary, and Mr. Giglio says, 'Endorse those checks.'

"I said, 'Are you going to give me the money?'

"And he says, 'No, but we will pay the income tax on it for you. We just want to get some of this money out of Eatsum Food Products.'

"And I said, 'I will do it if you will give me the money, I will endorse it. If you don't give me the money, I won't endorse it.'"

(3349)

The Burlan check. You recall this one? Burlan was one of the corporations in the Lubben-Giglio deal, the Lubben-Giglio-Livorsi deal. They had some money left. I won't dwell on this much.

The balance sheet of Burlan showed that they made some money. There was money there. They didn't want to pay taxes on that. $10,000 check to Raymond Giglio, if you recall, who had not done any work there, for commissions earned. They hadn't done a thing. That is one of those phony checks we have been talking about; money being drawn out.

Now positive proof about how phony all of these papers were, just as phony as day. Here is a part of them. There is a whole mess of these, various kinds of agreements.

At the end, if you recall, Giglio bought out Lubben—Giglio bought out Lubben. Even that final dissolution agreement was a phony right from the start, because Giglio split it with Livorsi. Giglio wasn't buying out Lubben. Giglio and Livorsi were buying out Lubben, and the proof of that, of course, is the fact that they each reported the shares in

That is how Tepper fits in, but Tepper is incidental to this picture. Tepper just drew some papers. They are in evidence and they mean nothing.

I should state this about them: of course, they were filed. Of course you file a deed when you transfer an estate. If you don't, then the Government can look through it. So they had to file this.

Well, then they had a meeting in Lawn's office—Lawn's office; not Tepper's, Lawn's office, 19 Rector Street, in which this transfer took place, and it was completed.

Now at that meeting—and here is some evidence, and this is real evidence, this isn't testimony; you don't have to worry about whether the man is telling the truth or not. Here is a check, the first check, September 12, 1947, Louis (3325) J. Roth, Emanuel and Margherita Giglio, $5,000, on the back signed "Emanuel Giglio, Margherita Giglio, OK for cash, Louis J. Roth," a check obviously cashed, and it is cashed. $5,000 in cash money.

In the first place, how many people do you know that deal in cash amounts like that? Don't people put money in banks when they are not trying to conceal it? Everybody does that. $5,000 is a lot of money, and, if you recall, on each occasion when one of these checks came in I asked, "What did the bills look like?" They didn't have thousand-dollar bills or five-hundred-dollar bills, they were always hundreds or less in each one of these instances.

A check drawn to cash and cashed on September 12, 1947, three days before these tax returns were received by the Internal Revenue Service, is simply awfully strong proof.

No. 2: September 24, 1947, apparently Roth did not have all the money in the world in the bank. A second check: $5,000. William Giglio, Margherita Giglio, signed on the

their own tax returns, each of them did. That was a phony. And here is positive proof from their own mouths.

(3350)

The day finally came when the Treasury Department, these special agents that the defendants think so little about, got around to Frank Loperfido. He was down in this information return for $45,000—you recall him being on the stand—and they said, "Well, now, where are your taxes on this $45,000? Let's have some money."

And he said, "Well, I never got that $45,000. I wasn't a partner during that period."

And they said, "Well, you had better give us some proof of that."

So he rushes back to Giglio and Roth, and here are affidavits that Giglio and Roth gave him in 1950, May of 1950, Giglio saying, in this affidavit, which you can take into the jury room—you can call for any papers in this case. If you recall, the partnership agreement showed Loperfido down for a full distributive share for the whole year: "Frank Loperfido was a limited partner to December, 1945, at which time I personally bought out his interest as a limited partner. He was no longer associated in any way with Eatsum after December 30, 1945; that I understand the federal income tax report was filed for the period ending May 31st, that is,

(3351)

this Eatsum tax return, indicating he was a limited partner at that time and participated in the profits. That was an error."

That is Giglio himself admitting that, admitting it. He couldn't fail to know that.

No, these various papers and agreements were phony right from the beginning, and whether or not the particular amount of the distributive share was correct or not as a matter of law—and his Honor will charge you on that, and I don't know what he is going to charge you—but whether

back, "OK for cash, Louis J. Roth." $5,000 more. This time nine days after the tax return was filed. Again not a (3326)

penny went to the Government.

Now here is the most beautiful of all, and this you have to really appreciate, and I marvel at how the special agents —and I had nothing to do with this case; I have come into it recently; it is all their work, every bit of it—the special agents worked this out magnificently as they have done in every other aspect of this case.

1948 the estate was sold, as you recall, for $85,000. The net balance remaining owed to Giglio was $21,000. The net balance remaining.

Well, there was a closing. Roth and Giglio went over to the bank, and Roth—and this, again, is real solid evidence, a piece of paper; this isn't testimony; you don't have to worry whether somebody is lying or not—went over to the bank, cash, $21,954, etc., etc., and here is Roth's computation how he worked out that amount that he still owed Giglio.

They cashed that in the bank. Signed on the back, the initials of the president of the bank, which Roth testified was a man named Miller, but it doesn't make much difference, on the back. But here is the beautiful part of this, and this is clever fraud. I don't know who thought (3327)

this one up, it is beautiful, though. The check is dated June 28, 1947, not 1948 at all.

Now any special agent looking at this at first blush would say there is nothing wrong with that because that was done before the tax returns were filed, and it is a couple of months before, and, well, there is nothing wrong with that, very much. It is dated June 28, 1947, but if you look through it, and you look at the date on the paid, it is 6/28/48. It

or not that is correct on the tax return, there isn't the slightest, doesn't make the slightest bit of difference.

The charges on the Eatsum return are that they filed a false and fraudulent partnership information return. It doesn't talk about taxes; it talks about false—falseness and fraudulence.

There is the corn box, and this dummy phony partnership.

Now turning to the corn box, there has been a great deal of testimony about the corn box. I won't dwell upon it very long. That is crude fraud, just as crude as you can get. How crude it was is illustrated by these words which I (3352)

think were very impressive from Lubben. I was asking him to describe this corn, this cash box itself, and he said that he didn't have a coin tray in it.

> "You threw away the coin trays? A. I do not recall ever seeing that. It would only get in the way.
>
> "Q. Get in the way of what? A. The bills in the bottom."

Well, now, I can't think of anything more positive in the way of proof of intent than those bills, some $450,000 in cash running through that corn box. That is a tremendous amount of money; even to these people it is a tremendous amount of money, and that kind of cash, how can you possibly think it is anything but black market operations. Yes, tax evasion, absolutely.

Incidentally, you perhaps recall this is where Lawn first came into this picture. Before that time it was almost all Roth and Giglio.

When Lubben first came there and described this corn deal to Giglio—it was Lubben's idea, incidentally, to start with. He didn't deny that. He said: (3353)

is exactly one year later. And there is also in evidence the bank statement, and that shows an odd check, 21,954.59, June 28, 1948. There is no question but that it was 1948.

Now why do they do that? It isn't a normal thing, of course. In January, you make those mistakes, and sometimes in February, maybe in March. Very rarely in April. When you get to June it is pretty rare, and I would doubt—I don't know this, but I would doubt that a bank would cash a check, cash a check for this much money on June 28, 1948, a year earlier, without something having been done; I don't know what it was.

In any event, this was done, the check was cashed, (3328)

but the evidence was created to appear as though it had been done one year earlier, long before the tax returns were filed.

Well, that is a piece of real evidence, and there is more cash money right in Giglio's hands, and, as a matter of fact, Roth testified on that one that he asked Giglio, "Why don't you pay part of that to the Government?" and Giglio said, "I will take care of that."

Exhibit 154 shows he didn't take care of it at all.

I hate to take so much time, and yet I think the story is worthy of several books; it is perfectly magnificent. Here we have this estate which he purchased, again through Howard Lawn and his friends, Quinn, Doremus, purchased —oh, I should mention this dower rights business.

There is no question but that Livorsi purchased this estate, purchased the estate from Mike Jacobs back in 1946. He purchased it. He purchased it; Howard Lawn made the arrangements, after they had a meeting and so forth and so on. His wife did not purchase it, he purchased it.

Under New Jersey law apparently, according to Mr. (3329)

McCue, and it is common law generally, although I don't

think it is the law in the state—his Honor may correct me—under New Jersey law, as soon as a man gets property of any kind, his wife gets a dower interest in it, which is an interest for the remainder of her life after he dies. So in order for there to be a transfer free and clear, a man must always have his wife sign the deed.

When Livorsi purchased the property, he purchased it, and Roth testified that the money came to the American Brands Corporation. It was Livorsi's estate, clearly his estate. His wife did have this dower interest, but, well, I don't know how much the dower interest is worth. It is academic.

Here are pictures of the estate. It is a perfectly magnificent place, from these pictures, anyway.

I think you recall the testimony of Joseph McCue, not Roth, not Lubben and not Bercu, who testified that the original asking price was $100,000, he was authorized by Lawn, Giglio and Livorsi to bid $85,000, and they sold it for $50,000, after a meeting between Jacobs, Lawn, Livorsi and Giglio, in which McCue was told to go take a walk. I don't know what happened at that meeting, but in any event

(3330)

the estate was purchased by Livorsi, $50,000. It was purchased by him at a price half of what Jacobs wanted originally, which isn't so serious but $35,000 less than he had offered to pay for it.

Well, that isn't important here either. There did come a time when he sold, and that was in September of 1947, as are all these several events, and this is, I think, so compelling proof of criminal intent and concealment that you need nothing more, nothing whatsoever more to convict Livorsi, and yet you have all these other methods of concealment that we have described, and that is the receivership

and all the rest of it, but this is so solid that alone I think it convicts.

There was a closing—preliminarily, there was a $5,000 down payment. I wasn't able to get the check, but there was a $5,000 check to Mr. Livorsi. There was a closing September 15th—September 16th, I think it was, the 16th day of September, 1947—the deeds are in evidence—there was a closing at which the balance of the purchase price, $80,000, was paid by the purchaser, Henry Mercer.

In addition, incidentally—and these items are incidental of the $64,000 item—in addition, he paid $3,950 for some

(3331)

personal property purchased from Mr. Livorsi, and you will note that that check, unlike the other check, is made out to Mr. Livorsi alone. You see, there are no dower rights in personal property, and therefore the wasn't any need to have Mrs. Livorsi in this one. But there is the $3,950 which he also got.

Now that is signed by Livorsi on the back also. But I am talking only about the $64,000. This is some more concealment.

And another concealment is $301.56 which he also got. There is also a check here, and it is also signed by Frank Livorsi, but I am only talking about $64,000 at the moment.

Well, they paid this $80,000 across, plus the other sums I mentioned, and Quinn, Doremus, who was handling it—and, by the way, Quinn, Doremus is Howard Lawn's old law firm—was handling this closing, deposited the $20,000, rather, the $80,000 in the bank and made payments of a variety of different kinds, mortgages and so forth, which also happens in a closing, and then on September 19, 1947, mailed to Mr. Livorsi a letter, return receipt requested, enclosing this check, and looking for-

in this court, because we have been able to look through it

(3356)

back in 1946 and 1947 this investigation had not reached this point, and proving it was fraudulent and a sham at that time would have been quite a job for Lubben, so he couldn't sue.

Instead he had to pay $350,000-odd to get his own inventory back. Here are some of the invoices. Here are the notes that he gave, all real evidence, "William Giglio" on the back, signatures. You can call for these if you want to see them.

Do you think that Giglio and Livorsi would let him leave the partnership with $70,000 in cash from the corn box and take notes back from him? He couldn't have any. If they thought he had any cash, they would never let him take these papers.

The additional cars of corn syrup—and these are the cars that Lubben sold after Eatsum partnership ended; this is after March—the invoices are in evidence; Lubben's testimony is in evidence; this one page from the black book is in evidence.

Mr. Stryker commented to some extent as to why only that one page was in evidence. If you really want the record, you can have it read back. The fact is I gave him the black book. I asked him what happened. I didn't even

(3357)

put any part of the black book in evidence, and counsel demanded that I show him the page which had refreshed Mr. Lubben's recollection, and I said, "All right, we will put it in evidence," so we put it in evidence. I didn't even offer the papers. It wasn't my intention to offer the papers. Those were the papers which went into evidence, Exhibits 291 to 296, and coupled with the testimony of Roth and Lubben, established beyond any question that these five

ward to seeing him in the future, and so forth. The re-
(3332)
turn receipt was received back by Quinn, Doremus, Exhibit 166A, signed "Frank Livorsi," dated September 22nd. That was a Monday. He received it.

And then a perfectly fantastic series of events happened.

Now September 22nd he could have taken this money. He lived in Long Island, by the way. It's quite a distance from where they were over in Jersey. He could have taken this check and deposited it in his own bank account or any place and waited for a day or two for it to clear. It doesn't take very long, I think you all know, for a check to clear. He could have done that, but he didn't.

He made arrangements with the Quinn, Doremus firm, who made arrangements with the bank, that he be able to go to Jersey and pick up cash in hundred-dollar bills or less, hundred-dollar bills, and that is what Mr. McQueen, the bank president testified—hundred-dollar bills.

Now, when did he go get it? Here is a check dated September 19—if you look through it, you will see the date, paid September 25th. That is six days later.

(3333)

Now assume he received it September 22nd, he could have gotten his money down where he lived easily—he could have gotten his money easily—by going to a bank or whatever else he might do, or waiting for it to clear, but, no, he wanted to go to Jersey.

Well, I ask you, why did he want to go to Jersey? I haven't been able to answer that question by evidence, except that comes from inference.

Now, what happened when he got to Jersey? September 25th he and an undescribed, unidentified friend, and Vincent McCue went over to the bank and they met Mr. McQueen.

cars of corn syrup in 1946 were sold on behalf of Giglio and Livorsi, the money turned over, and the money went into their tax returns.

Turning to their personal tax returns, you got some more there. It picks up all the moneys we have been talking about in the various other places, and I won't go into them in detail, plus one additional item, crude fraud, really crude fraud, couldn't be cruder, other income, $50,000.

Now, even what these people consider to be stupid revenue agents, special agents and Government attorneys, when you see an item of $50,000 flat, other income, in a tax return, you are bound to question it. There is something wrong with that.

(3358)

Normal people don't just make $50,000 in round figures, and put it down as other income. Now, you know you have to put down where your money comes from. If you are a salaried employee you put a W-2 form in, whatever it is.

This is so crude. Had they just taken $5 off and put down $49,995, or something like that, maybe some of the stupid revenue agents, special agents and Government attorneys wouldn't have figured it out, but this odd figure, $50,000, that flat amount, round amount, is crude, crude fraud.

Now, where did it come from? "Giglio had been doing it all along"—Roth talking, preparing Giglio's 1944 tax return:

> "In preparing the tax return, and asking Mr. Giglio whether he has any additional income besides that, what was indicated on the tax return, he says many of his friends filed tax returns and they put an arbitrary amount in in order to cover any possible income that they may have overlooked to include. I think the first year was $5,000, I am

Both of them took the stand here; you heard them. They got to the bank. Mr. McQueen had Mr. McCue endorse the check, because he wanted to be sure that everything was all right. And then he got $64,000 in cash money, turned it over to Livorsi, who did not count it. I said this in the opening, and it was proved conclusively by those two witnesses, who were not even cross examined, he didn't even count it. He took the money and he stuffed it in his pants and he walked out.

Now here is what they said—this is Vincent McCue:

(3334)

"Well, now, you say Mr. McQueen turned the money over to Mr. Livorsi and Mr. Livorsi then left. Was there any conversation that you recall between Mr. Livorsi and Mr. McQueen about the money? A. Well, he was asked if he wanted to count it, and he told Mr. Livorsi that he had proved it, I think, twice, the amount." "He had proved it, I think, twice," not twice the amount. "It was a rather large package. It reminds you somewhat about the size of a pound of butter, I would say; and he said no, he didn't necessarily want it counted; if he had his assurance there was that much money there he would accept it.

"Q. What denomination were the bills? A. I believe it was all hundreds.

"Q. Plus some change, of course? A. Some odd dollars necessary to make it up." The odd dollars, of course, would be—well, several hundred dollars is lots of money.

"Q. Where did—— A. I didn't count it myself, incidentally.

"Q. You didn't get any part of it, did you? A. No.

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"Q. Where did Mr. Livorsi put the money when he got it? A. Well, he took it and he put it right here, right in here.

"Mr. Wessel: The witness is indicating into his pants. Is that correct?

"The Witness: That's right."

And Mr. McQueen, uncontradicted, bank president, couldn't be cross examined, testified:

"It was on the morning of September 25th. Mr. Livorsi and another gentleman and Mr. McCue came to the bank and handed me the check, which was endorsed properly, and I took the check to the teller, got the money which was in a package and brought it into my office and handed it to Mr. Livorsi. I asked him to go to prove it. He said 'no.' He took it, opened his coat, put it in his belt and that was it."

Well, there is a lot more to be said. There is Eatsum, there is Tavern, there is the consolidation. I will try and do them very quickly.

The Court: Well, Mr. Wessel, I will tell you, now, the jury started at 9:15 this morning, and they can take it, but I hate to drive it too far.

(3336)

What have you got—about 15 or 20 minutes left, do you say, or a half hour?

Mr. Wessel: I will do it in a half hour.

The Court: You are not being pressed.

Mr. Wessel: I will do it in a half hour, your Honor.

The Court: I think it would probably be better if you finish up tomorrow morning, unless that will in some way upset your plans.

Mr. Wessel: It doesn't upset my plans, your Honor, at all. But I don't know how long tomorrow is, and we get into a weekend.

The Court: That is all right. You can't do everything at once, and I think eight hours is a long time to sit and listen to people talk. Some time I am going to ask all lawyers to sit in a jury box and be talked at. I have learned a lot in the last six months of how it feels to be talked at. I think that is enough for one day.

I am going to ask you to start at 10 tomorrow. I am not going to ask you to come in again at 9. I don't know what your personal situation is.

If we can start at 10 tomorrow, Mr. Wessel can finish

(3337)

in a half hour or so, whatever it takes, and then I think we can proceed from there.

I hope not to take that long, but you never can tell, when a lawyer starts talking sometimes it takes longer than you plan.

Just don't discuss the case now. Be careful not to do that and I will see you all at 10 o'clock tomorrow morning.

(Jury out.)

(Adjourned at 5:00 o'clock p.m., to February 18, 1955, at 10:00 o'clock a.m.)

(3338)

New York, February 18, 1955,
10:00 a. m.

(Jury in.)

The Court: All right, Mr. Wessel.

Mr. Wessel: I am going to put Exhibit 154 in front of you again, because, as I said, and I repeat over and over again, out of their own mouths, their own tax returns, signed by them, is proof positive, I think, that these men intended to and did evade taxes.

Tavern Fruit Juice Company: you heard a good bit about Goldenberg. He was here on the stand, and apparently the defendants raised some question as to whether this $32,000 figure, which is part of laboratory and research expense, was or was not a true expense. There is some confusion about that. That item is down in the Tavern income statement not as laboratory and research expense in a general way but as salary for William Goldenberg.

(3339)

He was talking about moneys that he spent, 30 or $40,000, he said. There is an item of that kind in that schedule, Exhibit 58A. There is an item there of research and laboratory expenses of something over $29,000. The item we are talking about is C. Goldenberg, Engineer, $32,780.93.

Now he testified that he got income from Tavern or from Giglio, his best recollection, of between $12,000 and $15,000, he wasn't sure.

Roth testified that he thought he got about $8,000; between $7,500 and $8,500. He wasn't sure either. The books in that respect are not in evidence. There isn't any clear proof as to precisely how much of Goldenberg's salary was from Tavern. This much is in evidence, however:

The social security returns of both Tavern and American Brands Corporation, 59A and 59B, they show, contrary to what Goldenberg said, that in fact he was paid by two companies, American Brands and Tavern.

More important, they show that in all probability there was a separate payroll account, a separate payroll account on the books for Goldenberg's salary, and that this $32,000 item is just another one of that $2,000 to $2,500 that they

(3340)

took out weekly from Tavern and they just allocated that $2,500, $2,000 or $2,500, among various expense accounts. That is what that $32,000 is.

There isn't any proof of any kind in this record that Goldenberg got anything approaching that amount, and the proof, I think, to the contrary is that the amount that Goldenberg got in fact was somewhere around $8,000, and that was a regular salary expense, carried on the books as a regular salary expense.

Most of Tavern I have already covered. The inventory, the closing inventory was referred to yesterday. I will only say briefly that there is in evidence a great volume of testimony about what this closing inventory was. There were, I believe, seven or eight witnesses who took the stand, all independent persons, all of whom were cross examined at some length, none of whom in any respect changed their story on direct examination.

Also in evidence are all these invoices and ledger sheets proving beyond any question—any question—not just reasonable doubt, beyond any question at all what that closing inventory was.

The Lawn legal fee I also referred to yesterday. I

(3341)

should add that this story that it was in fact a loan and not a legal fee is not only fantastic but Giglio's own bankruptcy

"Mr. Giglio said it sounded very good, and he would check it with Howard Lawn and see what Howard thought about it."

Even that had to be cleared. This is crude fraud. It is before the corporate deal started. It was cleared, and you recall some of the testimony that Mr. Stryker referred to as how Howard Lawn worked connections to get some corn down in St. Louis.

Part of that story I don't think ever has been very clear, but it is an impressive part of the clear tax evasion. This corn syrup was being sold through a broker named Michael Cohen, and Michael Cohen in turn sold it or arranged for its sale by Mario Betancourt, doing business as Commodity Trading Corporation.

Now Roth was accountant for those two persons also, Michael Cohen, Mario Betancourt. Of course, Betancourt was selling it for cash, he was paying the cash to Cohen, Cohen was paying the cash to Eatsum, and in order for Roth to protect Eatsum he had to somehow prevent this cash from showing up in Michael Cohen's and Mario Betancourt's tax returns, so he left it out of Cohen's tax return, he just didn't show any money coming in to Cohen or any money going out, which meant that he had to

(3354)

increase Betancourt's tax return by, I think he said, about $50,000. They only had sold a part of this corn syrup.

Poor Mario Betancourt got stuck for an extra $50,000 in income. When I asked him how he accomplished that, he said this:

"I just want to know how you accomplished filing Mr. Betancourt's return and overstating his income without his knowing about it. A. He signed the return in blank, and I filled in the figures."

That is pretty rough.

As to Lubben's share, there has been a tremendous amount of questioning by Mr. Stryker as to why Lubben did not sue for his $70,000.

Incidentally, all the evidence in the record, all of the evidence in the record, is positive and final—I don't think there is the slightest question about this; this comes from Roth and Lubben, and they are the only ones who said what happened at this meeting—that Lubben did not get any part of that corn box; that he was told by Giglio that they had an OPA deal of some kind: they had to pay the (3355)

money out and there wasn't anything left.

And Lubben testified that he wanted his money, he argued for a bit.

> "Giglio said, 'Get the hell out of here.' So I looked around the room, sir, and I left.
>
> "Q. You looked around the room. Whom did you look at? A. Well, a fellow named Big John Ormento.
>
> "Q. Anybody else? A. Mr. Livorsi, two or three other people, sir, that I don't remember; don't know their names, and I left, sir."

Big John. Now why didn't Lubben sue? Well, Lubben's rights were fixed by these various agreements that I have shown to you. Lubben had agreed in writing, he couldn't get out of it, that all he was going to get was the plant; and, by the way, I should say Lubben did very well. He made $117,000, and that is no mean profit for an eight-month period, but he did give up the rest. He gave up everything but the plant, which he got, and his rights to the corn box. He couldn't sue. He had given up his rights in writing, and this agreement; phony as it may be

going by memory; in 1944 the miscellaneous income about $5,000, I think in 1945 it was $15,000, 1946 it was $50,000."

(3359)

That wasn't to cover corn syrup; it was to cover any contingency. There wasn't any discussion at that time as to whether that was half the corn box or a quarter of the corn box or anything else. It was just a flat, round figure put in there. There is testimony right on this point, in order to cover any contingency. Think about it for a minute.

If you as an individual have a hundred companies, each of which is making $1,000, and you want to evade your taxes, well, how do you do it? You can't report $100,000. You have to pay all your taxes. That is what you make.

You have 100 companies. You put in $15,000. The Government comes around and they have gone to work and they have found five of these companies in which taxes were evaded. You say, "Sure I got it in that $15,000." Whatever five they come up with, you have got the $15,000. They have got to come up with 15 or more.

Now, this $50,000, what is that? The Government finds that corn syrup deal. "Well, we have got it in there." If the Government finds the other cars sold later, "We have got it in the fifty." If the Government finds the Tavern stuff, "It is in the fifty"; AB stuff, "It's in the

(3360)

$50,000." No matter what it is, "It's in the $50,000."

It takes a 10-year investigation to break that, but it is crude, because that particular figure, the flat, round figure, $50,000 is a silly thing to put in.

If you make it $49,172.23, then you may fool somebody.

Now the consolidation. I am not covering all the evidence. I am sure you know I couldn't possibly in the time I

have. The consolidation I will do as quickly as I can. I put it at the end because here is one of the clearest cases where we have intent, one of the most complicated fields of the law, Section 141 of the consolidated tax return, and yet one of the clearest cases where there is intent.

Final tax return, consolidated, tentative returns on an individual basis, clearly. Final draft returns, prepared right about the same time as the final return, on an individual basis. This consolidated return, phony, on the inside the affiliation schedule, because it shows that one company owns all the others, which wasn't true, because it shows the dates,

(3361)

and Mr. Stryker has made a tremendous amount about the fact that Louis Roth signed that.

I haven't said a word up to now, but I am going to tell you: Here is the 1947 return, which is also the same thing, and that was signed by William Giglio, and you can call for this return, which they put in evidence, any time you want to—William Giglio.

Now just how crude is this fraud? Look at it, ladies and gentlemen. Filed October, 1950, after the informations, after these men were under criminal informations, and being prosecuted for these very crimes, the very crimes we are talking about. The affiliation schedule which they then knew was definitely, clearly and unquestionably false, they filed it again. They filed it in connection with this suit; they filed it in order to prepare a defense of this suit; so they would have carry-back losses to use to prove to the jury there wasn't anything wrong that they didn't pay any tax; "We didn't have any tax to pay to start with."

Now here what they have done is just to add on two more crimes—two more crimes—in order somehow to get out of the first crime, and they did it with Mr. Holzer.

(3362)

Now he was very careful on cross examination to say, "Well, I didn't really know about it. It was filed from my office but I didn't see it or anything else." Filed from his office is right: 24 Commerce Street. That is his address. The same address, "Care of Herman Holzer" on this Exhibit 89.

All these papers were filed as part of this lawsuit, part of this lawsuit. These were not filed in 1947, and don't think for a minute they were filed to get back $300, because they were paying Herman Holzer a lot more than $300 for this work. Certified public accountants don't do this kind of thing unless, like Louis Roth, they get paid a lot of money.

Two more crimes, two more crimes, and there cannot be any question of any kind that when they did this they also—they couldn't not know that it constituted a crime, a crime under two sections of law. That is four separate crimes: to file this false consolidation, 1947, another one for 1948, manufacturing and fabricating evidence for this lawsuit.

Now there is a good deal more about this. I just want

(3363)

to read one portion of the testimony about how they were going to straighten out the books, which they did not do, and the reason they did not do it is because, I guess, they finally figured out the receiver had all this proof anyway.

Giglio said it's only a matter of mere mechanics, and those were his words, "mere mechanics," to modify these books, and Roth said:

> "Mere mechanics meant to me, to me meant that as long as he was in control of this stock of the corporation, of changing the names of the stockholders from themselves, Mr. Livorsi, Mr. Giglio and Mr. Lawn, from themselves individually, to that

of the corporation, dating it back to the inception of the corporation."

Now you heard Holzer on the witness stand testify as to how that was done. Can you conceive of an honest certified public accountant testifying as to how you go about doctoring up, manufacturing evidence in order to conform to the law so that you can evade taxes? Mere mechanics.

Just a few more things I would like to read, ladies and gentlemen, and then I will stop.

It's been a long trial, and very shortly it will be your (3364)

job, and it's a tough one. I suppose there isn't any tougher job to decide than guilt or innocence. I don't want you to think that it is your function at all to decide liberty. Mr. Stryker has put it that way. That isn't your function. That is the function of the Court. Your function is to decide whether these men are guilty or innocent.

You—and I try not to be dramatic, but you are the conscience of this whole country right now, because there isn't anybody else that can determine the question of guilt or innocence. These people have done what I think the evidence shows, some serious things.

You have got to decide whether that is the kind of thing you want done in this country. You have got to decide whether this is the kind of conduct you want to censure or you want to permit.

I want to read just a few more extracts from the record because I think, after reading them, you can't do anything but decide that these people must be punished; that these are the kinds of human beings that must in some way be prevented from continuing this kind of conduct; that you (3365)

must, not only for the good of the community, as far as

they are concerned, but for the good of other persons, to prevent it from happening again, tell the whole community, and you are the voice now of the community, that this kind of conduct is wrong.

Mr. Lubben talking:

> "I was told by Mr. Giglio to stay away from 253, and to keep my mouth shut, that everything would work out all right. I was told by Mr. Roth if I ever opened my mouth I would find myself at the bottom of the Hudson River in a cement box."

Roth admitted these threats.

That is Lubben talking about the kind of person that you are now deciding, kind of person whose conduct you are now deciding whether to approve or disapprove.

Roth talking:

He had a conversation with Mr. Giglio about the fact that he had been in Mr. Leone's office and was starting to talk. Mr. Giglio said to him, he says, "'All I can tell you is this: Be careful what you say to them. Make sure you tell them all the facts, and even if they hold you incommu-

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nicado,' he put his hand around my shoulder, and he said, 'You have an older son.'"

Now last, and this is why, ladies and gentlemen, Mr. Stryker attacked so bitterly Mr. Bercu, because he knew that Bercu was one person completely independent, no reason to lie or anything else, who would corroborate this kind of conduct in all respects. Bercu was not here to testify about the destruction of documents. Here is what he was here to testify about—and there was a meeting in Bercu's office with Giglio; Bercu did not see what documents were destroyed. This is why Bercu was on that witness stand:

"Mr. Giglio said to me that these work papers were being destroyed because of his—because as he said, he wanted to know that his partnership affairs were kept within his control, and that no outsider knew anything about them. He then said to me, 'We have ways of taking care'—this is in substance, because this happened ten years ago, or nine years ago, in substance he said, 'We have ways of taking care of any man who talks about our affairs out of turn.'"

(3367)

Thank you very much, ladies and gentlemen, for your patience and your consideration and your attention to all the evidence. I know whatever verdict you come back with will be a fair and an honest verdict.

Mr. Stryker: If your Honor please, I have a very brief question of law which I think under the rule I should discuss with you and Mr. Wessel privately. It will take a short time, under Rule 32.

The Court: Very well.

Mr. Stryker: If we do it now I would appreciate it.

The Court: I will excuse the jury now for a few minutes, and, ladies and gentlemen, as I told you yesterday, be very careful not to start any discussions now. Don't discuss this case among yourselves at all.

All right, you can retire for a few minutes.

(Jury out.)

The Court: All right, Mr. Stryker.

Mr. Stryker: If your Honor please, under Rule 30 of the Federal Rules, it provides that the Court shall inform counsel of its proposed action upon the requests; it says prior to their arguments.

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I didn't have the last one till then, so I am making it now.

The Court: I think you gave me the requests as you started your argument, as I remember it.

Mr. Stryker: That is right.

Now, under that rule, I respectfully request your Honor to advise me as to what position you might take. Possibly you may agree with me. If you do I have no obvious application. If you don't, I wish to record my position.

The Court: I think you will find, as I recall your requests, that I will charge the substance, but not the exact language of the requests up to No. 19. 19 and 21, which I think deal with circumstantial evidence, I will not charge in the way that you request.

The requests dealing with partnership distribution I will not charge in the language that you have requested. I think that is about the way it will happen.

Now, for the sake of brevity, it will be impossible for me to read each of your requests as they have gone along and do the same with the Government. I have done my best

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to compress the substance of the general rules of law for the protection of defendants, and I will try to cover that adequately.

Mr. Stryker: I record a very respectful exception to that disposition of our charges.

Mr. Wessel: I have two more charges, your Honor. Excuse me.

Mr. Stryker: As to——

Mr. Wessel: I did not mean to interrupt.

Mr. Stryker: It is quite all right. It was my fault.

The Court: Continue, Mr. Stryker. He didn't realize you hadn't completed your application. If you have another application, go ahead.

Mr. Stryker: I am not clear. There is quite a group of Government requests that your Honor has before you; some of them we do not agree with, and I just wondered what position your Honor would take with regard to them.

The Court: Well, I don't think I can give you the number. I will tell you what, we will take a brief recess. I have the requests outside here, and I will get them and I will come back, say, in about five or six minutes.

Mr. Wessel: I think under the rule counsel is required

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to state his objections to whatever the Government's requests are.

Mr. Stryker: I couldn't do that until I know what his Honor is going to do.

The Court: I will be glad to tell you in substance what I am going to charge. Take a 10-minute recess now.

Mr. Wessel: May I hand up two requests to charge. I certainly could not ask that they be read in that form, because they are improper, but they deal with two subjects that came up recently.

The Court: All right, I will be back in 10 minutes and then we will start.

(Short recess.)

The Court: Mr. Stryker, in answer to your inquiry as to which of the Government's requests I am going to charge, with no reflection on the Government, I don't think I am going to charge any in the language exactly that they requested.

Now I have a recollection that somewhere in my notes I said, charge Government number so and so, I think it is 1, it is not likely to be controversial, and I looked through my check marks here. What I have done is tried to compress

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something into my own, at least, outline, whether in its language or not, and I think requests 4 and 5 of the Government are in there, and 8, probably the substance of all their general charges at the beginning. And then when you get up to 18, where they start talking about the specific crimes, I think the substance of those requests are in my charges, but I doubt that it is in that exact language.

Incidentally, I do not have a written charge, or I would read the parts to you. Parts of it are written and parts are not.

Is there anything in particular that you were anxious to avoid, Mr. Stryker?

If we had plenty of time and could have gone along and gotten the requests in earlier, we could have gone through ahead of summation.

I will break a few minutes after the charge to give you a chance to correct anything that you think I have said that was wrong.

Mr. Stryker: Suppose we do it that way, and then we will break a minute and I can take it up with you.

The Court: The only trouble is at that point the jury is waiting, and so we don't have too much time.

(3372)

Mr. Stryker: No, what I will have to say will be very short.

The Court: On the facts, I am going to mention them. I think I have got to make some mention of them. I will do my best not to get into the controversial facts. I mean I will try to outline the contentions without getting into the details, as best I can.

All right, I guess we are all set.

(Jury in.)

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CHARGE TO THE JURY

The Clerk: As his Honor is about to charge the jury, those spectators desiring to leave the courtroom will do so now.

Will the marshal close the courtroom doors.

The Court: Mr. Foreman, Ladies and Gentlemen: In a trial that has taken seven weeks on the facts I am afraid we are going to have to take a little time on the law. It is not going to be as smooth and easy and free running as I would like, but I will do my best to cover the ground.

Before I start, I would like to take this opportunity—we may not have another—to tell you how very grateful I think all of us are for the way in which you have done your work as jurors. I think that some of you are having trouble businesswise to do this duty, and I know that all of you have been particularly devoted and serious. I wish that there were more people who could see you perform your work, because I think it's been outstanding.

Little things that I have noticed during the trial: When we have gotten off the track for a few minutes, some

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comment among counsel and the Court or something, you haven't been diverted; you have snapped right back and started following the evidence, even when at times the records and the complexity of things as they were going in were hard to follow, and thinks isn't much to give you, but I give it sincerely.

Now the first thing as we approach this job is to get clearly in mind the separation between your job and mine. On the facts, what witnesses to believe, what all of the evidence adds up to, what fact relates to what other fact, all of those things are solely and exclusively within your province. You are the sole and exclusive judges of the facts. If I say something about the facts, or if counsel has said something about the facts which is different from

the way you recall it, stick to your own recollection. Don't take ours.

I have tried scrupulously to avoid any indication of my thoughts on guilt or innocence. I don't intend to make any expression as to my thoughts on guilt or innocence. That is not for me to do. If I have said anything in discussing the facts, remember that I have been concentrating on some question of law, not fact. I have been trying to think of some rule of evidence, how it applies to what counsel

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has asked me, or what I have been discussing with counsel, and as I continue with this charge to you, I am going to be thinking in terms of law, and not facts, and even with the best of intentions, something that I say about the facts may be inaccurate, because I am not concentrating on that; that is your job, and I know you are going to do it well, because I have seen you read the exhibits and I have seen you listen to the witnesses. So just bear that in mind. If I say something which isn't as you recall it, or if I say something which conceivably could reflect some inner view as to the defendants, disregard it because I don't intend it, and it is not for me to say.

Now, the jury, as you know, is composed of 12 individuals, and you must render a unanimous verdict, and the verdict must represent the views of each of you as individuals. In other words, any verdict that you render must be one that you sincerely believe in as an individual. At the same time you have a duty to discuss with your fellow jurors their views and explain yours, and just as you have listened patiently for seven weeks to the evidence,

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so have 11 other people, and each of you is entitled to express your own views, and each of you is entitled to ask the other juror for his and to listen to them.

And so I urge you not to go into the jury room with any fixed determination or any stubborness. Remember that each of you—and all your fellow jurors—has tried to do his duty just as sincerely as you have, and listen to what each of you have to say and deliberate fairly and courteously together.

Now I will tell you some general rules of law that apply to all cases, and then I will try to tell you about the specific crimes that we are concerned with here, and I will talk to you a little bit about some rules of evidence which may help you in appraising the testimony that you have heard.

As I told you when you first sat in the jury box, the indictment which contains the charges in this case is simply a charge. It is not proof of anything. It just raises the question which is coming before you. It is not evidence of guilt, and it doesn't create any presumption or permit any inference of guilt. To charge a person with crime is not to prove it.

Each of these defendants has pleaded not guilty, and (3377)

he has thus placed in issue each and every one of the material allegations of this indictment. In other words, he denies them.

Now, one defendant who is named in the indictment, Louis Roth, has pleaded guilty. He has pleaded guilty, I think, to nine counts of the indictment, but that simply removes him from this trial. That is all that that means. He is one defendant you don't have to pass upon. But his pleading guilty is in no sense indicative of guilt of any other defendant. If one man says, "I am guilty," why, of course, that doesn't prove that somebody else is guilty.

Under the law persons charged with the commission of crime are presumed to be innocent until their guilt is established beyond a reasonable doubt. A defendant is not

bound to prove that he did not commit the crime. The Government has the burden of proving that he did, and the Government's burden is to prove guilt beyond a reasonable doubt.

The only thing which you can consider on the question of guilt or innocence is the evidence which is legally before you. Facts which were stated in questions, which I sustained objections to, or recited in questions which were

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answered "no," or answers to questions which I have stricken from the record, or colloquy between counsel and the Court, and particularly anything the Court says, is not evidence in any sense.

Evidence are the exhibts that you have got before you, and the testimony that you heard from the witness stand, and if you have read anything about this case—I don't know where you could—but if by any chance you have read anything or heard anything about this case other than from this witness stand or the exhibits, disregard what you heard from that source because we don't know whether it was right or whether it was wrong.

We know what we have gotten here is as cleancut and as reliable as the rules of evidence can determine. We have problems in any issue of fact, and this is the safest place to get your evidence from to come to your decision on.

Now in this regard the fact that any defendant has not seen fit to testify in this case cannot be considered by you as evidence against him or against any other defendant or as any basis for any assumption or inference unfavorable to him or them. The prosecution must prove the defend-

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ants guilty. They don't have to establish their innocence.

Now I have said the Government must prove guilt beyond a reasonable doubt. Now what is a reasonable doubt?

A reasonable doubt means a doubt founded upon reason. It does not mean a fanciful doubt or a whimsical or a capricious doubt, for anything relating to human affairs and depending upon human testimony is open to some possible or imaginary doubt.

When all of the evidence in the case, carefully analyzed, compared and weighed by you, produces in your minds a settled conviction or a belief of a defendant's guilt, such a conviction as you would be willing to act upon in matters of the highest importance relating to your own affairs, when it leave your minds in the condition that you feel an abiding conviction amounting to a moral certainty of the truth of the charge, then and in that event you would be free from a reasonable doubt; you would be convinced beyond a reasonable doubt.

Absolute or mathematical certainty is not required, but there must be such certainty as satisfies your reason and judgment, and such that you feel conscientiously bound to

(3380)

act upon.

Now, in this regard I would like to make it clear exactly what you do. What a jury does is report to the Court whether something happened or whether it did not happen. It doesn't decide whether something is good or bad—the laws tell us that, and I am going to do my best to instruct you as to the law, and it doesn't have anything to decide with respect to liberty or anything like that—that is all entirely within the province of the Court. All you do is make your honest, conscientious report as to whether certain facts happened, and if you do your best in the light of the evidence as you see it, you have no one to answer to.

Now, before I get into a discussion of the crimes, I am going to discuss just momentarily the credibility of witnesses, because through this case there has been great

emphasis on the credibility of two, three or four witnesses, primarily Lubben and Roth.

Now one of the great jobs—I mean one of the reasons we have juries—is to pass upon the credibility of witnesses; when one person says one thing and some other persons says something else, to decide who is telling the truth.

(3381)

In a simple case where you have the holdup of a bank, for instance, and you have a man who is observed by bank tellers, people under bond, you don't have much of a problem as to credibility of witnesses. The only question there is, did they see accurately and do they remember, because the people who see the crime are not people who are likely to lie about anybody.

But you have more complicated cases and you can't pick and choose them. As jurors you can't decide as you would who you would lend money to or who you wouldn't. You must decide on the case that is presented to you, whether you like to or not, whether someone is telling the truth.

In another type of case, there may be cases where children may be the principal witnesses, and you all know that children are easily impressionable, and that if you were given the choice you might rather have an adult's testimony as to something, but you don't have that choice; you have to take the witnesses that are given to you and do the best you can with them, and you have the difficult job in those cases of appraising the testimony of a child, whether he told

(3382)

the truth or whether he did not, and so in more complicated cases—for example, you take the bank robbery I mentioned; if you were interested in finding out who sold the gun to the bank robber, the prosecution might have to depend upon the testimony of the bank robber, and then the jury would have a very difficult job of appraising the testimony of a person who is an admitted criminal.

But to function with respect to complicated crimes, that is a responsibility which a jury undertakes.

Now, you must judge for yourself as to whether a person is believable or not. If after you have heard his testimony, you conclude that he is a liar and that you won't believe anything he says, that is completely within your judgment. If, on the other hand, you conclude he is a liar in part of what he said but he told the truth in part, you may accept his testimony as to that which you think is truthful.

And in considering whether a person is lying or not, you may observe his mentality, his capacity, whether he is an accurate observer, whether he remembers, how did he

(3383)

look on the stand, and in considering how he looks on the stand you have got to consider what he did and what he said in the light of what cross examination he was subjected to. You put both of them together, and your try to compare in your mind how he acted and how you think an honest witness might act under the same type of cross examination.

What was his demeanor? Would an honest witness have been able to answer in a different form or more readily, and so forth.

You also consider what interest a witness might have. Does he have any reason to lie, because if a person has a reason to lie, then you have to watch his testimony very carefully to make sure that he wasn't tempted to do so.

And when you get a witness who is an accomplice in the very crime on trial, then you have to be doubly careful. It doesn't mean that you can just say—well, you can, I suppose, if you wish, because you are the sole judge of this, but it is a matter which you may wish to consider, whether you would just say, "a man is an accomplice and I won't ever take

the testimony of an accomplice," because think what that might do to the prosecution of crime and law enforcement.

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But the fact that a man is an accomplice raises a question, and raises a danger signal, and it means that you have got to be particularly careful in scrutinizing his testimony to see whether to save his own skin he lied to hurt somebody else or whether he had some other motive for lying to hurt somebody else. And in those cases you listen to each word, and you look all the more carefully at the witness on the stand.

Now I have told you that you must scrutinize, and for this purpose I charge you, as a matter of law, Roth is an accomplice of these defendants, and whether Lubben is as a matter of law, I am going to tell you to be just as careful with his testimony as you would with an accomplice, and look and scrutinize it carefully.

Then look to see to what extent the testimony of this person you are examining so carefully is corroborated by the testimony of independent witnesses, unimpeached witnesses, or by records or by circumstances which are admitted. In other words, it is a difficult job, but that is what we have juries for.

So those are some of the things that you take into

(3385)

account in judging credibility. Now I don't say you have to take these things into account, except that I did tell you that Roth was an accomplice, but these are things which over the years have been found wise to take into account in exercising your judgment as to whom to believe and whom not to believe.

Now we will come to the crimes which are before us. Now in the course of this discussion, for the sake of simplicity, I may refer to some of the facts of the case, just

to bring it within some focus, but that doesn't mean that I am telling you which facts are important and which are not, because that is for you to decide, not me, and I don't want to affect your judgment in that regard, but I do want you to understand the law and so to make it easier I will from time to time perhaps give examples to relate certain facts.

All right, now I am going to start with the last count in the indictment for the sake of ease of discussion with you, and that is the conspiracy count, because when we get that count fully discussed, I think it will be easier to discuss the others.

Section 371 of the Code of Criminal Procedure says (3386)
that if two or more persons conspire either to commit any offense against the United States or to defraud the United States or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy each shall be guilty of a crime.

Well, the grand jury charges—this is count 10—from on or about the 1st day of July, 1945, and continuously thereafter up to and including the date of the filing of this indictment, which was sometime in 1954, William Giglio, Frank Livorsi, Howard Lawn and American Brands Corporation, the defendants, did wilfully and knowingly combine, conspire, confederate and agree, together and with each other and with diverse other persons to the grand jurors unknown, to commit an offense against the United States of America, to wit, to violate the provisions of Section 145(b) of Title 26 of the United States Code.

Well, now, that is the income tax violation that we will talk about in greater detail later. In other words, they are charged with conspiracy to violate the income tax law as set forth in this section. (3387)

It was a part of the said conspiracy that the defendants would defeat and evade a large part of the taxes due and owing by the said defendants individually and by American Brands Corporation, American Brands Wholesale Corporation, and American Trucking & Forwarding Corporation.

It was further a part of the said conspiracy that the defendants would defeat and evade the payment of a large part of the taxes due and owing by said defendants individually, and by American Brands Corporation, Wholesale, Trucking & Forwarding.

It was further a part of the said conspiracy that the defendants would organize and cause to be organized American Brands Corporation, American Brands Wholesale Corporation, American Trucking & Forwarding Corporation, American Agar Corporation, and American Sweets Corporation.

It was further a part of the said conspiracy that the defendants would file and cause the filing of delinquent income tax returns long after the due date for the filing of said returns for said defendants individually and for American Brands Corporation, American Brands Wholesale Corporation, American Trucking & Forwarding Cor-

(3388)

poration, American Agar Corporation, American Sweets Corporation.

It was further a part of said conspiracy that the defendants would cause American Brands Corporation to fail to withhold taxes on salaries or wages paid to the defendants.

It was further a part of the said conspiracy that the defendants would misappropriate, convert and divert assets of the aforesaid corporation; that is, American Brands.

It was further a part of the said conspiracy that the defendants would falsify, destroy and fail to keep and pre-

serve books and records of the operations of the aforesaid corporations, and of Eatsum Food Products Co., Ltd. and Tavern Fruit Juice Company.

It was further a part of the said conspiracy that the defendants would cause a consolidated corporation income tax return in the name of American Brands Corporation to be filed with the Collector of Internal Revenue for the Third Collection District of New York.

It was further a part of the said conspiracy that the defendants would file and cause to be filed false and fraudu-

(3389)

lent income tax returns for the said defendants individually and for American Brands Corporation, American Brands Wholesale Corporation, American Trucking & Forwarding, American Agar Corporation and American Sweets Corporation.

It was further a part of the said conspiracy that the defendants would file and cause to be filed false returns of patrnership income for Eatsum Food Products Co., Ltd. and Tavern Fruit Juice Company.

It was further a part of the said conspiracy that the defendants would conceal assets of William Giglio and Frank Livorsi for the purpose of evading the payment of taxes.

Well, now, what is a conspiracy? A conspiracy may be defined as a combination of two or more persons acting together to accomplish a criminal or unlawful purpose or to accomplish some purpose not in itself unlawful by criminal or unlawful means.

It has been characterized as a partnership to commit a crime. The gist of the offense is the unlawful combination or agreement—an agreement to work together for criminal purposes.

Now, conspiracy is a separate crime from the so-called

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substantive crimes charged, even though those crimes may be committed in furtherance of this conspiracy.

To give you an example unrelated to the case: Supposing we were back in prohibition times and three or four of us conspired to smuggle whiskey in from Canada, or from wherever you could get whiskey in those times, and that conspiracy, we did one thing in furtherance of it, we took a ship up to Canada and negotiated a purchase. That crime could be called complete then.

Suppose in furtherance of that conspiracy we actually bring the whiskey into the United States. The bringing of the whiskey in is itself a crime, and it is also an act in furtherance of the conspiracy. They are two separate crimes, the conspiracy and these individual acts.

Now nine of the counts in this indictment, the other nine counts, relate to individual acts, individual crimes committed in furtherance of this general conspiracy, but the conspiracy is in itself a crime.

Conceivably—and it is for you to decide—and I say this simply by way of hypothetical illustration—you could find

(3391)

the defendants or a defendant guilty of conspiracy and not of the other crimes, or you could find it the other way around, guilty of one of the other crimes and not of the conspiracy.

We go on now and find out more about a conspiracy. Now a conspiracy is an agreement, but there does not need to be a formal agreement or a written agreement. It is sufficient if the conspirators in any manner impliedly or tacitly come to a mutual understanding.

To give you another example: Four doors in this room; if simultaneously through each of those doors a person came into this room carrying a piece of cloth, and we put the cloth down on the table and we found that it was all of the same material, and put together it made a beautiful suit, you

would be justified in concluding that those people acted pursuant to a conspiracy to make a suit; even though there is no written agreement, you are justified in concluding those things just don't happen by accident.

So if the acts show such a coordination of conduct as to convince you beyond a reasonable doubt that there was an (3392)

agreement to perform that conduct, why, that is proof of a conspiracy.

Now it is not necessary that the objects of a conspiracy be accomplished. As I say, we may have been caught by the Coast Guard getting our whiskey in from Canada, but there still would have been a conspiracy. Persons may be guilty of being parties to a conspiracy though the objects were never accomplished, and even though those objects may have been highly improbable of accomplishment.

On the other hand, proof concerning the complete or partial accomplishment of the objects of the conspiracy is persuasive evidence of the existance of a conspiracy to accomplish those objects. In other words, if we see a finished suit, why, that is persuasive evidence that there was an agreement to make a suit.

Now it is not necessary that each conspirator participate in the original agreement that led to the conspiracy. If one conspirator comes in later than the other, he becomes a member of the conspiracy with respect to things that take place after he joins it as long as he knows what its objects are, and intends to carry them out. And a conspiracy is not (3393)

ended as long as the evidence shows an intention to continue it, but once a person is shown to be a member of the conspiracy he may be presumed to continue as such.

Now a conspirator can withdraw from the conspiracy, but that requires an affirmative and effective action. Then

there is a question of evidence, whether anyone withdrew from the conspiracy, whether there is any evidence before you that showed any person that you think was in the conspiracy withdrew.

And it is not necessary to prove that each of the conspirators did everything alleged in the indictment or even that everything alleged in the indictment was accomplished, as long as there was an indication of an agreement to try to accomplish them, and as long as one act was performed in furtherance of that agreement.

Usually in a conspiracy all of the conspirators don't do everything. Usually they all don't know everything that is done. Very often one will have one job and another job, but it is necessary that all of the conspirators know what (3394)
the purpose of the conspiracy was, and intend to help in its fulfillment.

Now, of course, you can't have a conspiracy with just one man. He has got to have somebody to conspire with, so there has to be at least two members to the conspiracy.

Now the statute said that there must be an overt act, there must be an act committed in furtherance of the conspiracy. Well, what does the indictment charge?

It says that in pursuance to the said conspiracy, and to effect the objects thereof, at the Southern District of New York, on or about the 15th day of September, 1947, William Giglio and Louis J. Roth, the defendants, filed or caused to be filed with the Collector of Internal Revenue for the Third Collection District of New York a partnership return of income for the fiscal year beginning June 1, 1945, and ending May 31, 1946, of Eatsum Food Products Co., Ltd. Further in pursuance of the said conspiracy and to effect the objects thereof, at the Southern District of New York on or about the 15th day of September, 1947,

William Giglio and Louis J. Roth, the defendants, filed
(3395)
and caused to be filed with the Collector of Internal Revenue of the Third Collection District of New York a partnership return of income for the period beginning April 16, 1945, and ending March 31, 1946, of Tavern Fruit Juice Company.

Further in pursuance of the said conspiracy and to effect the objects thereof, at the Southern District of New York during the month of March or April, 1946, William Giglio and Louis J. Roth, the defendants, visited the office of Bernard Bercu.

Now, an overt act does not have to be illegal in itself. It can be illegal or it may not be illegal; as long as it is performed, it is an act performed in furtherance of the agreement to accomplish a criminal purpose.

And further in pursuance of the said conspiracy and to effect the objects thereof, on or about the 11th day of September, 1947, Howard Lawn, Louis J. Roth and William Giglio, the defendants, had a conversation with one Solomon Tepper, and further in pursuance of said conspiracy and to effect the objects thereof, on or about the 28th day of October, 1946, Louis J. Roth, the defendant,
(3396)
did file and cause to be filed with the Collector of Internal Revenue for the Third Collection District of New York an individual tax return for one Mario Betancourt.

And I will tell you—this I will come to later, but this overt act reminds me of it—that if you find a conspiracy exists, and you find by independent testimony that certain persons are parties to that conspiracy, then what one does in a sense binds the other, and the fact that Louis Roth is not on trial here doesn't make any less a conspirator, and if you find that he and another were members of the conspiracy

and that he did this, why, this would be in that sense an act of the person who was in the conspiracy with him.

And further in pursuance of the said conspiracy and to effect the objects thereof, on or about the 1st day of March, 1946, Louis J. Roth, the defendant, and one Samuel Starr had a conversation. And then on or about the 1st day of September, 1946, Louis J. Roth and one Mario Betancourt had a conversation.

On or about the 15th day of September, 1947, William Giglio and Louis J. Roth, the defendants, did file and cause

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to be filed with the Collector of Internal Revenue for the Third Collection District of New York a consolidated corporation income tax return for American Brands Corporation for the calendar year 1946.

And further in pursuance of the said conspiracy and to effect the objects thereof, on or about the 15th day of September, 1947, William Giglio, the defendant, did file and cause to filed with the Collector of Internal Revenue for the Third Collection District of New York his individual return of income for the calendar year 1946.

And similarly, the defendant Livorsi did file and cause to be filed with the Collector of Internal Revenue for the Third Collection District of New York his individual return of income for the calendar year 1946.

And further in pursuance of the said conspiracy and to effect the objects thereof, on or about the 28th day of June, 1948, the defendant Louis J. Roth did deposit a sum of money in his account in the Pennsylvania Exchange Bank.

It is not necessary that the indictment contain all of the overt acts that are proven, but at least one of the overt acts

(3398)

alleged in the indictment must be proven. You must be

convinced beyond a reasonable doubt that at least one of those acts alleged in the indictment was proven in order to return a verdict of guilty as to any of the defendants.

Now if you are convinced beyond a reasonable doubt that there was a conspiracy to violate the income tax law, then you come to the queston as to who was in the conspiracy.

Now in order to find any defendant guilty of the crime of conspiracy you must be convinced beyond a reasonable doubt that he not only knew of the conspiracy alleged in the indictment, but that he actually participated in it, and that his participation was knowing and wilful; that he knew it was for an illegal purpose and he participated just the same and tried to help in the accomplishment of such an illegal purpose. And in deciding whether a person is in the conspiracy or not, you must determine that from his own actions and from his own statements as testified to under oath by a witness or from an exhibit received in evidence.

In other words, assume we have two conspirators, and

(3399)

one conspirator tells another conspirator that somebody is in the conspiracy, too, but the person who testifies only knows what one of the conspirators told him. That isn't proof against the third person, that he was in the conspiracy. In other words, the testimony as to the defendant's statements or conduct which you believed, or which proved to you that he was in the conspiracy must be testimony and acts testified to here by someone who saw them or heard them himself.

Now once you are convinced beyond a reasonable doubt that there is a conspiracy; and when you are further convinced beyond a reasonable doubt that certain persons are parties to that conspiracy—in other words, that there is a partnership, then, in deciding what was the purpose of that

conspiracy, what one conspirator does or says may be taken as evidence against all of the conspirators. Once you are convinced that they are working together, pursuant to a common agreement, then you can take into account what one says, what one does in deciding what that common agreement was, and that is evidence against them all.

(3400)

Now in coming to the question of the facts in this case, you have heard summations by two of the finest counsel in New York, expressing the views of both sides.

I meant to tell you this at the outset but I will tell it to you now, that long as this trial has been, complicated though it has been, you have the satisfaction of knowing that it has been presented to you on both sides by persons of the greatest competence; that they have been thoroughly prepared, and that everything that there is that was to be presented and they wanted presented was presented, and that that has made the job of both of us much easier.

Now I thought that the only thing which I can do which will help you on the facts would be to briefly run through perhaps a chronology of the events as they happened.

You see, this conspiracy is alleged to have started back in 1945, I think, and to have continued. That means that you have got to appraise the facts which were proven, and then you have got to decide what happened and what was the intent of the parties when this happened. I am not going to go over all of it, but I thought that we could run

(3401)

through just a very easy chronology.

The story starts, I believe, in the last year of World War II, back in 1944 and 1945. The sugar was rationed. We have Lubben, who in conducting a black market operation by himself. Apparently the defendants, Giglio and Livorsi are already associated, but not in that enterprise.

The defendant Giglio met Roth, and had certain discussions that Roth testified to.

Now in this the defense challenges Roth's credibility. They say you can't believe—I guess they would say you can't believe anything he says. I am not passing on that one way or another. That is for you to decide.

Thereafter we know that Tavern partnership came into being. That, I believe, was the first of the various entities that we have been concerned with here.

That was a partnership between the defendant Giglio and the defendant Livorsi, and then there is this question of fact as to whether their wives were real partners or whether they weren't, which is something that ultimately we will come to and which you will have to decide.

(3402)

Then in April or May of 1945 the defendants Giglio and Livorsi, through Roth, commenced negotiations as to the Eatsum Company that Mr. Lubben had, and they buy into that company.

The defendants, Giglio and Livorsi, get a 50 per cent interest either for themselves, or for themselves and their wives and certain others, and Lubben has a 50 per cent interest which he says was for himself. That gets us to the fall of 1945, and the war is then ended, but sugar is still rationed.

Then the corn syrup transactions start, and Lubben is the person who negotiated that. $140,000 is accumulated, or is claimed to have been accumulated at that time, and all of these things I recite are things which you must come to your own conclusion on, and are things which in so far as they bear on the guilt or innocence of these defendants you must be convinced beyond a reasonable doubt as to. All I am trying to do now is sketch out in broad terms the chronology of how this is claimed to have happened.

(3403)

The business itself, in addition to this corn syrup transaction, was successful generally. I think the original investment of $67,000 in 10 months or so went up more than tenfold.

In the fall of 1945, I think you have the discussion, or I think there you have the testimony by Lubben or Roth that there were certain discussions as to the corporations, and I think we know that American Agar was formed at that time, because we have the certificate of incorporation on that.

And research was done at the Agar plant, or, at least, they started to construct a plant in which research could be done to recover sugar from blackstrap molasses.

In the beginning of 1946 your other American Brand Corporations are formed, and in the Agar Corporation the stockholders were Mr. Giglio and Mr. Livorsi, and I believe that Mr. Lawn had a 25 per cent interest.

As to the other American group corporations, I believe that the stockholders were Mr. Giglio and Mr. Livorsi, and I don't recall whether their families held stock or not.

(3404)

Mr. Lawn held office in those other corporations, but did not hold stock, as I recall it. He held office in some of them, but not all of them.

Then in 1946 the American Brands Corporation absorbed the business, and I am speaking loosely now, and again I am speaking only of what is claimed—you must decide whether these things are proven—the American Brands Corporation absorbed the business of Tavern Fruit Juice Company, the partnership that made jelly over in Brooklyn, and the Government claims that Tavern's inventory which had been accumulated in the last part of 1945 was taken over as the beginning inventory for American Brands.

Then in March of 1946 the Eatsum partnership has trouble, and Lubben sells out to Mr. Giglio.

Now I am not going to go into the testimony of Mr. Lubben or Mr. Roth in that respect at all, but the Government contends that Mr. Lubben left without his half of the corn syrup transaction.

About that time, I believe in the spring of 1946, the defendants, Giglio and Livorsi, buy their houses over in

(3405)

New Jersey, and if I am wrong on this, or if your recollection is different from mine, stick to your own recollection. All I have is one man's recollection of this trial, too.

Then in 1946 the Tavern partnership return for the fiscal year of March 31, 1946, was not filed, and then the Eatsum return for the fiscal year ending May 31, 1946, was not filed. The Eatsum Company, I believe, went out of business May 31st, finally, and I think that part of the business was carried on thereafter by American Brands Wholesale Corporation.

Then during the year 1946 you have over in New Jersey the Agar Company building its pilot plant for the extraction of sugar from blackstrap molasses. Toward the end of 1946, I think, they moved this operation to Michigan.

Then after the end of the year 1946, in 1947, the corporate income tax returns for the various American Corporations became due, I believe, and they got extensions, I think, until May 15, 1947. The personal returns of Mr. Giglio and Mr. Livorsi were due on March 15, 1947.

I don't recall that they got any extension.

(3406)

Now during this period—and here the testimony is the testimony of Roth, which I have cautioned you about, and I am again only talking about what is contended; I am not in any way passing on whether it is proven—Roth claims

that during this period there were the withdrawals in cash from the American Brands Corporation of $2,000, $2,500 a week, I think he said, which he covered up by false expense entries.

In September of 1947 we have the filing of all of the returns, I think, which are in controversy in this case. On or about September 15, 1947, they file the consolidated corporation return for the American Brands group, they file the partnership return for Eatsum, for the year which ended 15 months earlier, and they file the partnership return for Tavern which ended for the year, ended 15 months earlier, they file the personal returns for Mr. Giglio and Mr. Livorsi.

At about this time, as I remember it, it is claimed that Mr. Giglio sold his house to Roth and took back a mortgage, and that Mr. Livorsi sold his house and received cash. You (3407) remember the testimony as to the cashing of the check.

In December of 1947, which is two or three months later, the Jersey receivership proceeding commences, and the principal creditor there is the United States Government, who has a claim for taxes.

In 1948, the middle of 1948, that receivership ends up with a settlement of 10 cents on the dollar, but no settlement on the taxes: 10 cents on the dollar to settle with all the other creditors.

And in 1948 there is the testimony as to the final sale of the Giglio estate, I think, and the sale of his automobile and other personal assets which were being turned over to his wife.

Now I have just tried to sketch the chronology so that you would have some, perhaps, chronological picture of this. I should continue further, I expect. In 1950 there was the filing of the informations which Mr. Stryker has

referred to, and then after that the filing of the 1947 and 1948 returns claiming a carry-back loss for 1946 by the American Brands consolidation, and the claim for the repayment of certain taxes already paid in that respect.

(3408)

Now I want to make it clear that I don't wish to state or suggest that any of these facts are proven. That is something of which you must be convinced. And I am not trying to suggest that these are the important facts or that they add up, one way or the other. I am just trying to sketch a chronology for you as best I can.

The question will then come as to—if you find that these facts are true and that others fit in between them—what does it add up to? Does it prove one thing or does it prove the other, and what was the intent with which things were done, and as to that I am not going to try to summarize the evidence for you, because it is almost impossible to do it without adding emphasis one way or the other.

The defendants, I think, in substance, contend that much, if not all, of the money of these corporations went into this unsuccessful research venture. The Government contends, I believe, that it did not; that much of it went elsewhere.

The defendants contend that whatever happened during this period was done with an innocent intent, with no intent to defeat any law, and particularly with no intent to defeat

(3409)

the tax law, this particular section, and I charge you that I don't care what other crimes were committed—if black market operations were a crime—if any of the events were a crime other than a crime charged in the indictment, these defendants are in no sense on trial for that. They are on trial for the crimes charge in the indictment, and the conspiracy charge in the indictment is a conspiracy to evade this section of the income tax law.

You have heard counsel in their summations, better than I can summarize it for you, point to some events to show an innocent intent. I believe, for example, Mr. Stryker pointed to the recording of certain deeds. You have heard counsel for the Government point to other events to show a criminal intent, an intent that they contend could only mean a purpose of evading taxation, and you have heard Mr. Wessel point to certain cash transactions, extraordinary cash transactions, you might say; the alteration of the books of the Loraine Corporation. Those are the kinds of things that you have just got to appraise. Take your time, think back over the evidence as you have heard it,

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and see how the evidence adds up.

If you are convinced beyond a reasonable doubt, after you have thought it over, that it shows that any of these defendants participated in such a conspiracy as charged, why, that is your answer on that count. If you have a reasonable doubt, that is your answer, too.

If you have a reasonable doubt, of course, you must find them not guilty. If you don't have a reasonable doubt, you will find them guilty.

Well, now, that takes care of the conspiracy count as best as I can summarize it.

As I told you, once you conclude there is a conspiracy, you have the question of who was in the conspiracy and what was the purpose of the conspiracy, and I am not going to attempt any further summary of the facts.

You have heard them eloquently summarized, and I am sure that you paid good attention to it.

Well, now we come to the other counts which I have got to cover. The first count of the indictment relates to the.

(3411)

Eatsum partnership return. That charges that on or about

the 12th day of September, 1947, at the Southern District of New York, William Giglio, the defendant, in connection with a matter arising under the Internal Revenue laws, did unlawfully, wilfully and knowingly aid, assist in, procure, counsel and advise the preparation and presentation of a false and fraudulent return, to wit, a partnership return of income of the Eatsum Food Products Co., Ltd. for the fiscal year beginning June 1, 1945, and ending May 31, 1946.

As you have heard pointed out by counsel, partnerships don't pay income taxes themselves. The individual partners report their distributive share of the partnership income on their own personal returns, because a partnership is not an entity like a corporation, it is just two men working together. But partnerships are required to file an information return, a return which tells the Federal Government how much the partnership made and how those earnings were distributed so the Federal Government will know what individual to look to get this tax.

Now the statute which it is alleged was violated provides: any person who wrongfully aids or assists in or procures, (3412) counsels or advises the preparation or presentation under the Internal Revenue laws of a false or fraudulent return shall be guilty of a crime.

Now, the defendant Giglio is the only defendant on trial under this count. The other two defendants are not.

In order to find him guilty of violating this section under the indictment in this case, you must be convinced beyond a reasonable doubt, first, that a return was filed; that Mr. Giglio knew it was to be filed, and that it was filed. It is not necessary that he file it himself, as long as he procured its filing. And that he knew it was false, and that it was intentionally false, and that it was false as to a substantial

amount, and that it was not a mere inadvertent error. In other words, you have got to find that this return was filed with an intent to mislead the Internal Revenue Bureau.

Now, if you are convinced of those elements beyond a reasonable doubt, then the crime is complete. Whether they made money thereafter, whether they lost money thereafter, if he filed a return which he knew was false with an intent to file a false return, then that constitutes the commission of this crime.

(3413)

In this crime, in all of the counts in this indictment, it is only a crime if the person committed it wilfully and knowingly. He had to know what he was doing. He had to know, he had to have the intent to violate the law, and he had to go ahead wilfully anyhow. You must be convinced of that beyond a reasonable doubt.

Now, on this partnership return, the Government claims that it was false in two respects, that it did not include the $140,000 from the corn deal, and that it also did not correctly show the distributive shares of the partners. In other words, the Government wouldn't know which partner to look to for the income.

Now in this respect, for the sake of simplicity, I am going to charge you that the key to this count is the $140,000 from the corn deal. In other words, the question is: are you convinced beyond a reasonable doubt that there was $140,000 accumulated, and are you convinced beyond a reasonable doubt that it was partnership income.

Now partnership income is the income which is earned by the partnership, and on that you will remember the tes-

(3414)

timony—I am not going to summarize it for you. In your mind you will perhaps want to consider it. How did the transaction start? Was it started through the partner-

ship? Was it handled through the partnership? Did both of the partners know about it, and so forth?

And then if you are convinced beyond a reasonable doubt that it was and that amounted—it doesn't have to be exactly $140,000,. but if it was a substantial sum which wasn't reported, then that constitutes proof of guilt under this count.

Now with respect to the alleged misstatement of the distributive shares of the partners, that turns on the contention that the wives were not in fact partners, and the question is, what is the true fact; what was the intent of the parties; were they real partners or weren't they; and in deciding that you could look to whether they invested own money, whether they participated in the management. Those are all indications of whether that was the true fact or not. But for the sake of simplicity I am going to leave that first count with you entirely on the corn box transaction.

If you are convinced beyond a reasonable doubt that (3415)

the testimony produced by the Government is so, that there was a corn box transaction for $140,000, that it was partnership income, then that constitutes proof of that count.

If you are not convinced beyond a reasonable doubt of that, I am not going into the distributive shares with you, and I am going to let that count go at that.

The first count turns on the corn box and whether you are convinced that money was accumulated as partnership income; that Mr. Giglio knew about it; that he intentionally filed a return which did not disclose it.

On count 2, you have the same crime charged with respect to Tavern, and I am not going to read the statute to you again. I will read the indictment:

On the 12th of September, 1947—that is the same day—at the Southern District of New York, William Giglio and Louis J. Roth, the defendants, in connection with the matter arising under the Internal Revenue laws, did unlawfully, wilfully and knowingly aid, assist in, procure, counsel and advise the preparation and presentation of a false and fraudulent return, to wit, a partnership return of income of the

(3416)

Tavern Fruit Juice Company for the period beginning April 16, 1945, and ending March 31, 1946.

Well, your crime is the same again. In order to find Mr. Giglio guilty under this count you must be convinced beyond a reasonable doubt that this return was filed as alleged, that Mr. Giglio knew it was to be filed, and that it was filed; that it was false, and intentionally false as to a substantial amount; that it wasn't inadvertent; that it wasn't just a mere inaccuracy; and that it was filed with an intent to mislead the Bureau of Internal Revenue.

Now in this respect—and again I tell you, rely on your own recollection; I am just trying to give you a simple illustration, or my simplification of the contentions as I go along—it is claimed that the Tavern return was false because it concealed the closing inventory of Tavern.

Inventory, as perhaps you all know, is merchandise on hand. That is what you have ready to sell or you have supplies with which to make your merchandise, and if you have more on hand at the end of the year than you had when you started, why, that is all part of your income for the

(3417)

year. That is one of your assets which you should report, and the charge here is that Tavern partnership or that Mr. Giglio, in filing the return for Tavern partnership, concealed the accumulation of merchandise, so that when he reported his income he reported a lesser amount than it really was.

And if you are convinced beyond a reasonable doubt that that is so, then that establishes the charge as to the second count.

It is also claimed, as to the second count, that the amount for engineering expenses has been, you might say, padded: that there is, I believe, a $32,000 item in there that doesn't represent expenses, although it is claimed as an expense, and if you find beyond a reasonable doubt that that is so, that constitutes proof as to the second count.

I mean if either of those two things are true, that would be falsification in a substantial amount, and if Mr. Giglio knew it, and did it deliberately, that would constitute proof of guilt. If you have a reasonable doubt in that regard as to those items, why, then your verdict should be not guilty on that count.

(3418)

Now I am going to jump to count 4, because count 4 charges a violation of the same law as counts 1 and 2, but count 4 relates to the American Brands Corporation or the American Brands group, and it charges that on or about the 15th day of September, at the Southern District of New York, William Giglio, in connection with a matter arising under the Internal Revenue laws, did unlawfully, wilfully and knowingly aid, assist in, procure, counsel and advise the preparation and presentation of a false and fraudulent return, to wit, a consolidated corporation income tax return in the name of American Brands Corporation for the year 1946. The crime is the same. It is the filing of a false return. It doesn't make any difference whether there were a lot of taxes that were due and not paid or whether there weren't any taxes. The question here is, was the return false.

And in that connection, in order to find the defendant Giglio guilty under that count you must be convinced

beyond a reasonable doubt that the return was filed; that Mr. Giglio knew it was to be filed and was filed, and that it was false; that he knew it was false, and that he intended it to be false, and that it was false as to a substantial

(3419)

amount; that it was not a mere inaccuracy or inadvertence, and that it was done with an intent to mislead the Bureau of Internal Revenue. And if you are convinced of that, as I say, when the filing is completed, that completes the crime.

Now, that count turns upon the affiliation of these corporations. The return was filed as though they were affiliated, and the Government contends that they were not, that Mr. Giglio knew that they were not.

Now an affiliated group of corporations exists when one or more chains of corporations are connected through stock ownership with a common parent organization which has at least 95 per cent of the stock of each of the corporations.

In other words, if—and I think the return claimed that American Brands was the parent—if American Brands did have 95 per cent of the stock of the other corporations, that would have been a proper affiliation.

If, in fact, it did not have that, and if, in fact, Mr. Giglio knew that, then that was not a proper affiliation, and he knew he was filing a false return.

(3420)

Now the mere fact that a group of corporations had the same individual stockholders doesn't make them an affiliated group, and this is no matter of mere technicality. This is a question of who owns the corporations.

Now if you have the same group of people, four individuals own ten corporations, that doesn't make that an affiliated group; but if they own one corporation, and that corporation has 95 per cent of the stock of each of the others, then you would have an affiliated group and, at least

for the purposes of this case, I think the illustration will suffice.

Now that is the charge, that is the third charge; in other words, that is count 4.

Count 1 is Eatsum; count 2 is Tavern; count 4 is the American Brands return, the filing of those false returns.

Now I will come back to count 3, which also concerns the American Brands group, but here we get into the question of the evasion of taxes.

They are charged with evading the payment of taxes. I think I have made clear that each of these three counts

(3421)

we have discussed, like the conspiracy count, in order to find guilt you must be convinced beyond a reasonable doubt of the criminal intent.

Now, as to count 3, the indictment charges that on or about the 15th day of September, 1947, at the Southern District of New York, William Giglio, the defendant, did wilfully and knowingly attempt to defeat and evade a large part of the income taxes due and owing to the United States of America by American Brands Corporation, American Brands Wholesale Corporation and American Trucking & Forwarding Corporation for the calendar year 1946 by filing and causing to be filed with the Collector of Internal Revenue for the Third Collection District of New York a false and fraudulent consolidated corporation income tax return within the provisions of Section 141, title 26, United States Code, in the name of American Brands Corporation, in which American Brands Corporation, American Brands Wholesale Corporation, American Trucking & Forwarding Corporation, American Sweets Corporation, and American Agar Corporation were listed as an affiliated group of corporations, and in which return the de-

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fendants stated that the net income of American Brands Corporation and its affiliated group of corporations was $261,753.36, and that the tax due and owing thereon was the sum of $104,701.35, whereas, as the defendants then and there well knew, American Brands Corporation, American Brands Wholesale Corporation, American Trucking & Forwarding Corporation, American Sweets Corporation, and American Agar Corporation were not an affiliated group of corporations within the provisions of that section, and the net income of American Brands Corporation for the said calendar year was the sum of $279,371.45, upon which said net income American Brands Corporation owed to the United States of America an income tax of $106,161.15; and the net income of American Brands Wholesale Corporation for the said calendar year was the sum of $169,131.09, upon which said net income American Brands Wholesale Corporation owed to the United States of America an income tax of $64,269.81; and the net income of American Trucking & Forwarding Corporation for the said calendar year was the sum of $3,180.16, upon which said net income American Trucking & Forwarding Corporation owed to the United States of America an income tax of $667.83.

(3423)

Well, the gist of it is that by consolidating the profitable and the losing corporations allegedly illegally the consolidated group paid a lower tax than it would have been required to pay if they had filed their returns as individual corporations, as the Government contends they must have done.

Well, now I have told you about affiliation, and it is the same question in this count as it was in count 4. Did a corporation hold this stock, did American Brands hold 95 per cent of the stock of these corporations or didn't they?

The Government contends that the proof here, without contradiction, is that the individual stockholders held these corporations, and that even the beneficial holdings as to one of them wasn't identical with the others; that therefore the affiliation was improper.

Well, now, you got not only the question of whether the affiliation was improper but whether the Government lost money by it, and the Government offered its proof of what the income would have been as individual companies, and showed what it claimed to be the excess of the sum of the

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individual taxes over the consolidated tax.

Now, in order to convict or in order to return a verdict of guilty with respect to count 3 under this indictment, you must be convinced beyond a reasonable doubt that an income tax was due from American Brands, and, for the other corporations, for American Brands, American Brands Wholesale and American Trucking & Forwarding Company, for the year 1946; that the tax due from these companies exceeded by a substantial amount the tax paid, and, further, that the defendants did something more than merely fail to pay their tax, more even than intentionally failing to pay their tax; that they took some act affirmatively, you might say, to throw the government off the scent, and here it is claimed that that act was the filing of a false return; in other words, they filed a return with a false affiliation shown as well as not paying their taxes.

In other words, you have got to find that not only this defendant intentionally failed to pay the tax or intentionally had these corporations fail to pay their taxes, but that he took a further step, the filing of a false return, a return

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which he knew to be false, in order to conceal the tax liability of these corporations.

Well, that is count 3.

Now we come to count 5, which charges a violation of the same statute—I don't recall whether I told you you must find each of these elements beyond a reasonable doubt but I meant to.

As you know, when I said this is an element of crime, if you don't find it beyond a reasonable doubt, your verdict must be not guilty.

As to count 5, the indictment charges that on or about the 15th day of September, 1947, in the Southern District of New York, William Giglio, the defendant, did wilfully

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and knowingly attempt to defeat and evade a large part of the income tax due and owing by William Giglio to the United States of America, for the calendar year 1946, by filing and causing to be filed with the Collector of Internal Revenue for the Third Collection District of New York, a false and fraudulent income tax return wherein he stated that the net income of William Giglio for the said calendar year was the sum of $286,690.01, and that the amount of tax due and owing thereon was the sum of $232,978.73, whereas he then and there well knew that the net income of William Giglio for the said calendar year was the sum of approximately $492,190.77, upon which said net income William Giglio owed to the United States of Ameirca an income tax of approximately $344,520.92.

Now we have the same statute again. In order to find the defendant guilty of violating this statute you must be convinced beyond a reasonable doubt that an income tax was due from Mr. Giglio for the year 1946; that it exceeded the amount paid by him by a substantial amount, and that in addition to intentionally withholding payment of his tax,

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he did something further to conceal his tax liability, and

here it is alleged that this something further was the filing of his tax return which he knew was false, and which he intended to be false, and which he intended to mislead the Government with.

Now, in other words, you must be convinced beyond a reasonable doubt that he in fact filed a return; that he knew it was false, and that he did it with intent to evade payment; and you must also be convinced beyond a reasonable doubt that he actually did owe a tax in excess of that which he reported, and that he knew it.

Now I think that I will again, for the sake of simplicity, state the Government's contention. I am not saying there is evidence that it is so or not. I am just trying to relate the alleged elements of the crime charged, which is that the income which he did not relate was his share of the unreported income of Tavern, his share of the five cars of syrup that were obtained after Lubben left the Eatsum partnership, and his share of the unreported income of Eatsum.

It is claimed, I think that he understated the amount of his share from Eatsum by $127,000-odd; that he under-

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stated his share of the income from Tavern by $40,000, and his share of the proceeds of those cars by $20,000.

Now the Government arrives at those figures:

on the five additional cars—that was simply a mathematical computation they made here—depending, as I recall it, upon Lubben's testimony, and records.

Tavern—the amount of the undisclosed inventory and the padded engineering expense.

From Eatsum,—part of it was the allegedly undisclosed corn box transaction, and part of it was

the allegedly false statement as to the distribution of the partnership income.

I think, again for the sake of simplicity, I am going to take that element of distribution out of this case. I am going to charge that the only claim of income unreported which you may consider from Eatsum is the amount of income from the corn syrup sales unreported, if any, and that as to that no more than 25 per cent of that amount shall be allocated to the defendant Giglio, and no more than 25 to the defendant Livorsi. That will reduce the figures (3429)
which the Government used, but it will still show unreported income from this source.

There is through this case a disagreement as to whether the wives were actual partners or not. I think I mentioned that briefly once before. If the wives were actual partners, then they should pay a tax on their share, unless there was a joint return filed, and similarly, the husband pay a tax on his.

Now the contention is that they were not actual partners by the Government, and they have recited the facts which they say lead them to that conclusion.

The defendants have challenged the sufficiency of the Government's proof in that regard, and that is something which you must come to your own conclusion on, whether in fact they were or were not actual partners.

Now count 6 is the same as count 5, except that it relates to the defendant Livorsi, and the contentions are the same, and everything that I have said with respect to the (3430)
defendant Giglio as to count 5, I would now repeat as to the defendant Livorsi as to count 6. I don't intend to repeat it all, and I hope that you will consider that every-

thing that I have said as to count 5 applies to count 6, but I would for the sake of emphasis repeat once more, in order to convict the defendant Livorsi under count 6 you must be convinced beyond a reasonable doubt that he had a tax due for the year 1946 in excess of the amount which he paid, that it was a substantial excess, and that he knew it, and that he intentionally did not pay his tax, and, further, that he did something further than intentionally not paying his tax, that you must be convinced beyond a reasonable doubt, under the charge in this indictment, that he filed a return which he knew was false, with an intent to conceal his tax liability.

Now we come to counts 7 and 8. Those counts charge a violation of the same statute that we have been talking about under counts 3, 5 and 6, and that is evading payment of taxes.

Here, however, the Government says it is not charging

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him with falsely reporting taxes. It says, taking their taxes as reported, they evaded payment of those taxes by concealing assets, to make it impossible to collect those taxes.

Let's just run through it again now. The charge is that from on or about the 1st day of September, 1947, and up to and including the date of filing of this indictment, William Giglio, Howard Lawn, Louis J. Roth, the defendants, an income tax return for the calendar year 1946 for the said William Giglio having been filed, stating the net income of said William Giglio for said calendar year to be the sum of $286,690.01, and the amount of tax due and owing thereon to be the sum of $232,978.73, did wilfully and knowingly attempt to defeat and evade the payment of a large part of the taxes due and owing by William Giglio to the United States of America for the calendar year 1946 in that they did conceal the assets of William Giglio.

Well, in order to convict either of the defendants under this count you must be convinced beyond a reasonable doubt that Mr. Giglio had a tax due for the year 1946, a personal income tax; that he did not pay that tax or did not pay a substantial part of it; that he knew that he had such

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a tax due; that he intended not to pay it; and, further, he did something else beyond the non-payment of the tax, to make it impossible, to make the collection of that tax impossible, and that is that he concealed assets.

Now there are two defendants charged with this crime, the defendant Giglio and the defendant Lawn. And you must be convinced beyond a reasonable doubt, first, that the crime was committed and, then, second in order to find guilt as to either defendant you must be convinced beyond a reasonable doubt that he aided and assisted in the commission of the crime.

Now I think that in order to find either defendant guilty under this account you must be convinced beyond a reasonable doubt that when the tax was due it could have been paid, if the assets had not been concealed, and the concealment of the assets was intentional and that they were concealed to prevent the collection of the tax.

Now, the charge in account No. 8 is the same as in count No. 7, except that it relates only to Frank Livorsi, the defendant Livorsi. And in order to find the defendant

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Livorsi guilty under that count, you would have to be convinced beyond a reasonable doubt of the same elements that I have related as to count 7.

I am not going to attempt to recite the various contentions as to what was actually concealed. I am sure the summations are fresh in your mind, and I, in my general chronology with respect to the conspiracy count, ran

through it, and in view of the length of the time this charge has taken, I don't think I am going to be more specific as to count 7 and 8.

Now we come to the last count, and, incidentally, I must tell you, with respect to count 7, what I told you with respect to count 10, the conspiracy count, that you must arrive at your verdict as to each defendant as an individual. In other words, you must consider not only whether the crime was committed, but whether, where there is more than one defendant charged with a crime, each defendant participated in the commission of that crime.

Now we come to count 9, which is that from on or about the 1st day of January, 1946, up to the date of the filing of this indictment, William Giglio, Frank Livorsi,

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Howard Lawn and Louis J. Roth, the defendants, did wilfully and knowingly attempt to defeat and evade the payment of a large part of the taxes due and owing by the American Brands Corporation for the calendar year 1946 in that they did misappropriate, convert and divert assets of the aforementioned corporation to their own use and benefit.

Again the same statute is involved, and the same general question is involved: the evasion of the payment of a tax due from the American Brands Corporation, not by filing a false return, but taking the return as filed as correct, by concealing, diverting the assets of that corporation so that the tax could not be collected.

Now in order to find the defendants or any of them guilty of this count you must be convinced beyond a reasonable doubt that there was a tax due from American Brands for the year 1946; that it wasn't paid; that the defendants or each defendant, you must consider individually that each defendant knew that the tax was due; that it wasn't

paid, and that they intentionally kept the corporation from paying its taxes, and, then, that they did something further

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besides not paying their taxes, they made it impossible to collect the taxes by concealing the assets of that corporation or by misappropriating and diverting the assets of that corporation, as it is charged here.

And, again, you must be convinced beyond a reasonable doubt that if they had not so concealed the assets of that corporation, that the tax could have been collected when it was due.

Well, I think that finishes my discussion of the counts of the indictment, and I have very little else to tell you. I have told you, I think, as to each of these counts, but I want to make sure that I have emphasized it, that, as to every one of the counts of this indictment, in order to find the defendants or any defendant guilty you must be convinced that he acted wilfully and knowingly; that he knew what he was doing; that he had an intent to commit the crime related in the indictment, and that he did it nonetheless.

Now in deciding what a person's intent was, you can consider what they said at the time, what they did, how they did it. You have to make those decisions, if not every day, at least every month of your life. A person may say

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one thing, may do one thing, but you have to decide what is his intent; how does he do it; does he show a guilty purpose; does he act like a person who is guilty of something, who is trying to conceal something, who is trying to break the law? Does he act like a person who is trying to conceal tax payments and who knows that he is not paying his taxes, who is trying to escape the collection of taxes?

And then you may also consider testimony as to what was said, what he said at the time; what he said his plans were, if you are convinced beyond a reasonable doubt that it is true.

Now I guess the last general topic I have got to cover is circumstantial evidence. I have been asked to charge on that.

Some of the testimony in this case is what we call direct testimony, direct evidence, and some is circumstantial evidence.

Circumstantial evidence consists of facts proved, from which the jury may infer by process of reasoning other facts sought to be established as true. Let me give you an example. I think that is the easiest way. Some of you may have heard it before.

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If the question before you were, "Is it cold today?" there are three ways in which we could settle that question. I could take you all downstairs to the front door and we could all step outside and then you would know of your own knowledge whether it was cold today or whether it wasn't. That is one way. That is your own knowledge.

Now the second way we could do it, I could go downstairs, and I could go outside and feel how it felt and come back up here, take an oath, and swear to you that it was cold today. That is direct testimony. I testify as to my own knowledge and tell you what it is.

And the third way is called circumstantial evidence. Instead of going outside the front door, I might just look out, or I might look out the window here, and I might see the wind blowing the trees, I see the trees leaning over, I see people clutching their coats around them, see ice in the streets that hadn't melted, then I could come back and tell you, I looked out the window. I saw trees keeling over.

I saw people clutching their overcoats around them. I saw
(3438)
ice in the street that hadn't melted, and then when counsel summed up they could ask you from those circumstances to come to the conclusion it was a cold day. That is all circumstantial evidence is. Where you don't have direct testimony that someone can say it is cold today, the jury can be asked to infer from the facts proven that it is cold.

No greater degree of certainty is required when the evidence is circumstantial than when it is direct, for in either case the jury must be convinced beyond a reasonable doubt of the guilt of the defendant; in either case you would need to be convinced that I was telling the truth. In the case of circumstantial evidence, however, you would also need to be convinced that the facts which I have observed and related, taken together, prove that it was cold.

If all the circumstances taken together are consistent with any reasonable hypothesis which includes the innocence of the defendant, the prosecution has not proved his guilt beyond a reasonable doubt and you must acquit him.

On the other hand, if you find that all of the circumstances established by the evidence of this case, taken to-
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gether, satisfy you beyond a reasonable doubt of the guilt of the defendant, then I charge you that it is your duty to find the defendant guilty.

Now in this case we have got 10 counts, and as to some of the counts we have more than one defendant, and you must read your verdict as to each count, and as to each defendant named in each count individually.

Let me put it this way: There is no way in which I can tell you how to conduct your deliberations. That is something which you will solve for yourself. But I want

to be sure that you reach your verdict as to each defendant as an individual as to each count.

Now I have attempted to summarize the law the best I can. You heard counsel try to summarize the evidence. If you need any of the exhibits, or if you want some of the testimony read back, anything like that which will help you, you just send in a message, and we will see that you get it. That is our job, to see that you get everything that will help.

Now everything that has been said in summation, every-

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thing that has been said in the charge, is just to help you and to guide you. In the last analysis the question of what these facts add up to is all yours. I want to make clear that you have nothing whatever to do with punishment or possible punishment; that is my job; that is the responsibility of the Court. You have one responsibility, a difficult and an important responsibility, and that is to just give us an accurate report on the facts in this case.

The system of law enforcement which we have is better than any that has ever been developed. I mean, juries like you at the time of the Crusades were faced with somewhat the same problem. Over hundreds of years the jury system has proved itself, but it depends on everybody doing his job, not trying to do somebody else's job, doing his own job, and let's each tackle our job for what it is, and yours is to carefully consider the evidence, nothing but the evidence, and come to your verdict sincerely on the facts.

If after considering the facts as to any count, as to any defendant, as to all counts or as to all defendants, you have a reasonable doubt as to the guilt of a defendant as to any

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or all of these counts, say so by your verdict of not guilty.

On the other hand, if after considering this testimony and the facts in coming to your conclusion, you are convinced beyond a reasonable doubt of the guilt of these defendants, as to some or all counts, why, say so by your verdict. That is your job.

Now I am going to ask you to wait there for a few minutes longer, and then I am going to hear counsel to see whether I have in this discussion of the law left out anything or said anything which they would like corrected or added to, so if you will just wait there and relax for a few seconds, I will go into chambers.

(In robing room.)

(Discussion off the record.)

Mr. Wessel: My suggestion, if your Honor please, with regard to the Eatsum tax return is to let it stand as you have given it; that is, count 1. To just eliminate from the consideration of the jury anything with regard to distributive shares.

With regard to counts 5 and 6, which are the individual tax returns of Giglio and Livorsi, the Government charged

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originally, and I believe specified in the bill of particulars, that the defendants put down the wrong distributive share of Eatsum, and as I recall your Honor's charge, you said, all you can consider in that connection would be at most a quarter of the corn box, if you find the corn box existed, and all the rest.

Now I would suggest eliminating from the consideration of the jury anything with regard to Eatsum in so far as the individual tax returns of Giglio and Livorsi are concerned in counts 5 and 6, because the question is whether or not the amount of money, that they reported was a

proper distributive share, and if you consider only a part of the Eatsum picture it doesn't necessarily mean that the share is right or wrong.

The Court: All right. Anything else I did wrong?

Mr. Wessel: I think you stated that the indictment was filed in 1954. Actually, that was the date the indictment was unsealed, I believe. It was filed in 1953, and, of course, they can't consider any acts in connection with the conspiracy that would have happened after the date of the filing of the indictment in July or June of 1953.

(3443)

Now, as far as the payment of taxes is concerned in counts 7, 8 and 9, I think your Honor suggested the Government must have shown that they concealed assets sufficient to pay the tax. I don't think it is necessary to say that, but rather that the Government showed they concealed assets sufficient to pay a substantial amount of the tax—"substantial" instead of "all."

I have finished.

The Court: All right.

Mr. Wolfram: May I say a word as a preliminary matter? The elimination of the distributive shares of the Eatsum partnership at this late date raises a host of problems, your Honor.

The Court: What are they? I can put them back in, if you want me to.

Mr. Wolfram: We would object to it if you did. We certainly felt right from the beginning that the distributive shares theory that the Government presented to the jury was all wrong and we did our best to try to correct it.

The Court: I think their distributive share theory was right, but I was impressed, frankly, by what Mr. Stryker

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said, that it may be a question for the Tax Court and not

a criminal trial, and that is why I took the course I did, and it drove it home to me hearing Mr. Stryker's summation.

Mr. Wolfram: Let me show you the problems. There are a number of Government's exhibits relating to Livorsi's and Giglio's personal tax returns which are based on distributive shares of income coming out of Eatsum. There is testimony of Present.

Now as I understand it, the jury can send for any exhibit it wishes to send for, and here are exhibits which the Government has put into evidence showing a distributive share of income coming to these two individuals from Eatsum.

The Court: I realize that, Mr. Wolfram. There is probably evidence in the case which at this point goes beyond the issues that I have left with the jury, but I think you will find that in any long trial, and I think I made that just as clear to the jury. As a matter of fact, it was very easy to speak simply on it because as to count 1 you cut it right down to the corn box and you disregard everything that isn't related to corn box.

Mr. Wessel: I think the answer perhaps is strike those

(3445)

exhibits.

The Court: No, I think those exhibits should stay. You can put a sticker over the bottom of them if you want. Because I think they are key exhibits. I think the jury should have them if they want them.

Is that capable of being done?

Mr. Wessel: Yes.

Mr. Wolfram: Your Honor, without agreeing with either Mr. Wessel or you, that is another position, a unique position, where we have to disagree with two views instead

of one, but another problem raised is the question of the defendants' intent when they filed the information return, because if they did not have to report their distributive shares of income from Eatsum on their individual returns, then when they omitted the corn box on the Eatsum return and did no damage to the Government, you have a very serious question of what their intent was, and we should have been in a position to argue that since the Government wasn't deprived of distributive income from Eatsum.

The Court: Don't get me wrong. I think the Government was deprived of distributive income now. I am per-

(3446)

fectly glad to charge right down the line to the jury if that will simplify your problem. I just thought in fairness that I would simplify that; not in fairness, but in an abundance of caution, let me put it that way. But I did not make up my mind until I took the bench, and I am perfectly glad right now, and I am prepared to charge on my theory of partnership distribution.

Mr. Wolfram: Well, we are left high and dry on this question of intent as far as that is concerned.

The Court: I don't see, Mr. Wolfram, that you are. I think in a case of this size you are reaching for pretty fine possibilities.

Mr. Wolfram: There is another point. I don't believe your Honor made the matter clear to the jury with respect to Livorsi's tax return. You said something about the distributive share not being in Giglio's but you did not make the same comment. I think you said the same thing applied.

The Court: I tried to tell them that the entire—whatever I said as to Mr. Giglio's personal return applied to Mr. Livorsi's. If you think there is anything of substance in there that I have overlooked, I certainly don't want to be

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unfair to Mr. Livorsi.

Mr. Wolfram: You said the same thing applies. I guess my last observation wouldn't make much difference. I think in two places your Honor said, "Before I get into a discussion of the crimes. . ." And then you said, "I now come to the crimes which are before you," and then you read the conspiracy count. I don't think your Honor meant to say "the crimes," you meant to say, "the crimes alleged in the indictment."

Mr. Stryker: I am sure that is what you meant, but you did happen to say "the crimes." Of course, it was plain to me what you meant. I am not sure it was to most of the jury.

The Court: What would you like me to do?

Mr. Wolfram: I think you ought to tell them when you mentioned "crimes," what you meant was the alleged crimes or crimes alleged in the indictment.

Mr. Stryker: I know that is what you meant, but I don't think the jury knows that.

Mr. Wolfram: And that the indictment is only a charge, or something to that effect.

The Court: Yes.

(3448)

Mr. Wolfram: There was one reference that your Honor made to the American Brands returns, and you said something to the effect that filing completed the crime.

The Court: The alleged crime, I will tell them wherever I used that, yes.

Mr. Wolfram: And then, in addition to that, the defendants request that your Honor charge that when the returns were filed in 1947 the jury may consider the defendants' knowledge of losses in 1947 on the question of their intent.

The Court: I will tell you, Mr. Wolfram, now, I will be glad to go back and recapitulate the facts on intent as

I see it, but I am not going to charge one particular thing. What I tried to do in my chronology was to stick, I think, principally to uncontested facts which happened, and I tried to stay away from those things which bore on intent, because, I mean, I think I told the jury that, I was going to leave that to them on the basis of the summations as I heard them, because if I start telling them what I think bears on intent I have got to tell them on both sides, and, as I say, if you think that will help, I will be glad to do

(3449)

it, but I won't do it just as to a single fact.

Mr. Wolfram: Well, the only thing this present discussion relates to, of course, is the fact that your Honor charged them that the filing of the American Brands returns completed the crime.

The Court: I told them, I think I told them 69 times it had to be an intent, with a knowledge that it was false, and an intent to mislead the Federal Government or the Collector of Internal Revenue.

Mr. Wolfram: But I believe that the defendants are entitled to have a charge, in my opinion, anyway, that if they knew of operating losses when they filed the returns, that that bears on their intent to defraud.

The Court: I say I am not going to single out that. Mr. Wessel must have a hundred—well, I won't say a hundred —50 facts that he would like to have me single out that he said bore on the question of intent.

Now I don't think you want the Court to get into that kind of a discussion. At least, I thought it would be just as well not to.

(3450)

Mr. Stryker: I think generally, but since this is quite a crucial issue here, and there isn't any question that the companies were losing money, these people knew it——

Colloquy

The Court: I will have to say, Mr. Stryker, well, now you will have to balance this against the testimony that during this period of time they were withdrawing $2,000 or $2,500 a week, as claimed by Roth, that they were changing the loans receivable account, that they had the alteration of the—what was that company's books?

Mr. Wessel: Loraine.

The Court: —Loraine books.

I think we are going to get into more trouble than it is worth.

Mr. Stryker: I don't want to overrule Mr. Wolfram. I seldom do. I think we may as well leave it the way you have got it.

The Court: All right, Mr. Stryker. I have tried hard to keep away from where I would lend weight to one side or the other on any issue.

Mr. Wessel: On this other point, Judge, and on the Eatsum partnership distribution, I think the Government is right in its contention, but I think what you have done

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may well be, because of the complexity of the problem, the right thing to do. However, under the rules the defendants have a right to object to the charge if they wish to, and I think if they desire to object, they should object now and your Honor can charge as your Honor feels you want to.

The Court: I will be glad to charge on the distributive share as I have outlined it to Mr. Wolfram in my previous discussions with him.

Mr. Wolfram: If your Honor please, our position is that your Honor was correct in saying that this distributive share shouldn't be considered because the Government went to the jury on the wrong theory there. We don't dispute that, but the point is that it does raise a host of problems to get that right now instead of getting it in the case itself.

Colloquy

The Court: Well, I doubt that we get a host of problems. I don't know any exhibit that you offered that would be admissable. I thought that over. And there are two exhibits of the Government's that are in: There is 141, the Eatsum analysis, and then I guess it is about 150, which —or the two on the personal returns of Mr. Giglio and

(3452)

Mr. Livorsi, which I think you can blot out. I don't like to make alterations on exhibits. Otherwise, I would suggest a recomputation of them.

I think that jury, if I can judge a jury, understood me. I may have not been clear on other points, but I think that point the jury understood, that as far as Eatsum was concerned, they were to stay—the only thing before them was this corn box.

Mr. Stryker: Why don't we—I know you have got the jury waiting—why don't we just state a formal exception to that, and go on the way we are.

The Court: All right, Mr. Stryker.

Mr. Stryker: I should think the exception would be to that part of the charge just discussed, not because we don't agree with that part as a fact, as a theory, but because by that statement it still leaves before the jury certain allegations and certain evidence which would be entirely thrown out by that theory.

Mr. Wessel: I understand your Honor has stricken that from the jury's mind by his charge.

Mr. Stryker: Why don't we settle it by just putting it on the record and then we will go ahead.

(3453)

The Court: On count 3 I want to be sure I have it the way you all want it. The question is the excess of the tax due, over the tax reported, whereas I said tax paid, by mistake.

Mr. Wessel: Right. We want to eliminate all income from Eatsum on counts 5 and 6.

The Court: Okay. I got the wrong date of the indictment. Okay. Mr. Wessel, I am not going to charge, I think, on the concealment of a substantial part rather than all. I think that is just going to emphasize it.

(In court.)

The Court: Mr. Foreman, ladies and gentlemen, it wasn't as bad as I suspected. There are about four things which I have done which I shouldn't have done.

I think in discussing counts 3, 5 and 6, those are the counts charging evasion of income tax by filing a false return, I erroneously told you that the question was whether the tax due was in excess of the tax paid under those counts. The question under those counts is whether the tax due is in excess of the tax reported.

I would like to correct my statement as to those three counts. Counts 1, 2 and 4, that is Eatsum, Tavern and

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American Brands, charge the filing of a false return. There the question is the filing of a false return in itself.

Now counts 3, 5 and 6 charge the evasion of a tax by filing a false return, and that is where I misspoke. There the question is the difference between the tax due and the tax reported.

Counts 7, 8 and 9 charge the evasion of payment of a tax by concealment of assets. There the question is the difference between the tax due and the tax paid.

That was one error that I have corrected.

Now, I spoke to you about simplifying the picture on Eatsum as to count 1 and counts 5 and 6, and I told you that in considering counts 5 and 6, where it was claimed that part of the income unreported by the defendants Giglio and

Livorsi, (defendant Giglio in count 5, defendant Livorsi in count 6) was the income from Eatsum. To simplify that, disregard any income they may have received from Eatsum in consideration of those counts, just consider them in re-

(3455)

spect to Tavern and the cars of corn syrup which were sold by Lubben after the Eatsum partnership, after he had stopped operating as part of the Eatsum partnership.

I hope I have made that clear.

As to Eatsum, you remember there were originally two questions, whether the income from corn syrup was reported or not, the corn syrup transactions, $140,000, and whether the distributive shares were properly stated, and I said that because of the complication of law as to distributive shares we would forget that, and so that when you get to counts 5 and 6, where it was claimed that the income received from Eatsum wasn't fully reported by the defendant Giglio and by the defendant Livorsi, in connection with their individual returns, I say because of that distributive share difficulty, don't consider Eatsum at all, their income from Eatsum at all in connection with counts 5 and 6.

Now let's see what else I did that I shouldn't have done. I referred to the date of filing of the indictment as 1954. It was, in fact, 1953, so that acts after 1953 can't be considered, of course.

(3456)

And a few times during the charge I spoke of crimes. I meant, of course, alleged crimes, because I am not telling you that a crime was committed or not. That is what you have got to find out. The crimes charged or the alleged crimes, that is what I meant.

Now I think that concludes the charge, and if, as you go along with your deliberations, any part of that charge isn't clear to you or you want it read back or you want me

to give you an additional charge, I will be glad to do so; you just send in a note the same as you would ask for exhibits or to have testimony read.

All right, now I am going to have the jury retire.

The Clerk: Marshals will step forward to be sworn.

(Marshals duly sworn.)

The Clerk: The jurors with the exception of alternate juror Francis K. Nolan will now retire to the jury room and start its deliberations.

The Court: You are discharged with the thanks of the Court, Mr. Nolan, and many thanks for all the time you have devoted to this case. Just wait a second and let Mr. (3457)
Nolan get a head start here.

(Alternate juror excused.)

The Court: All right, the jury may now retire.

(Jury out at 1:30 p. m.)

The Court: I think we can recess here till 3:00 o'clock as far as this case is concerned.

(Recess taken to 3:00 p. m.)

(Jury sent in note at 2:50 p. m.)

(In Robing room.)

The Court: The jury has asked for the indictment. I am in favor of sending them the indictment unless I hear some good reason for not sending it.

Mr. Stryker: I am in favor of it, provided what is in effect part of the indictment, namely, the bill of particulars, goes with it.

Now if I couldn't understand the indictment without the bill, I don't see how the jury could, and the bill of particulars, in my view, if not a part, is a supplement to the indictment, and I am perfectly willing to have them see the indictment, but I don't see why they should not see the definition of the charges in so far as they were kind enough to give us any in that bill of particulars. I should

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think that is clear, Judge.

Mr. Wessel: May I state, Judge: There has been a tremendous amount of colloquy, examination and evidence in this case about a bill of particulars. If the jury wanted the bill of particulars they would ask for it. They haven't asked for it.

I don't think it is proper to foist upon them a document they haven't asked for. I want to send in Exhibit 154, but I haven't asked to do it. The bill of particulars is not in evidence as part of the indictment. It requires legal interpretation to understand what it means in connection with the indictment. There has even been some controversy before your Honor about that question and I not only think we would be foisting upon them something they haven't asked for but it would be adding to legal confusion without proper interpretation to them.

The Court: The only thing that bothers me is the possibility of confusion. I don't think that is too great, but I am pretty much going to limit myself to what they ask for and the bill of particulars, as I recall it, is a fairly simple document, but it is also very terse, and I don't know whether that would make—I don't think it is any great

(3459)

disadvantage to a lawyer but it might be to a jury.

Mr. Stryker: How would this be, Judge, as a compromise: send out the indictment with some sort of a state-

ment that you can phrase to the effect there is a supplement to that known as a bill of particulars which you will be glad to send if asked for.

The Court: My own feeling is, Mr. Stryker, we will send these to them as they ask for them. If you both consent, I think if they ask for the bill they can have it. I wouldn't be sure if either of you objected.

Mr. Stryker: I don't.

The Court: But I think let's let them have the indictment. I think they just want to get in--they were not able to take notes of the summation or the charge and they want to get in mind what the various counts are.

Mr. Stryker: Off the record.

(Discussion off the record.)

Mr. Wolfram: Do you think we ought to have the record note that certain exhibits were asked for by the jury?

(3460)

The Court: Yes, sent in by consent.

Mr. Wolfram: I have a list of them. Shall I read them?

The Court: That will be helpful.

Mr. Wolfram: The jury has already gotten, I understand, these Exhibits, at their own request: Exhibit 2, 4, 6, 7, 8, 10, 11, 13, 15, 17, 69B, 89, 90 and BBB.

Mr. Wessel: I did not make a record of the numbers, but they were all the tax returns that were requested.

The Court: Mr. Dilberian has a record, too.

Mr. Wolfram: Tax reports.

Mr. Wessel: Tax reports, that is correct, not returns, except for the form 899s which, I suppose, might be reports.

Mr. Wolfram: Tax reports, yes.

The Court: The note that we received that started all this is: "Please furnish jury with a copy of indictments and also all tax reports filed by the corporations, Eatsum, Tavern, etc., also individual tax reports of defendants." Signed by the foreman.

(3461)

(Jury in at 4:55 p. m.)

(Jury call.)

The Court: Mr. Foreman, have you arrived at a verdict?

The Foreman: We have.

The Court: How do you find, sir?

The Foreman: We, the jury, find the defendants William Giglio, Frank Livorsi and Howard Lawn guilty of the respective counts as charged in the indictment.

The Court: Members of the jury, listen to your verdict as it stands recorded. You say you find the defendants William Giglio, Howard Lawn and Frank Livorsi guilty as charged in the indictment, and so say you all?

(Jury answered in the affirmative.)

Mr. Stryker: I would like to have the jury polled, if your Honor please.

The Court: Poll the jury.

(Jury polled.)

The Court: Well, Mr. Foreman, ladies and gentlemen, the jury is excused with the thanks of the Court, and the conscientiousness and the care with which you have gone about your work, as I have told you before, left a great

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impression on me, and I think there is ample basis in the

record for your verdict, and I thank you for the long and devoted service that you have given us. The jury is excused.

(Jury out at 4:57 p. m.)

Mr. Stryker: If your Honor please, I should like to reserve motions to dismiss, to set aside the verdict on various grounds. I really think at this moment I am not quite prepared to make them.

The Court: All right, Mr. Stryker. Well, what would you say to March 8th as a date for sentence and motions.

Mr. Stryker: I think that would be satisfactory.

The Court: All right with the Government?

Mr. Wessel: Yes, your Honor.

The Court: I am disposed to continue bail during that period. I guess we can take care of everything then.

Mr. Stryker: Thank you, sir.

The Court: All right. I think we will make that 10 o'clock in the morning.

Mr. Stryker: On March 8th.

The Court: Yes.

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Mr. Stryker: All right, sir.

(Sentence adjourned to March 8, 1955, at 10:00 o'clock a. m.)

(3463a)

New York, March 11, 1955,
10:00 o'clock a. m.

MOTIONS AND SENTENCE

Mr. Stryker: May it please your Honor, the motions, as your Honor will remember, were deferred until today.

I respectfully move this court for judgment of acquittal, notwithstanding the verdict, for the following reasons:

One, the verdict is not supported by substantial evidence; two, the evidence adduced at the trial is insufficient to sustain a conviction of any of the defendants of any of the offenses charged in any count of the indictment.

I should like, with your Honor's permission, to address myself first to the case of Howard Lawn.

(3464)

* * *

The Court: Mr. Stryker, I am going to deny your motion. I realize that compared with the volume of proof against for instance the defendant Giglio, that against the defendant Lawn seems slight by comparison. But I think there is ample in the record to sustain the verdict of the jury, and the points that you make only take an appearance of substance when we have in mind the volume of testimony against the other defendants. I will deny it.

Mr. Stryker: I respectfully except.

Now with regard to the other two defendants, my motion includes them. I have served on Mr. Wessel a motion which sets forth, not as fully as I would like, but in some detail, the grounds of my motion with respect to the other two defendants. If I have not said so before, of course my motion is for a new trial on the grounds set forth in that paper, which I am sure must have been exhibited to your Honor.

The Court: Yes.

(3471)

Mr. Stryker: That states as well as I could in the time I had the grounds of my motion for a new trial, and to set aside the verdict with respect to the other two defendants, Giglio and Loversi. I will not at this time detain you with further argument on that subject.

The Court: The motion in arrest of judgment——

Mr. Stryker: I have made that in substance.

The Court: Very well.

Mr. Stryker: So I presume your Honor denies my motion.

The Court: I deny the motion.

Mr. Wessel: I do not want to hold this up at all, if your Honor pleases, but there is just one comment Mr. Stryker made that I think I would like to respond to briefly, and that is, there is no evidence or not sufficient evidence without the testimony of Lubben and Roth. I think the documents, the testimony of the other witnesses, and the testimony even of the defendants' own witnesses, on cross-examination, are sufficient.

Mr. Stryker: I won't argue that at this time.

If your Honor pleases, the defendants are ready for sentence, and I would like to be heard very briefly on that

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subject before your Honor pronounces it. If you will bear with me, I will be as brief as I can.

The Court: I will be glad to hear you. I am disposed to separate, or to defer momentarily, the sentence of the defendant Lawn. So you will now address yourselves to the sentence of the other two defendants.

(3473)

* * *

The Court: Mr. Giglio, and Mr. Livorsi, I am going to impose a heavy sentence.

I have given a lot of thought to this, and my determinations were in a fair state of finality before I heard Mr. Wessel this morning. As I have analyzed what he said, it seems to me, contrary to what Mr. Stryker suggested, most of the things he spoke of are matters which refer back to records and other publications.

The reason I am going to impose a heavy sentence is that I feel you are both guilty, in the first place, of this charge. The time has come when the millions of taxpayers who step up, whether they have twenty dollars or twenty-five or twenty-five thousand or twenty-five million, and pay their taxes, have the benefit of the realization that the few that cheat are not dealt with lightly.

Some people speak lightly of commercial crimes, of tax crimes, crimes which do not involve violence, and I think

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it is high time that tax crimes are separated from other crimes which simply involve money; because if this country labors under increased responsibilities and its taxes become heavier, the absolute integrity of the taxpayer, particularly with the type of taxing system we have, must be counted on as never before.

You have seen fit to exploit a war crisis, a time when everyone was under some additional burden, or at least some of us were under additional burden. You sought to exploit it for your own personal gain. Not satisfied with that, you have gone further and you have even cheated the Government out of its tax. That is the principal basis, but I would be less than frank—and I think my disposition should be on the record with everything else, because it has been an open trial—if I did not say both of you were engaged in organized crime. That is why I am treating with you here and have the two of you here alone before me now.

Mr. Livorsi—and this is no matter of idle accusation—has a long record of arrests. He has been convicted of narcotics violations. Most people would learn, but when a person returns from prison and immediately commences on another illegal enterprise, I do not see much basis for

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leniency.

Mr. Giglio, I think you have convinced everyone who has participated in this trial of your mental ability, your brightness and quickness. And I cannot feel anything you have done has been done innocently or mistakenly. When you have a tax fraud of this magnitude, coupled with threats of violence to witnesses, destruction of books, the vilification of revenue agents who try to do the job, the vilification of witnesses who try to testify against you, I do not think it is a case of the ordinary first offender making an innocent mistake.

I would like to say at this time that I saw Mr. Mahon and Mr. Twohig sit through this trial. I think the job they did here is one worthy of the greatest commendation. I did not see anything in this trial of malice, personal bias, or anything except Government agents trying to do a job for the rest of the country.

And I sat here and heard eloquent vilification of these people. I do not know where that stems from or who could have misinformed counsel on such matters. I heard the cross-examination of Lubben and Roth, both of whom impressed me as telling the truth. They are people who got into your toils and then tried to work their way out, and

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they suffered the tortures of the damned.

It may be that Mr. Livorsi has only one narcotics offense on his own record, but you have got other people in your plant with narcotics convictions. You had them there.

When you get this picture of your organization, not only seeking to profit out of the war crisis, not only seeking to defraud the Government out of taxes, but also to find a haven for people who go there from even more vicious fields, I do not think I need labor the point because the crime before me is of sufficient gravity to more than justify the sentence I am going to impose.

I am going to impose sentence on both of you of fifteen years, and commit you to the custody of the Attorney General for the term of fifteen years. The way that is computed is as follows:

I sentence you both to the term of five years on the conspiracy count, count 10; then to run consecutively I sentence you—talking now only of Mr. Giglio, I sentence Mr. Giglio to the term of five years on count 1, and I sentence him to additional terms of five years on counts 2, 5 and 7, but counts 2, 5 and 7, will run concurrently with count 1. So taking counts 1, 2 and 5 and 7 together, although I sentence

(3498)

you to five years on each of those counts, that five years is consecutive only to count 10, and the additional sentence which I am about to impose. I then sentence to a third consecutive sentence of five years on count 3, and I sentence to a term of five years on counts 4 and 9, to run concurrently with count three. So that you get a total sentence of fifteen years.

As to Mr. Liyorsi, I sentence him to five years on count 10, and then consecutive with that an additional term of five years on count 6. I sentence him to a term of five years on count 8, to run concurrently with count 6, but consecutively to count 10. And then a third consecutive term of five years on count 9, to run consecutively with the other two.

That is the sentence of this Court.

Defendant Giglio: Your Honor, may I say something?

The Court: Certainly.

Defendant Giglio: I just want to make the statement that I have never, your Honor, been involved in any gambling business, narcotics business, or racketeering business of any kind. If I am being sentenced for an income tax case that might be one thing; but if you are taking into considera-

(3499)

tion that I have been involved in any gangsterism or racketeering, your Honor, this is completely untrue—but completely untrue.

The Court: Have you finished your statement?

Defendant Giglio: Yes.

The Court: In imposing this sentence I understand you are only here on an income tax violation. I state that in itself, and considering the manner in which the money was earned and concealed—in other words, taking into account the transactions of the two partnerships and the group of corporations, and your own personal affairs, so far as proved in this case, on that basis alone I sentence you.

Defendant Giglio: Is your Honor aware that I don't have a dollar and haven't had for years, and that the Government should know that if they have made an investigation?

The Court: Mr. Giglio, I am not going to answer your question, because I do not think that is a function that the Court serves at this time, and I think that question is irrelevant.

Now, Mr. Giglio, I am going to let my sentence stand. If within the next sixty days you want to talk with the United States Attorney and make a complete and full dis-

(3500)

closure of such other matters as you may be interested in, both you and the United States Attorney can come back to

me. I am not suggesting that you do that, but leave that for your own consideration.

It is not on the basis you have approached at all. In other words, the basis of my sentence is the crime of which you have been convicted; and, as you realize, you have been convicted on I think it is eight counts, and the maximum I could impose would be forty years. I have concluded that fifteen years is a reasonable sentence in view of the gravity of this crime and the manner in which you committed it.

I look at you, Mr. Giglio, since you asked the question, as the managerial brains of the enterprise, as it was developed during this proceeding. Our penal laws provide that a sentence of fifteen years is in effect a sentence with a minimum of five and a maximum of fifteen years. I think that is a rough computation and don't want to be held to that. So when I impose that sentence I of course have that in mind. But if you have information with regard to the facts Mr. Wessel recited, or any others in which the Government is interested, and you see fit to give the Government that information, I tell you you may talk with them and that as long as the law has that power and leaves that with me,

(3501)

you may come back to me. Now the sentence of the Court stands as I stated it.

Mr. Stryker: If your Honor please, two matters. I respectfully move this Court in arrest of judgment, on the ground that the Court is without jurisdiction or right to conduct a trial of the general issue, for the following reasons:

First, the indictment in its entirety should have been dismissed by reason of the fact the defendants acquired immunity from prosecution as a result of the violation of the privilege against self-incrimination before the 1952 grand jury.

Second, counts 7, 8 and 9 of the indictment should have been dismissed, in that they violate the requirement of the Constitution that the accused be informed of the nature and extent of the accusation against him.

The Court: I deny it.

Mr. Stryker: Now, if your Honor please, the time has passed when I can ask anything——

The Court: I want to make a correction—not a correction, but I want to clarify something. The only matter in which I am interested, Mr. Giglio, is not the truth or

(3502)

falsity of what Mr. Wessel stated, and I am not going into a further discussion of that, but what I am interested in is getting information for the Government as to crimes which have not as yet been prosecuted and brought to conviction. That is what I meant and had in mind when I refer to your seeing Mr. Wessel.

Mr. Stryker: In view of several factors, the severity of the sentence as well as other factors, I am sure that your Honor has in mind that there are in this case, quite apart from any decision you have made on the subject, that raise very substantial issues of law, some of them arising before your Honor came into this case at all, those matters should be passed upon by the United States Court of Appeals, and a notice of appeal will be filed today; and because of the substantial points that I need not rehearse, I hope that your Honor will continue the bail until the determination of the appeal.

Mr. Wessel: Before your Honor rules, in that connection may I hand to the Court a further affidavit of myself and of each assistant, both legal and agent, who worked on this case during the trial, certifying to the Court that there was in no way any use made of any evidence obtained

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under subpoena of the 1952 grand jury.

The Court: All right.

Mr. Stryker: I have read the affidavit. It is a reiteration of what was set forth before Judge Palmieri. So I would request that in any case, where I have been unfortunate enough to lose before, the Court has always granted bail pending appeal, and I hope that you will.

The Court: Mr. Stryker, I think I am going to disappoint you. Although there have been a large number of questions of law raised in this case, I frankly do not think there is any substantial question, and certainly not as to some of the counts on which the defendants have been convicted. Take, for example, count 4, the filing of the consolidated tax return. I do not see any question whatsoever as to that count.

Supposing that, in all the other counts, you could establish there was some question, the sentence on that count might as well begin to be served.

Take the conspiracy count. I think that is established beyond any question. This question as to the improper use of records, I have watched this case and was alerted to that by you before I even picked a jury, and as each thread of evidence has gone in I have had sharply in mind the claim

(3504)

you made. I have not seen any evidence which came into this case that struck me as possible evidence that could have been developed through any improper use of the grand jury.

As to the sufficiency of the evidence, I think Labben and Roth did very well on the stand, and were subjected to the most vigorous cross-examination. They were tested in every way, one of them for six days, or five days, and the other one for three or four. I think they impressed the jury that they were telling the truth, and they certainly so impressed me. I recognize that you have raised many ques-

tions of law, and I have no doubt that you can discuss them at some length; but if any court has got the time to listen and to appraise these so-called points of law, I think they will see that there is in reality no substance to them.

I think it is the duty of the trial judge in a case such as this to deny bail. I have done that in some cases; I have not just granted bail because I thought it was nice for someone to be on bail pending appeal. I think I have a duty at least to tell the Court of Appeals whether I think there is a substantial question of law. I recognize they will have a superior wisdom, and a new chance to look at the case afresh, and will come to their own conclusion on it. But at least I

(3505)

tell them when I think there is one, and here I do not think there is one.

Mr. Stryker: May I interrupt you?

The Court: Sure, go ahead, Mr. Stryker.

Mr. Stryker: Then I am sure you will continue them until I can make my application to the Court of Appeals.

The Court: No, at this point I think all such treatment ends. I am convinced that these men are serious criminals as they stand before me, and so far as I am concerned, they can commence the service of their sentence now.

Mr. Stryker: Would your Honor permit me—all I am asking at the moment is to give me a chance to apply to the Court of Appeals. I will apply today, as soon as I have the papers ready—by two o'clock, I should think—for bail pending the hearing and determination of the motion for bail before this court.

The Court: No.

Mr. Stryker: I do not think, I respectfully submit, the interests of justice would be in any wise prejudiced by granting me that. I think your Honor might well do that. It is

just a question of giving me a chance to turn around. I will be pretty busy here with this thing.

(3506)

The Court: I do not think any great damage will be done if the course of the law is followed while you get those papers together. I will deny bail and commit the defendants.

Incidentally, while all the defendants are still here, I want to do one more thing. As to the corporate defendant I am going to declare a mistrial unless I hear opposition from the Government, and I think in that case the indictment should be dismissed. That is just to clarify the record. All right.

(3507)

* * *

Motion for New Trial

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C 142-72

[SAME TITLE]

The defendants severally move the Court to grant them a new trial for the following reasons:

1. The Court erred in denying defendants' motion for acquittal made at the conclusion of the evidence.

2. The verdict is contrary to the weight of the evidence.

3. The verdict is not supported by substantial evidence.

4. The Court erred in denying defendants' motion for a bill of particulars concerning the alleged concealment of assets by the defendants.

5. The Court erred in denying the defendants' repeated motions for a continuance of the trial in order to enable the defendants to prepare to meet the Government's proof concerning the alleged concealment of assets.

6. The Court erred in denying the defendants a separate hearing concerning leads and clues obtained by the Government as a result of the violation of defendants' privilege against self-incrimination before the 1952 Grand Jury; the Court also erred in sustaining objections to questions di-

rected to Government witnesses relating to leads and clues obtained by the Government as a result of the violation

of the defendants' privilege against self-incrimination before the 1952 Grand Jury.

6(a). The Court erred in refusing to permit the defendants to ascertain, at a separate hearing or through cross-examination of Government witnesses, whether the Government had used tainted evidence before the Grand Jury which found the present indictment.

7. The Court erred in quashing subpoenas served by the defendants upon the Treasury Department, the Office of Price Administration, the Reconstruction Finance Corp., the Department of Justice and the United States Attorney's Office for information in the Government's possession relating to David Lubben and Louis Roth, witnesses called by the Government.

8. The Court erred in limiting the cross-examination of David Lubben:

(a) With respect to his actual income, and his distributive share of the income, from the Eatsum partnership;

(b) With respect to his income tax returns, personal and corporate, for the period covered by the year 1946;

(c) With respect to his testimony in the case of College Town Candy Co. v. Betancourt;

(d) With respect to defendants' Exhibit H for identification, and particularly with respect to the entry which Lubben had made on said exhibit: "Taken over from Frankie."

9. The Court erred in striking defendants' Exhibits S through DD, both inclusive, consisting of checks identified

by David Lubben as payments to him or his account from the Eatsum partnership; the Court erred in refusing to receive in evidence further checks signed by David Lubben drawn on the Eatsum partnership and in limiting defendants' cross-examination with respect thereto.

(4050)

10. The Court erred in refusing to receive in evidence defendants' Exhibit II for identification.

11. The Court erred in permitting the prosecutor to impeach his own witness, Frank Loperfido, and in refusing to permit the defendants to inspect the Grand Jury minutes of Frank Loperfido's testimony, after the prosecutor had read to him several questions and answers from his said Grand Jury testimony.

12. The Court erred in refusing to permit the defendants to inspect the testimony of Louis Roth before the Grand Jury on September 11, 1952, on the occasion of his testifying falsely concerning his own income tax return.

13. The Court erred in limiting the cross-examination of Louis Roth, concerning statements made in his presence by his lawyers on the occasion of his appearance before Judge Skelly Wright in connection with his sentence for violation of the R. F. C. laws.

14. The Court erred in striking defendants' Exhibit CCC, the corporate return of American Brands Corporation for the year 1948, together with the testimony concerning its contents.

15. The Court erred in limiting the cross-examination of Bernard Bercu with respect to the loan and exchange account of the Eatsum partnership.

16. The Court erred in permitting the prosecutor to discuss his testimony with Bernard Bercu, during the luncheon recess before the completion of the witness' cross-examination; the Court erred in denying defendants' motion for a mistrial.

(4051)

17. The Court erred in refusing to strike Government Exhibits 141 to 151, both inclusive, and the testimony of the Government witness, Theodore Present, in connection therewith on the ground that the assumptions upon which the exhibits and the testimony were predicated were erroneous as a matter of law.

18. The Court erred in denying defendants' motion to strike the testimony of the Government witness and exhibits relating to re-allocation of the distributive shares of the partnership income, on the ground that the Government had furnished the defendants with a bill of particulars prior to the trial in which the Government had been ordered to designate those portions of the income tax returns upon which the indictment was based that the Government claimed were false, and the Government failed to specify any alleged falsity in the distributive shares of the partnership stated in the said returns.

19. The Court erred in denying the defendants an opportunity to examine a statement given by the defendants' witness, Walter Kohn, to special agents of the Treasury Department from which the prosecutor had questioned the witness on cross-examination.

20. The defendants were substantially prejudiced and deprived of a fair trial by reason of the following circumstances:

During the cross-examination of the defendants' witness, Herman Holzer, after counsel for the defendants referred to books "in evidence," the prosecutor stated: "I (4052) would like to see the Tavern and Eatsum books." The Court erred in denying defendants' motion for a mistrial.

21. The Court erred in limiting the defendants' proof concerning losses sustained by the American corporations during the years 1947 and 1948.

22. The Court erred in sustaining the Government's objection to testimony in behalf of the defendants, and to the exhibits, concerning the distributive shares of the net profit of the Eatsum partnership.

23. The Court erred in sustaining the Government's objection to hypothetical questions put to the defendants' expert witness on the question of the distributive shares of partners; on the question of whether a distributive share of a partner may be altered or changed by one partner purporting to report, in his personal income tax return, the entire distributive share of another; on whether partners may, by their dissolution agreement, alter or change the distributive shares of the partners' earnings for the period preceding the date of dissolution.

24. The Court erred in failing to instruct the jury on all of the essential questions of law involved in the case.

25. The defendants were substantially prejudiced and deprived of a fair trial by reason of the prosecutor's statement, in summation, that the Government witness, Bernard Bercu, had not been called to testify at this trial concerning the destruction of documents.

Motion for New Trial

26. The defendants were deprived of a fair trial by virtue of the limitation placed upon their discovery and inspection of books and papers pursuant to Rules 16 and (4053) 17(c) of the Rules of Criminal Procedure.

27. Defendants were deprived of a fair trial by virtue of the failure of the District Court to order a bill of particulars which would have adequately apprised them of the issues involved, which would have limited the proof upon the trial, and which would have enabled them to plead prior jeopardy.

AS TO THE DEFENDANT, WILLIAM GIGLIO:

28. The defendant, William Giglio, was substantially prejudiced and deprived of a fair trial by reason of the following circumstances:

(a) The prosecutor, in questioning the witness, Joseph McCue, stated: "If you knew, sir, that Mr. Giglio had been arrested in Detroit, would that change your testimony with regard to Mr. Giglio's reputation?" (963). The Court erred in denying defendants' motion for mistrial.

(b) The prosecutor, in summation, accused the defendant, Giglio, of attempted bribery. In his summation, the prosecutor asserted that the witness, Roth, had testified that Giglio asked him: "Can you reach Harry Pfeffer?" In fact, the witness, Roth, had not so testified (976).

(4054)

Motion for New Trial

AS TO THE DEFENDANT, HOWARD LAWN:

29. The Court erred in denying defendant, Howard Lawn, a severance and a separate trial of the issues.

30. The defendant, Howard Lawn, was substantially prejudiced and deprived of a fair trial by reason of the following circumstances:

The prosecutor, in his summation, in order to attribute guilty knowledge to the defendant Lawn, stated that Lawn had discussed criminal intent with the witness, Louis Roth, and had pointed out to Roth that the defendants could not be convicted on an income tax charge if the Government failed to prove criminal intent. The prosecutor failed to advise the jury that, according to Roth's testimony, this conversation took place subsequent to the filing of criminal informations against the defendants.

Dated, New York, March 2, 1955.

LLOYD PAUL STRYKER,
Attorney for Defendants,
40 Wall Street,
New York 5, N. Y.

(4055)

Motion for Judgment of Acquittal

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C 142-72

[SAME TITLE]

The defendants severally move the Court for judgment of acquittal, notwithstanding the verdict, for the following reasons:

1. The verdict is not supported by substantial evidence.

2. The evidence adduced at the trial is insufficient to sustain a conviction of any of the defendants of the offenses charged in any count of the indictment.

Dated, New York, March 4, 1955.

LLOYD PAUL STRYKER,
Attorney for Defendants,
40 Wall Street,
New York 5, N. Y.

(4057)

Motion in Arrest of Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C 142-72

[SAME TITLE]

The defendants severally move the Court to arrest the judgment because the Court is without jurisdiction or right to conduct a trial of the general issue for the following reasons:

1. The indictment in its entirety should have been dismissed by reason of the fact that the defendants acquired immunity from prosecution as a result of the violation of the privilege against self-incrimination before the 1952 Grand Jury.

2. Counts 7, 8 and 9 of the indictment should have been dismissed since they violated the requirement of the Sixth Amendment to the United States Constitution that an accused be informed of the nature and cause of the accusation against him.

Dated, New York, March 2, 1955.

LLOYD PAUL STRYKER,
Attorney for Defendants.
40 Wall Street,
New York 5, N. Y.

(4077)

Notice of Appeal by Defendant Giglio

IN THE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No. C-142-72

[SAME TITLE]

NOTICE OF APPEAL

Name and Address of Appellant
William Giglio
43 Comanche Drive
Long Branch, New Jersey

Name and Address of Appellant's Attorney
Lloyd Paul Stryker
40 Wall Street
New York, New York

Offense:

Violation (in eight counts) of Sections 3793(b)(1) and 145(b) of the Internal Revenue Code and Title 18 Section 2, United States Code, with regard to the personal income tax return of the appellant for the year 1946 (Count 5); the partnership return of income of Eatsum Food Products Company Limited for the fiscal year beginning June 1, 1945 and ending May 31, 1946 (Count 1); the partnership return of income of Tavern Fruit Juice Company for the period beginning April 16, 1945 and ending March 31, 1946 (Count 2); the corporate income tax return of American Brands Corporation, American Brands Wholesale Corporation and American Trucking & Forwarding Corpora-

tion, for the calendar year 1946 (Counts 3 and 4); concealment of personal assets (Count 7); concealment of (4074) corporate assets (Count 9); conspiracy in connection with the foregoing (Count 10).

Judgment:

Judgment dated March 11, 1955.

The defendant was sentenced to a term of imprisonment totaling fifteen (15) years; five (5) years on Count 10 (conspiracy), to run consecutively with five (5) years on Count 1 (Eatsum partnership return) to run consecutively with a further five (5) years on Count 3 (American Brands return); five (5) years on Count 2 (Tavern partnership return), five (5) years on Count 5 (Giglio personal return) and five (5) years on Count 7 (concealment of Giglio assets), to run concurrently with the sentence imposed on Count 1; and five (5) years on Count 4 (American Brands return) and five (5) years on Count 9 (diversion of American Brands assets), to run concurrently with the sentence imposed on Count 3.

The defendant is confined to Federal Detention Headquarters, 427 West Street, New York 14, New York.

I, the above mentioned appellant, hereby appeal to the United States Court of Appeals for the Second Circuit from the above-stated judgment.

WILLIAM GIGLIO

By: .....

LLOYD PAUL STRYKER,
Attorney for Appellant.

Dated: New York, March 11, 1955.

(4075)

Notice of Appeal by Defendant Livorsi

IN THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
No. C-142-72

[SAME TITLE]

NOTICE OF APPEAL

Name and Address of Appellant
Frank Livorsi
15 Fulton Avenue
Long Beach, L. I., N. Y.

Name and Address of Appellant's Attorney
Lloyd Paul Stryker
40 Wall Street
New York, New York

Offense:

Violation (in four counts) of Section 145 (b) of the Internal Revenue Code, and Title 18 Section 2, United States Code with regard to the personal income tax return of Frank Livorsi for the year 1946 (Count 6); concealment of personal assets (Count 8); concealment of corporate assets (Count 9); and conspiracy in connection with the foregoing (Count 10).

Judgment:

Judgment dated March 11, 1955.

The defendant was sentenced to a term of imprisonment totaling fifteen years; five (5) years on Count 6 (Livorsi personal return), to run consecutively with five (5) years on Count 9 (diversion of American Brands assets) to run

consecutively with a further five (5) years on Count 10 (4071) (conspiracy). The Court imposed an additional term of five (5) years on Count 8 (concealment of Livorsi's assets), to run concurrently with the sentence imposed on Count 6.

The defendant is confined to Federal Detention Headquarters, 427 West Street, New York 14, New York.

I, the above-mentioned appellant, hereby appeal to the United States Court of Appeals for the Second Circuit from the above-stated judgment.

FRANK LIVORSI

By: .....

LLOYD PAUL STRYKER,
Attorney for Appellant.

Dated: New York, New York, March 11, 1955.

(4072)